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

IN THE MATTER OF: An Application by **Norcon Marine Services Ltd.** for relief under the *Company' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as am.

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

APPLICANTS' SUPPLEMENTARY MEMORANDUM OF FACT AND LAW

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

TO: Supreme Court of NL
P.O. Box 937
Duckworth Street
St. John's, NL A1C 5M3

Attention: Court Registry

This memorandum is responsive to the application of Business Development Bank of Canada ("BDC") to appoint a receiver over the assets and undertakings of Norcon Marine Services Ltd ("Norcon").

This memorandum also addresses the temporal difficulties occasioned by the time of year of the initiation of the *Companies' Creditors Arrangement Act* ("*CCAA*") proceedings, and the change in the Initial Order currency period from a maximum of thirty days to a maximum of ten days.

Appointment of a Receiver

Counsel for BDC has advised that the affidavit of Robert Prince and the memorandum of law will be filed "within the timelines set out in the *Rules of Court.*" BDC Counsel has also advised that '"...we will ask that the Court hear this application prior to the *CCAA* application". Given the short timelines, and anticipating the objections to be raised by BDC, these comments are submitted to enable the Court to be aware of the issues at an early date.

For factual background, the Court's attention is drawn to the Report of the Proposed Monitor filed subsequent to the application materials of Norcon.

It goes without any real argument to the contrary, that to hear the receivership application before considering the *CCAA* application would pre-empt consideration of the very issues that the *CCAA* exists to address. If a secured creditor were to be able to insist on such a process, then the *CCAA* would to all intents and purposes be rendered nugatory. Obviously, that was not Parliament's intent in drafting and passing the statute into law.

The purposes of the CCAA were canvassed at paragraph 28 of the Memorandum of Fact and Law filed by Norcon on December 5th. These purposes bear repeating here:

> (i) To permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets;
>
> (ii) <u>To provide a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made</u>;
>
> (iii) To avoid the social and economic losses resulting from liquidation

> of an insolvent company;
>
> (iv) To create conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all.
>
> (emphasis added)

Here we are dealing with a "creditor initiated termination of ongoing business operations" i.e. the application for the appointment of a receiver.

Commentary to be found in Houlden & Morawetz is illustrative of the approach taken by the courts in cases such as that at bar:

> A stay should be ordered if there is a reasonable chance that the debtor company can continue to operate its business as a going concern: *Re Stephanie's Fashions Ltd.* (1990), 1 C.B.R. (3d) 248, 1990 CarswellBC 373 (B.C. S.C.). A dogmatic approach taken by creditors in the first instance, that they will not approve of any proposal, should be given little weight if there is reasonable hope that matters can be salvaged and no undue prejudice caused. The length of a stay will depend on surrounding circumstances, and no particular set time period is necessarily applicable to all cases. Where the applicant received the benefit of a stay exceeding five months and it was uncertain whether the applicant was any further advanced in making a firm proposal at this time than it was five months earlier, the stay was lifted to permit the creditors to take whatever action they deemed necessary: *Timber Lodge Ltd. v. Imperial Life Assurance Co.* (1992), 17 C.B.R. (3d) 126, 1992 CarswellPEI 15, (*sub nom. Timber Lodge Ltd. v. Montreal Trust Co. of Canada (No. 2)*) 104 Nfld. & P.E.I.R. 104, 329 A.P.R. 104 (P.E.I. T.D.).
>
> The stay of proceedings is a basic component of the maintenance of the *status quo*. Staying the proceedings means to suspend or freeze not only actual or potential litigation, but likewise any type of manoeuvres for positioning among creditors, including the possibility of creditors seeking to repossess their goods in the hands of the debtor company who, to the contrary, should be allowed to continue operating as a going concern while protected under the *CCAA*. The restructuring process in the general interest of all the creditors should always be preferred over the particular interests of individual creditors: *Re Boutiques San Francisco Inc.* (2004), 2004 CarswellQue

300, 5 C.B.R. (5th) 174, [2004] R.J.Q. 986 (Que. S.C.)[1].

(emphasis added)

Re Kocken Energy Systems Inc.[2] was a case where, as is apparently the case here, the senior secured creditor took the position that they opposed any stay extension (in that case under the *Bankruptcy and Insolvency Act*) on the basis that they had lost all faith in the debtor and would oppose any proposal regardless of its content. On the initial hearing Justice Moir concluded:

> 20 Ms. Graham swears that the Bank of Montreal "has lost all confidence and trust in current management and ownership". "BMO will not engage in negotiations." She is of the view "that any proposal is doomed to fail". The Bank of Montreal is the primary secured creditor and its support will be necessary when the time comes for a vote.
>
> 21 Such statements by a secured creditor with a veto are not determinative. They are forecasts rather than evidence of present fact. We must not assume intransigence in a world in which misunderstandings occur, they are sometimes corrected, and trust is sometimes restored in whole or in part. Nor may we, in this case, assume that the proposed terms will require a restoration of confidence or trust or a continuing relationship with the Bank of Montreal.
>
> 22 I have some difficulty with the decision of Justice Penny in *NS United Kaiun Kaisha, Ltd. v. Cogent Fibre Inc.*, 2015 ONSC 5139 (Ont. S.C.J.), which suggests that s. 50.4(9)(b) requires at least a hint of what the insolvent will offer to the secured creditor and what the proposal will contain. It is in the nature of proposals that they are developed and, if an extension is needed, the proposal is developing.
>
> 23 The requirement is "would likely be able to make a viable proposal", not "has settled on terms likely to be accepted". I think that is the point made by Justice Goodfellow in *H & H Fisheries Ltd., Re*, 2005 NSSC 346 (N.S. S.C.), when he says that s. 50.4(9)(b) 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."
>
> 24 The affidavits prove the cash flow projections, the preparation of other documents or reports, arrangements for appraisals, the

[1] Houlden & Morawetz Analysis N§63 (Tab 1)

[2] 2017 NSSC 80 (Tab 2), additional reasons at 2017 NSSC 215 (Tab 3)

> trustee's investigation of accounts receivable, and the trustee's opinion that time is required for analysis of revenue and expense. Further, terms for a proposal are being discussed and need more development. In the meantime, Kocken has remained in operation. I am told that one appraisal has been delivered and another is close. All of this has been done over the holiday season. This evidence satisfies me that there is a better than even chance of a viable proposal being developed[3].

Justice Moir's comments were prescient:

> 3 This summer I heard an uncontested motion to approve Kocken's proposal. I read the proposal and studied the Trustee's report. I found the creditors voted unanimously in favour of the proposal and the proposal provides a much better recovery for creditors than bankruptcy would have done. Therefore, I was prepared to grant the motion.
>
> 4 However, Kocken asked that I issue reasons in writing because of the news reports. I agreed. The reports should be corrected.
>
> 5 Also, we have here an example of something seldom written about but relevant in early challenges to a reorganization effort. A secured creditor who is able to veto a proposal, or a plan of arrangement, vehemently opposes the effort from the beginning and says it is doomed because the creditor will exercise its veto when the time comes. That forecast does not always come true.
>
> 6 My earlier decision was published as *Kocken Energy Systems Inc., Re*, 2017 NSSC 80 (N.S. S.C.). I summarized the bank's concerns and expressed a reservation. I also noted the banks present intention to veto any proposal.[4]

To summarize, the position being taken by BDC is not in any way determinative of the proper outcome of the *CCAA* application. It is respectfully submitted that what should be considered are the purposes of the *CCAA* as outlined above applied to the present fact situation:

(a) is there a reasonable chance that Norcon can continue to operate its business as a going concern?

(b) is there a reasonable hope that matters can be salvaged, and no undue prejudice caused?

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[3] 2017 NSSC 80 (Tab 2)
[4] 2017 NSSC 215 (Tab 3)

(c) is the restructuring process to be preferred as in the general interest of all the creditors of Norcon, rather than preferring the particular interests of BDC?

Approached in this way it can be seen that a stay to give the opportunity to restructure is much to be preferred. This is particularly so when the prejudice to the senior secured creditors is weighed. The security of both BDC and the Bank of Nova Scotia ("BNS") will not be impaired in any material way. Norcon is not seeking debtor in possession financing at this time. Norcon will seek the customary charge for professional fees, but same is not in essence material.

The security possessed by BDC and BNS is for the greater part over the real property and vessels owned by Norcon. We are not dealing with perishables. There is no significant probability of the secured creditors' security being impaired.

For all these reasons it is submitted that the application for a receivership order be denied, and that Initial Order be granted.

Temporal Issues

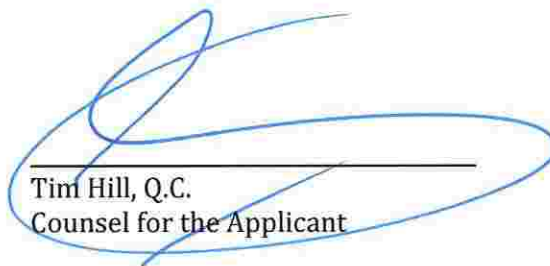
This matter is scheduled to be heard on December 17, 2019. As the Initial Order may only provide for a maximum 10 day stay, and given the time of year and the Court's sitting schedule, the timing of the "comeback" hearing to seek an extension and an administrative charge order is problematic.

Norcon is prepared to file the application to extend the stay upon being given a date for same by the Court. Again, given the issues occasioned by the time of year, Norcon would seek an extension of the Initial Order upon the identical terms, to the first reasonably available date in January at which time Norcon will seek a further extension and an administrative charge order.

This might be accomplished by granting the initial stay for a relatively short period, and by dealing with the comeback prior to the Christmas holiday. This would allow the stay to be granted to a date in January, when the question of a further extension and an administrative charge order can be dealt with.

All of which is respectfully submitted

DATED AT the Dartmouth, in the Province of Nova Scotia, this 11th day of December, 2019.



Tim Hill, Q.C.
Counsel for the Applicant

PL# 148403/9304626

TAB 1

HMANALY N§63
Houlden & Morawetz Analysis N§63

Bankruptcy and Insolvency Law of Canada, 4th Edition

COMPANIES' CREDITORS ARRANGEMENT ACT

Sections 11-11.11
L.W. Houlden and Geoffrey B. Morawetz

N§63 — Stay of Proceedings, Generally

N§63 — Stay of Proceedings, Generally

See ss. 11, 11.001, 11.01, 11.02, 11.03, 11.04, 11.05, 11.06, 11.07, 11.08, 11.09, 11.1, 11.11

The stay created by s. 11 is a stay of proceedings by creditors against the debtor company; it has no application to proceedings taken by the debtor either before or after the commencement of proceedings under the *CCAA:* see *Dinovitzer v. Weiss* (1957), 1957 CarswellQue 32, 37 C.B.R. 160, [1958] Que. S.C. 133 (Que. S.C.).

Section 11 provides the court with a general power to make any order that it considers appropriate in of the circumstances of the *CCAA* proceeding. It distinguishes between stays under the initial application and stays other than under the initial application.

Section 11.01 sets out the rights of suppliers, specifying that no order under s. 11 or s. 11.02 has the effect of prohibiting a person from requiring immediate payment for goods and services provided after the order is made or requiring the further advance of money or credit.

Section 11 is constitutionally valid, even though it may be used to stay the claims of persons who are not creditors: *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 1988 CarswellAlta 318, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B.).

The stay restrains judicial or extra-judicial conduct that could impair the ability of the debtor company to continue in business and the debtor's ability to focus and concentrate its efforts on the negotiating of a compromise or arrangement: *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303, 1992 CarswellOnt 185, [1992] O.J. No. 1946 (Ont. Gen. Div.). See also *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, [1991] 2 W.W.R. 136, 51 B.C.L.R. (2d) 84, 1990 CarswellBC 394 (B.C.C.A.) and *Re Air Canada [Always Travel Inc. - Leave to Proceed Motion]* (2004), 47 C.B.R. (4th) 177, 2004 CarswellOnt 481 (Ont. S.C.J. [Commercial List]).

The purpose of s. 11 is to maintain the *status quo* for a period of time so that proceedings can be taken under the *CCAA* for the good welfare and well-being of the debtor company and of its creditors: *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 141 (B.C. S.C.); *Sairex GmbH v. Prudential Steel Ltd.* (1991), 8 C.B.R. (3d) 62, 1991 CarswellOnt 215 (Ont. Gen. Div.). The stay order prevents any creditor from obtaining an advantage over other creditors while the company is attempting to reorganize its affairs: *Re Woodward's Ltd.* (1993), 17 C.B.R. (3d) 236, 79 B.C.L.R. (2d) 257, 1993 CarswellBC 530 (S.C.). It enables the debtor to have some breathing room in the face of pending and potential proceedings against it, in order to give it time and uninterrupted opportunity to attempt to work out a restructuring: *Re Philip Services Corp.* (1999), 13 B.B.R. (4th) 159, 1999 CarswellOnt 4673 (Ont. S.C.J. [Commercial List]); *Toronto Stock Exchange Inc. v. United Keno Hill*

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Mines Ltd. (2000), 48 O.R. (3d) 746, 19 C.B.R. (4th) 299, 7 B.L.R. (3d) 86, 2000 CarswellOnt 1770 (S.C.J. [Commercial List]). See also *Milner Greenhouses Ltd. v. Saskatchewan* (2004), 2004 CarswellSask 280, [2004] 9 W.W.R. 310, 50 C.B.R. (4th) 214, 2004 SKQB 160 (Sask. Q.B.).

A stay should be ordered if there is a reasonable chance that the debtor company can continue to operate its business as a going concern: *Re Stephanie's Fashions Ltd.* (1990), 1 C.B.R. (3d) 248, 1990 CarswellBC 373 (B.C. S.C.). A dogmatic approach taken by creditors in the first instance, that they will not approve of any proposal, should be given little weight if there is reasonable hope that matters can be salvaged and no undue prejudice caused. The length of a stay will depend on surrounding circumstances, and no particular set time period is necessarily applicable to all cases. Where the applicant received the benefit of a stay exceeding five months and it was uncertain whether the applicant was any further advanced in making a firm proposal at this time than it was five months earlier, the stay was lifted to permit the creditors to take whatever action they deemed necessary: *Timber Lodge Ltd. v. Imperial Life Assurance Co.* (1992), 17 C.B.R. (3d) 126, 1992 CarswellPEI 15, (*sub nom. Timber Lodge Ltd. v. Montreal Trust Co. of Canada (No. 2)*) 104 Nfld. & P.E.I.R. 104, 329 A.P.R. 104 (P.E.I. T.D.).

The Ontario Court of Appeal held that s. 11 of the *CCAA* provides a broad jurisdiction to impose terms and conditions on the granting of the stay and s. 11(4) includes the power to vary the stay and allow the company to enter into agreements to facilitate the restructuring, provided that the creditors have the final decision under s. 6 whether or not to approve the plan. The point of the *CCAA* process is not simply to preserve the *status quo* but to facilitate restructuring so that the company can successfully emerge from the process and it is important to take into account the dynamics of the situation: *Re Stelco Inc.* (2005), 2005 CarswellOnt 6283, 15 C.B.R. (5th) 288 (Ont. C.A.), affirming (2005), 2005 CarswellOnt 5023, 15 C.B.R. (5th) 279 (Ont. S.C.J. [Commercial List]).

In *Always Travel Inc. v. Air Canada* (2003), 43 C.B.R. (4th) 163, 2003 CarswellNat 1763, 2003 FCT 707, Hugessen J. of the Federal Court of Canada was of the view that a stay order under s. 11 of the *CCAA* did not have the effect of automatically staying proceedings in the Federal Court. However, he held that, as a matter of comity, in virtually every case where a stay order is given by a provincial court in the course of its *CCAA* jurisdiction, the Federal Court will observe the stay order and grant aid on a proper application being made. This approach does not prevent a person from opposing the recognition of a stay order, or if a stay order has been granted by the Federal Court, applying to have it lifted. After the Plaintiffs sought for the fifth time, in one court or another, to lift the stay, Hugessen J. confirmed that it would take very exceptional circumstances for a Federal Court judge to interfere with proceedings being administered by the Ontario Superior Court of Justice: *Always Travel Inc. v. Air Canada* (2004), 2004 CarswellNat 2866, 2004 CarswellNat 1362, 2004 CF 675, 2004 FC 675, 49 C.B.R. (4th) 1 (F.C.).

The stay provisions under a *CCAA* order apply to post-filing creditors with claims asserted against the debtor company; there are no words in the statute limiting the stay to debts or claims in existence at the time of the initial order: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 2007 CarswellSask 324, 33 C.B.R. (5th) 50, 2007 SKCA 72, [2007] S.J. No. 313 (Sask. C.A.).

Where there were partnerships related to the debtor and a dispute arose as to whether the partnerships should be stayed, the Alberta Court of Queen's Bench held that while the *CCAA* does not grant the court express power to stay proceedings against non-corporate entities, the court has jurisdiction to grant a stay of proceedings where it is just and convenient to do so. The court concluded that given the complex corporate and debt structure of the Calpine group, the cross-border nature of the proceedings, and the evidence before it that irreparable harm could accrue to the Calpine group if the stay was not granted, it was just and reasonable to stay the proceedings against the partnerships: *Re Calpine Canada Energy Ltd.* (2006), 2006 CarswellAlta 446, 19 C.B.R. (5th) 187, 2006 ABQB 153 (Alta. Q.B.).

Madam Justice Barbara Romaine of the Alberta Court of Queen's Bench declined to grant an initial *CCAA* order where there was no evidence to suggest that there was any possibility of the debtor restructuring its affairs. The court observed that while the burden is placed on an applicant for an initial *CCAA* order to show that it has a reasonable possibility of restructuring, the burden is not an onerous one. Here, there was no evidence that any of the debtor's efforts had resulted in a refinancing source stepping forward; and there were substantial builders' liens and corporate governance problems such that the prospect of any successful refinancing looked unlikely. The court held that if what is really more likely is a liquidating *CCAA*, the consideration becomes whether such a resolution is better advanced through existing management in a *CCAA* proceeding, or through a receivership. Here, the CEO was likely to be terminated and a board of directors was under threat of replacement

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from a major shareholder, and the balance of efficient resolution tipped in favour of a receivership: *Mateo Capital Ltd. v. Interex Oilfield Services Ltd.*, (Docket No. 060108395), Oral Reasons for Judgment, Romaine, J. (1 August 2006), (Alta Q.B.).

In order to obtain a stay under s. 11, it is not necessary to have first made an arrangement with secured creditors. If a pre-arrangement were required, the approval or rejection of the plan would be in the control of secured creditors, not in the control of the court: *Taché Construction Ltée c. Banque Lloyds du Canada* (1990), 5 C.B.R. (3d) 151, 1990 CarswellQue 39 (Qué. C.S.).

The *CCAA* should not be used where it will put the financial well-being of the majority of the creditors at risk. A stay of proceedings should not be granted under the *CCAA* where it would only prolong the inevitable, or where the position of the objecting respondents would be unduly jeopardized. Where no plan will be acceptable to the required percentage of creditors, the *CCAA* application should be refused: *Re Hunters Trailer & Marine Ltd.* (2000), 2000 CarswellAlta 1776, [2000] A.J. No. 1550, 5 C.B.R. (5th) 64, 2000 ABQB 952 (Alta. Q.B.).

Where there was no reasonable possibility of the company continuing to operate for the benefit of itself and its creditors, an application for a stay was refused: *851820 N.W.T. Ltd. v. Hopkins Construction (Lacombe) Ltd.* (1992), 12 C.B.R. (3d) 31, 1992 CarswellNWT 4 (N.W.T. S.C.).

In appropriate cases, the court, while the plan of reorganization is being worked out, may make a stand still order against the debtor company prohibiting the issue of further shares, bonds, etc., the disposing of assets, the incurring of debts, or applying cash flow other than in the ordinary course of business: *Re Northland Properties Ltd.* (1988), 69 C.B.R. (N.S.) 266, 1988 CarswellBC 531, 73 C.B.R. (N.S.) 146, 29 B.C.L.R. (2d) 257 (S.C.).

In making a stay order, although a court can prohibit a person from taking a particular action, it cannot make an order permanently taking away an alleged legal cause of action: *Re Quinsam Coal Corp.* (2000), 20 C.B.R. (4th) 145, 2000 BCCA 386, 2000 CarswellBC 1262 (C.A. [In Chambers]).

The Ontario Superior Court of Justice held that, despite opposition from a main secured creditor, it is appropriate to grant a "two track approach" under the *BIA* and *CCAA* in which a proposal trustee is appointed under the *BIA* and the same entity is appointed as a monitor under the *CCAA* and to authorize debtor-in-possession ("DIP") financing to a debtor company for an initial 30-day period where allowing the debtor company to attempt to restructure for at least 30 days provides an opportunity to generate greater value to the stakeholders of the debtor company than an immediate liquidation; the benefits of the proposed DIP financing outweigh the prejudice to the largest secured creditor of the debtor company; and there is a limitation on the draw-down of the DIP financing: *Re Manderley Corp.* (2005), 2005 CarswellOnt 1082, 10 C.B.R. (5th) 48 (Ont. S.C.J.).

The Ontario Superior Court of Justice held that a monitor should not be enjoined from proceeding with an offer submitted as part of a court-approved sale process, even where a new offer arising following the bid deadline may preserve jobs, since this would amount to an unfairness in the working out of the sale process to the detriment of the current purchaser and the secured creditors; interfere with the efficacy and integrity of the sale process; and prefer the interests of one party (i.e. the new prospective purchaser or the union representing the employees), over others: *Re Tiger Brand Knitting Co.* (2005), 2005 CarswellOnt 1240, 9 C.B.R. (5th) 315 (Ont. S.C.J.). For tests for approval of process, see N§56 "Court Approved Sale Process".

In considering a motion seeking to extend the closing date of a court-approved sale pending an application for review of a share ownership decision, the Ontario Superior Court of Justice held that Ontario cases have recognized the concept of provisional execution such that it is not only a concept applicable in Québec; and that it has the jurisdiction to make an order subject to provisional execution, which, pursuant to s. 195 of the *BIA*, operates as an exception to the automatic stay of an order appealed from unless varied by the Court of Appeal; but such discretion should only be exercised sparingly and with caution: *Century Services Inc. v. Brooklin Concrete Products Inc.* (2005), 2005 CarswellOnt 1248, 10 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice held that it is not necessary to amend a *CCAA* claims procedure order to redefine "restructuring claim" to specifically exclude a claim arising under an agreement entered into with the debtor company subsequent to the *CCAA* proceedings where the debtor company has previously acknowledged that such creditor's claim is a

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post-filing claim that is stayed until the *CCAA* proceedings are terminated. In such circumstances, the debtor company is not to treat the creditor's claim as a "restructuring claim" subject to compromise under a *CCAA* plan; rather, such claim is stayed to be addressed in the ordinary course of litigation after termination of the *CCAA* proceedings: *Re Stelco Inc.* (2005), 2005 CarswellOnt 5024, 15 C.B.R. (5th) 283 (Ont. S.C.J. [Commercial List]).

If, prior to the taking of proceedings under the *CCAA,* an action has been commenced jointly against the debtor and a third party, the court can restrain the proceedings against the debtor under s. 11, and, if it deems appropriate, against the third party under the general power possessed by the court in civil matters: *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303, 1992 CarswellOnt 185 (Ont. Gen. Div.).

Since the Act is a federal Act, a stay order made under the Act in one province will be binding in other provinces: *Lehndorff United Properties (Canada) Ltd. v. Confederation Life Insurance Co.* (1993), 17 C.B.R. (3d) 198, 82 Man. R. (2d) 286, 1993 CarswellMan 25 (Q.B.).

Since the purpose of the stay order is to maintain the *status quo,* no interest will be payable on secured or unsecured claims during the period of the stay without court order: *Re Philip's Manufacturing Ltd.,* 12 C.B.R. (3d) 133, 68 B.C.L.R. (2d) 162, [1992] 5 W.W.R. 537, 91 D.L.R. (4th) 105, 1992 CarswellBC 488 (S.C.), additional reasons at (1992), 91 D.L.R. (4th) 766, 1992 CarswellBC 1150 (S.C.), affirmed 12 C.B.R. (3d) 149, 69 B.C.L.R. (2d) 44, [1992] 5 W.W.R. 549, 92 D.L.R. (4th) 161, 15 B.CA.C 247 (*sub nom. Philip's Manufacturing Ltd. v. Coopers & Lybrand Ltd.*), 27 W.A.C. 247, 1992 CarswellBC 490 (C.A.).

No provisions under the *CCAA* address or contemplate court applications for exemption from filing requirements under securities legislation, and the court's discretionary power under s. 11 of the *CCAA* cannot be used to override provincial statutes: *Re Richtree Inc.* (2005), 2005 CarswellOnt 255, [2005] O.J. No. 251, 7 C.B.R. (5th) 294, 74 O.R. (3d) 174, 13 C.B.R. (5th) 111, 10 B.L.R. (4th) 334 (Ont. S.C.J. [Commercial List]).

A prescription period does not run while a stay is in effect under s. 11: *Conserverie Girard & Beaudin Inc. v. Bellavance* (1991), 12 C.B.R. (3d) 46, (*sub nom. Conserverie Girard & Beaudin Inc., Re*) [1991] R.S.Q. 2906, 1991 CarswellQue 23 (C.S.).

In *Crane Canada Inc. v. McCain Foods Ltd.* (1992), 14 C.B.R. (3d) 106, 1 C.L.R. (2d) 16, 127 N.B.R. (2d) 219, 319 A.P.R. 219, 1992 CarswellNB 35 (Q.B.), it was held that the enforcement of a mechanics' lien on the property of a third party was not affected by a stay order.

In *Milner Greenhouses Ltd. v. Saskatchewan* (2004), 2004 CarswellSask 280, [2004] 9 W.W.R. 310, 50 C.B.R. (4th) 214, 2004 SKQB 160 (Sask. Q.B.), the court observed that legislation expressly exempted by Parliament from the operation of the *CCAA* is commercial in nature and that the *CCAA* stay is directed to commercial as opposed to penal activities. Accordingly, the court held that the prosecution of offences under the *Occupational Health and Safety Act,* S.S. 1993, c. O-1.1 was not stayed by s. 11, although the stay would apply to the enforcement of any fines imposed following a successful prosecution.

The stay of proceedings is a basic component of the maintenance of the *status quo.* Staying the proceedings means to suspend or freeze not only actual or potential litigation, but likewise any type of manoeuvres for positioning among creditors, including the possibility of creditors seeking to repossess their goods in the hands of the debtor company who, to the contrary, should be allowed to continue operating as a going concern while protected under the *CCAA*. The restructuring process in the general interest of all the creditors should always be preferred over the particular interests of individual creditors: *Re Boutiques San Francisco Inc.* (2004), 2004 CarswellQue 300, 5 C.B.R. (5th) 174, [2004] R.J.Q. 986 (Que. S.C.).

The Alberta Court of Queen's Bench affirmed the use of inherent jurisdiction to impose a stay on third parties, finding that although the *CCAA* does not give a court the power to stay proceedings against noncorporate entities, the court has the inherent jurisdiction to grant a stay of proceedings where it is just and convenient to do so. Here, given the extremely complex corporate and debt structure, the cross-border nature of the proceedings, and the evidence before the court on the value of the partnership assets, the court was satisfied that irreparable harm may accrue to the debtor group of companies if the stay was not granted; and on balance, it was just, reasonable and appropriate to exercise the court's jurisdiction to stay proceedings against the partnerships: *Re Calpine Canada Energy Ltd.* (2006), 2006 CarswellAlta 446, 19 C.B.R. (5th) 187, [2006] A.J. No. 412 (Alta. Q.B.).

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The Alberta Court of Queen's Bench, in dismissing an application by the trustees of an income fund to lift the stay of proceedings imposed by the *CCAA* and for extensive relief that would have the result of giving the trustees substantial control over certain tolling arrangements, held that existing administration and management agreements precluded the relief sought by the trustees and that the protocol proposed by the existing manager of the entities adequately protected the interests of all interested persons. The court rejected the assertion by the trustees that it is an inappropriate role for the monitor to be put in a supervisory position under the protocol with respect to the tolling process: *Re Calpine Canada Energy Ltd.* (2006), 2006 CarswellAlta 277, 19 C.B.R. (5th) 177, 2006 ABQB 177 (Alta. Q.B.).

The Ontario Superior Court of Justice held that the stay of proceedings in respect of a debtor under the *CCAA* should not be lifted to permit litigation in respect of a conspiracy claim to proceed against the debtor where a claims process for determining the conspiracy claim has been previously established by a claims officer. In these circumstances, the claims officer should be permitted to render its decision in respect of the conspiracy claim pursuant to the claims process. If necessary, the claimant may then appeal the claims officer's decision: *Re Stelco Inc.* (2005), 2005 CarswellOnt 1732, 11 C.B.R. (5th) 161 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice held that interested persons who wish to have set aside or varied an initial *CCAA* order granting a stay of proceedings in respect of a debtor, should not feel constrained about relying on the comeback clause in the *CCAA* order to seek same. The court held that the *CCAA* debtor/applicant has the onus on a comeback motion to satisfy the court that the existing terms of the *CCAA* order should be upheld: *Re Warehouse Drug Store Ltd.* (2005), 2005 CarswellOnt 1724, 11 C.B.R. (5th) 323 (Ont. S.C.J. [Commercial List]).

In considering an application under s. 11(b) of the *CCAA* to extend a company's *CCAA* proceedings beyond the initial 30 days, the applicant must satisfy the court that circumstances exist that make such an order appropriate; and the applicant has, and is, acting in good faith and with due diligence. While "good faith" in the context of stay applications is generally focused on the debtor's dealings with stakeholders, concern for the broader public interest mandates that a stay not be granted if the result will be to condone wrongdoing: *Re San Francisco Gifts Ltd.* (2005), 2005 CarswellAlta 174, 10 C.B.R. (5th) 275, 2005 ABQB 91 (Alta. Q.B.). In *Re San Francisco Gifts Ltd.*, the debtor pled guilty to charges under the *Copyright Act* and was fined; the court held that while the conduct was illegal and offensive, the debtor had already been condemned and punishment levied in the appropriate forum, and that in balancing the interests in the *CCAA* proceeding, particularly those of unsecured creditors, a continuation of the stay was appropriate: *Re San Francisco Gifts Ltd., supra.* See also *Re Simpson's Island Salmon Ltd.* (2005), 2005 CarswellNB 781, 2006 NBQB 6, 18 C.B.R. (5th) 182, 294 N.B.R. (2d) 95, 765 A.P.R. 95 (N.B. Q.B.).

Where a company sought and received a stay under the *CCAA* as a means of achieving a global resolution of numerous product liability actions, and a complainant alleged bad faith as to activities of the debtor pre-filing of the *CCAA* application, the Ontario Superior Court held that the good faith test in considering an extension of the stay relates only to the debtor's conduct during the *CCAA* proceeding, not to prior conduct; and the court was satisfied that the debtor was proceeding with due diligence and good faith and extended the stay. The court may, where appropriate, extend a stay of proceedings to third parties, including third parties that are privy to litigation including the *CCAA* Applicant: *Re Muscletech Research & Development Inc.* (2006), 2006 CarswellOnt 720, 19 C.B.R. (5th) 57 (Ont. S.C.J. [Commercial List]).

Atkins Nutritionals, Inc. et al. (collectively, the "Atkins Group") applied to the Ontario Superior Court of Justice under s. 18.6 of the *CCAA* for recognition in Canada of an order obtained by the Atkins Group under Chapter 11 of the U.S. *Bankruptcy Code* granting a stay of proceedings in respect of the Atkins Group in the United States. The operating entity of the Atkins Group (both in the U.S. and in Canada) was a U.S. entity with certain assets located in Canada. The Canadian division of the Atkins Group was dormant and without assets, although with some liabilities totalling only a few hundred thousand dollars: *Re Atkins Nutritionals Inc.* (2005), 2005 CarswellOnt 4371, 14 C.B.R. (5th) 157 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice held that, in the context of a sale of a debtor's business and assets under the *CCAA,* a court should take great caution before vesting free and clear title to the debtor's real property in the purchaser thereof where a restrictive covenant in favour of a third party owner of adjacent real property runs with the land. The court, in drawing a distinction between the termination of executory contracts in a *CCAA* context, which may be necessary to permit the continued operation of a debtor's business as a going concern, and the discharge of a restrictive covenant, held that a court should not discharge a restrictive covenant running with land where such discharge does not serve to advance the debtor's

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restructuring; the discharge would have the effect of maximizing value for certain stakeholders of the debtor at the expense of the land owner in whose favour the restrictive covenant was given; and there is no evidence before the court of failed or unreasonable negotiations with the beneficiary of the restrictive covenant: *Re Terastar Realty Corp.* (2005), 2005 CarswellOnt 5985, 16 C.B.R. (5th) 111 (Ont. S.C.J.).

In making an application under the *CCAA*, the debtor corporation does not have to demonstrate at the initial stay application stage that it has a feasible plan, although the courts have held that the debtor corporation is wise to have consulted with major creditors in advance of the application, in order to ascertain their willingness to co-operate in the negotiation of a workout. An early decision of the Québec Court of Appeal in *Groupe Bovac Ltée* held that at the time of the application, the plan must be in existence, although the plan could be modified or varied after that time: *Banque Laurentienne du Canada v. Groupe Bovac Ltée* (1991), 1991 CarswellQue 39, 9 C.B.R. (3d) 248, [1991] R.L. 593 (Que. C.A.). However, the *CCAA* was modified in 1997, introducing a limit on the length of the stay granted on an initial application for a stay order, Parliament recognizing that the debtor might need a period to prepare a plan. As a consequence, it appears that *Groupe Bovac Ltée.* is now not good law as a result of the changes to the *CCAA* in 1997.

The Ontario Superior Court of Justice dismissed a *CCAA* application where the sole purpose of the application was to obtain a stay that was directed at preventing a regulatory tribunal hearing from proceeding. The applicant satisfied the technical requirements of the *CCAA* in that it was insolvent; however, while it had substantial secured and unsecured debt, there was no evidence that any creditors were taking action against the applicant to enforce payment. The principal purpose of the application was to seek a stay of certain licensing proceedings before the License Appeal Tribunal, which were scheduled to commence three days after the *CCAA* application was made. There was no business to protect; there were no employees, nor was there any prospect of a sale of the business to satisfy the creditors that would require *CCAA* protection in order to conduct a sales process: *Re Realtysellers (Ontario) Ltd.* (2008), 2008 CarswellOnt 438, 40 C.B.R. (5th) 154 (Ont. S.C.J.).

Where an application for extending the initial stay was generally opposed by the secured creditors on the basis that performance by the debtor company did not generate confidence that it had turned the corner and was likely to survive and the creditors were concerned about prejudice to their security, the court held that in order to obtain an extension, the applicant debtor must establish three preconditions: that circumstances exist that make the order appropriate; that the applicant has acted and continues to act in good faith; and that the applicant has acted and continues to act with due diligence. The court concluded that the requirements of s. 11(6) of the *CCAA* had been satisfied and the continuation of the stay was supported by the overriding purpose of the *CCAA*, which is to allow an insolvent company a reasonable period of time to reorganize and propose a plan of arrangement to its creditors and the court, and to prevent maneuvers for positioning among creditors in the interim. The court relied on the monitor's assessment that the debtor, by its actions, appeared to be acting in good faith and with due diligence and moving forward towards the preparation of a plan: *Re Federal Gypsum Co.* (2007), 2007 CarswellNS 629, 2007 NSSC 347, 40 C.B.R. (5th) 80 (N.S. S.C.) (November 5, 2007).

The Ontario Superior Court of Justice concurrently considered a receivership motion brought by a secured creditor and a *CCAA* application brought by the debtor. The receivership motion was granted. Morawetz J. was of the view that the loan agreement was in default and had been in default since August 2007 and default had not been waived. The creditor had agreed not to enforce but on terms reflected in the forbearance agreement. An agreement to forbear on terms does not have the effect of reversing or cancelling existing defaults. In addition, there had been a number of recent further defaults. Morawetz J. held that these defaults were material and not merely technical defaults. A receiver can be appointed under s. 47 of the *BIA* provided it is shown to the court to be necessary for the protection of the debtor's estate, or the interests of the creditor who sent a notice under s. 244(1). Here, the appointment of a receiver was justified under both aspects of the *BIA,* as well as under s. 101 of the *Courts of Justice Act.* The *CCAA* application did not proceed; however, there was no prohibition on the management or board of the debtor from continuing ongoing activities to refinance. If a refinancing transaction came forward, the interim receiver was directed to report such developments to the court and seek further direction: *Retail Funding Inc. v. Cotton Ginny Inc.* (2008), 2008 CarswellOnt 4808, 45 C.B.R. (5th) 250 (Ont. S.C.J. [Commercial List]). [Note: Subsequently, the debtor was able to obtain refinancing and made a new *CCAA* application that was granted; ultimately a plan of arrangement was presented, approved by creditors and sanctioned by the court.]

The British Columbia Court of Appeal overturned an order of the chambers judge extending a stay of proceedings and granting DIP financing under the *CCAA* proceeding for a development project. The Court of Appeal held that the nature and state of a business are simply factors to be taken into account when considering whether it is appropriate to grant a stay under s. 11 of the *CCAA*. The ability of the court to grant or continue a stay is not a free standing remedy, and a stay should only be

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granted in furtherance of the *CCAA*'s fundamental purpose of facilitating compromises and arrangements between companies and their creditors. A stay should not be granted or continued if the debtor company does not intend to propose a compromise or arrangement to creditors. If it is not clear at the initial application hearing whether the debtor is proposing a true arrangement or compromise, a stay might be granted on an interim basis, with the debtor's intention scrutinized at a comeback hearing. Here, in the absence of an expressed intention to propose a plan to creditors, it was not appropriate for the stay to have been granted or extended under s. 11, and the chambers judge failed to take this important factor into account. While the *CCAA* can apply to a business with a single development, the nature of the financing arrangements may mean that the debtor has difficulty proposing a plan that is more advantageous than the remedies already available to creditors. It continued to be open to the debtor company to propose to its creditors an arrangement or compromise restructuring plan. However, the *CCAA* is not intended to accommodate a non-consensual stay of creditors' rights while a debtor company attempts to carry out a restructuring plan that des not involve an arrangement or compromise on which creditors may vote: *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* (2008), 2008 CarswellBC 1758, 46 C.B.R. (5th) 7, 2008 BCCA 327 (B.C. C.A.). For a discussion of the standard of review in this case, see: N§85 "Appeals from Stay Orders".

The British Columbia Supreme Court considered the test for setting aside an *ex parte* order for non-disclosure in the context of *CCAA* proceedings. The court will consider whether the facts that were not disclosed might have affected the outcome if they had been known at the time the application was made. In this case, the court found that there was a realistic standard of disclosure met by the petitioner, which resulted in full and fair disclosure. The court also held, in accordance with the principles set out by Tysoe J. in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* (2008), 2008 CarswellBC 1758, 46 C.B.R. (5th) 7 (B.C.C.A.), that the debtor had shown an intention to put a plan before its creditors, and was satisfied that the financing was in place that would allow sufficient time to bring forward a plan for the consideration of the creditors: *Re Hayes Forest Services Ltd.* (2008), 2008 CarswellBC 1946, 46 C.B.R. (5th) 189 (B.C. S.C. [In Chambers]).

The Ontario Superior Court of Justice granted an initial *CCAA* order that also approved an interim financing agreement. The issue that caused concern for the court was that the debtor agreed to guarantee obligations of an affiliated U.S. entity that had concurrently filed for Chapter 11 protection in the U.S. In considering whether approval should be granted, the court observed that if there was a shortfall on the realization of U.S. assets, up to US$5 million of assets of the Canadian debtor would not be available to the current creditors of the Canadian debtor. Justice Morawetz noted that it would have been helpful if the monitor had been involved in this process at an earlier stage as the court would have benefited from an analysis of the situation. On balance, Justice Morawetz concluded that the agreement, combined with the breathing space afforded by *CCAA* protection, would have the greatest potential in an attempt to preserve value for stakeholders of the debtor, including the prospect of preserving over 350 manufacturing jobs, as well as the preservation of the business for customers and suppliers: *Re A & M Cookie Co. Canada* (2008), 2008 CarswellOnt 7136, 49 C.B.R. (5th) 188 (Ont. S.C.J. [Commercial List]).

An initial *CCAA* order covered a debtor and a number of its associated entities, and the court extended the benefit of *CCAA* protection to two Canadian partnerships affiliated with the debtors. Each of these *CCAA* entities had also filed for Chapter 11 protection in the United States the day prior to the *CCAA* proceedings. The court held that the business operated as a North American company rather than as a collection of individual business units. The U.S. and Canadian operations were fully integrated; management decisions were made by a U.S. management team and it would have responsibility for the restructuring plan for the *CCAA* entities; a secured credit facility covered both the Canadian and American operations and the amount outstanding on the pre-filing facility was approximately U.S.$1 billion of which approximately US$367 million was attributable to the Canadian debtor company; and security over all material Canadian assets had been provided as part of the facility. The proposed outline for a plan included continuing the process of selling and realizing value in respect of closed and discontinued operations and coordinating with the U.S. entities to achieve a balance sheet restructuring. The proposed monitor was also of the view that the restructuring and continuation of the *CCAA* entities as a going concern was the best option available, given that a going concern restructuring would preserve the value of the entities whereas a liquidation and wind-down would likely result in a substantial diminution in value that could ultimately reduce creditors' recoveries: *Re Smurfit-Stone Container Canada Inc.* (2009), 2009 CarswellOnt 391, 50 C.B.R. (5th) 71 (Ont. S.C.J. [Commercial List]).

The British Columbia Court of Appeal dismissed the appeal of a secured creditor from an order of the chambers judge who had extended an initial order granted under the *CCAA*. The appeal raised the issue of the court's jurisdiction to stay proceedings against a partnership, as well as whether the stay ought to have been granted in circumstances where the applicants intended to refinance as opposed to presenting a proposal of a plan of arrangement. The court held that the *CCAA* is appropriate for situations such as this where it is unknown whether the "restructuring" will ultimately take the form of a

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refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of one or more parties. The fundamental purpose of the *CCAA,* to preserve the *status quo* while the debtor prepares a plan that will enable it to remain in business to the benefit of all concerned, will be furthered by granting a stay so that the means contemplated by the Act, a compromise or arrangement, can be developed, negotiated and voted on if necessary: *Re Forest & Marine Financial Ltd.,* (2009), 2009 CarswellBC 1738, 54 C.B.R. (5th) 201 (B.C. C.A.).

The Ontario Superior Court of Justice held that claims for termination pay and severance pay were unsecured claims that were stayed during a *CCAA* proceeding: *Re Windsor Machine & Stamping Ltd.* (2009), 2009 CarswellOnt 4471, 55 C.B.R. (5th) 241 (Ont. S.C.J. [Commercial List]).

The court has jurisdiction to permit the debtor to refrain from making special payments: *Re Collins & Aikman Automotive Canada Inc.* (2007), 37 C.B.R. (5th) 282, 2007 CarswellOnt 7014, 63 C.C.P.B. 125 (Ont. S.C.J.).

The Québec Superior Court held that it has jurisdiction to authorize the suspension of the debtor's obligation to finance the pension plan by suspending its special payments, distinguishing between rights that flow from a collective agreement and the performance of obligations to give effect to those rights. Mayrand J. determined that the past service contributions or special payments related to services provided prior to the initial order and therefore were not barred by section 11.3 of the *CCAA: Re AbitibiBowater inc.* (2009), 74 C.C.P.B. 254, D.T.E. 2009T-434, 2009 QCCS 2028, 2009 CarswellQue 4329, 57 C.B.R. (5th) 285 (Que. S.C.).

The Ontario Superior Court of Justice held that it has jurisdiction in a *CCAA* proceeding to stay the requirement to make special payments required under a pension plan. At the time of the initial application, the debtor's request for an order that the stay applied to special payments in respect of unfunded and going concern and solvency deficiencies with respect to certain pension plans was adjourned. This motion sought to suspend past service contributions or special payments to fund any going concern unfunded liability or solvency deficiencies of certain pension plans during the stay period. Current service payments or normal cost contributions were not in issue. In the circumstances of the case, the court grant the stay. Justice Pepall noted that the evidence was that the payments related to services provided in the period prior to the initial order, and the collective agreements did not change this fact. The court was not being asked to modify the terms of the pension plan or the collective agreements. In the court's view, the operative word was suspension, not extinction. In addition, the actuarial filings were current and the relief requested was not premature. The court held that the failure to stay the obligation to pay the special payments would jeopardize the business and the debtor's ability to restructure. The opportunity to restructure is for the benefit of all stakeholders including the employees. That opportunity should be maintained. Justice Pepall also granted ancillary relief by ordering that the officers and directors should not have any liability for failure to pay special payments during the same period: *Re Fraser Papers Inc.* (2009), 2009 CarswellOnt 4469, 55 C.B.R. (5th) 217 (Ont. S.C.J. [Commercial List]).

The Alberta Court of Queen's Bench denied a *CCAA* application of a real estate company that purchased, held and sold properties. The debtor had applied for *CCAA* protection as it was unable to make all of its mortgage payments as a result of the economic downturn, which meant that several tenants had defaulted on their lease. As part of its application, the debtor sought approval of DIP financing for $3.5 million with the first draw being up to $1.5 million with an interest rate of 15% plus other fees. The application was opposed by the majority of first mortgagees, who wanted to proceed with their foreclosure remedies. Justice Kent concluded that it was not appropriate to grant relief under the *CCAA;* it appeared highly unlikely that any compromise or arrangement would be acceptable to creditors; the proposed costs of the proceeding were not appropriate given the circumstances; and there were not a large number of employees or significant unsecured debt in relation to the secured debt: *Re Octagon Properties Group Ltd.* (2009), 2009 CarswellAlta 1325, 58 C.B.R. (5th) 276, 2009 ABQB 500 (Alta. Q.B.).

The court held that representative counsel should be appointed pursuant to s. 11 of the *CCAA* and the Ontario Rules of Civil Procedure. Employees and retirees not otherwise represented were a vulnerable group who required assistance in the restructuring process, and it was beneficial that representative counsel be appointed. The balance of convenience favoured the granting of such an order, and it was in the interests of justice to do so. Once commonality of interest has been established, other factors to be considered in the selection of representative counsel include: the proposed breadth of representation; evidence of a mandate to act; legal expertise; jurisdiction of practice; the need for facility in both official languages; and estimated costs. The court held that the objective of the order was to help those who were otherwise unrepresented, but to do so in an efficient and cost effective manner and without imposing an undue burden on the insolvent entities struggling to

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restructure. In the event that a real, as opposed to a hypothetical or speculative, conflict would arise at some point in the future, the parties could seek directions from the court. In the result, the representation requests for two unions and one other representative counsel were granted, with funding ordered for the representative counsel of the non-unionized employees and retirees: *Re Fraser Papers Inc.* (2009), 2009 CarswellOnt 6169 (Ont. S.C.J. [Commercial List]).

The Québec Superior Court declined the request of the Province of Newfoundland and Labrador to gain access to the electronic data rooms set up in the *CCAA* restructuring proceedings of the debtor company. Justice Gascon held that the *CCAA's* purpose is to facilitate compromises and arrangements between an insolvent debtor company and its creditors; and this case was not one where judicial discretion should be exercised in the manner sought by the Province as there was no reasonable or reasoned justification that would support it. Justice Gascon found that the Province failed to produce any reliable or admissible evidence to establish that it was a creditor of the debtor; there was no evidence to establish the nature of the payments made or any lawful assignment of the related claims of the employees. The Province also did not provide the court with any convincing evidence in support of its alleged status of potential creditor for environmental problems resulting from the debtor's economic activities. The court held that to conclude that the Province was a creditor would, in essence, substitute speculation for reason and guesswork for proof. Access to the data rooms at that point had only been provided to secured creditors whose assets were being used in the restructuring process, and to committees of unsecured creditors whose status was officially recognized in the U.S. proceedings or whose support was essential to the outcome of the restructuring because of the amount of debt owed to them. There was no evidence to suggest that potential or contingent creditors such as the Province had been given the kind of access it was seeking. Justice Gascon held that the debtor company could, for legitimate business reasons and through the exercise of reasonable business judgment, restrict access to its data rooms when the access would not further its restructuring process. In this case, Gascon J. noted that the Province wanted access to the data room not to enhance the restructuring process, but to assess the extent of the debtor's present and future ability to cover the Province's undetermined and potential environmental claims. It was reasonable for the debtor to deny access to its data rooms to a stakeholder with whom it has a legitimate debate and reasonable expectations of upcoming litigation. In such a situation, the *CCAA* process should not be used to further a collateral objective that, in the end, is not consistent with the ultimate goal of the *CCAA*: *Re AbitibiBowater inc.* (2009), 2009 CarswellQue 11821 (Que. S.C.).

The stay performs the initial function of keeping stakeholders at bay in order to give the debtor a reasonable opportunity to develop a restructuring plan: *Re Canwest Global Communications Corp.* (2009), 2009 CarswellOnt 7882 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice approved a series of agreements that provided the debtors with certainty with respect to ongoing funding, resolution of inter-company issues, and a settlement with taxing authorities. The agreements were entered into after extensive negotiations among the debtor companies, the monitor, the joint administrators, the official committee of unsecured creditors, the bondholders committee and the creditors' committee. The trustees of the pension plan objected. The court held that in considering the funding arrangements of the debtor entities, which operate globally with numerous international subsidiaries, the scope of review must take account of the complex and interrelated funding agreements that had been developed over a period of years. It was appropriate to place reliance on the views of the monitor who had the benefit of intensive involvement for over a year and was active in the negotiations leading up to the proposed settlement. There was considerable downside risk for the Canadian estate if the settlement was not approved. The terms of the settlement had been thoroughly canvassed not only by the applicants and the monitor, but also by the creditor groups; and there were a number of checks and balances in the system, that when considered together, provided the court with reasonable comfort that the settlement was fair and reasonable. The court was satisfied that the financial stability of the Canadian debtor was in jeopardy and the situation would not improve without the approval of the proposed settlement: *Re Nortel Networks Corp.* (2010), 2010 CarswellOnt 1044 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice appointed representative counsel to act on behalf of the former salaried employees and retirees of the debtor company, notwithstanding that the funding of fees for representative counsel would contravene the provisions of the support agreement. Factors that the courts consider in granting representation orders include: the vulnerability and resources of the group sought to be represented; any benefit to the companies under *CCAA* protection; any social benefit to be derived from representation of the group; facilitation of the administration; avoidance of a multiplicity of legal retainers; the balance of convenience and whether it is fair and just for parties including the creditors of the estate; whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and the position of other stakeholders and the monitor. In this case, the primary objection to the relief requested was prematurity; and Justice Pepall was of the view that

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this "watch and wait suggestion" was unhelpful to the needs of the salaried employees and retirees and to the interests of the applicants. The individuals in issue may be unsecured creditors, and they are all individuals who find themselves in uncertain times facing legal proceedings of significant complexity. There was evidence that members of the group were unable to afford proper legal representation. Further, Justice Pepall noted that the monitor already had very extensive responsibilities and that it was unrealistic to expect that it could be fully responsive to the needs and demands of these many individuals in an efficient and timely manner. It would be of considerable benefit to have representatives and representative counsel who could interact with the applicants and represent their interests. The court directed counsel to ascertain how best to structure the funding and report back to court: *Re Canwest Publishing Inc.* (2010), 2010 CarswellOnt 1344 (Ont. S.C.J. [Commercial List]).

The court granted an extension of a stay under the *CCAA* on the basis that the debtors had proved they were acting in good faith and with due diligence, and the extension would allow the debtor companies the opportunity to present a plan of arrangement for the benefit of all creditors. The debtor required equipment to complete its contract and the court declined to allow the secured creditor to lift or terminate the stay and seize the equipment: *Re Clayton Construction Co.* (2009), 2009 CarswellSask 690, 59 C.B.R. (5th) 213 (Sask. Q.B.).

The Ontario Superior Court of Justice, over the objections of the largest unsecured creditor, approved the payment by the debtors of a contribution to the settlement of an action against the debtors and others, as well as the payment of legal fees relating to the action. The creditor of the debtor commenced *CCAA* proceedings, which were recognized under Chapter 15 of the U.S. *Bankruptcy Code,* and which had the effect of staying a lawsuit against the debtor companies. The Texas court, however, refused to stay the entire action and severed the other defendants. Trial was set; however, the action was settled on behalf of all defendants. The Ontario court authorized the debtor companies to enter into the settlement agreement. As a result of the sale, two secured creditors were paid in full and the monitor estimated that there would be a dividend of 20% to 40% for the unsecured creditors. Justice Karakatsanis noted that under s. 11 of the *CCAA,* a court may approve material agreements, including settlements, before the filing of any plan of compromise, if it is fair and reasonable and will be beneficial to the debtor and its stakeholders generally. After reviewing a number of factors, the court concluded that it was in the best interests of the debtor companies and its creditors generally and specifically that the debtor make a 25% contribution to the settlement of the lawsuit: *Return on Innovation Capital Ltd. v. Gandi Innovations Ltd.* (2010), 2010 CarswellOnt 2084 (Ont. S.C.J.).

The court granted an extension of a stay under the *CCAA,* on the basis that the community served by the debtor was huge, given that the debtor was the largest publisher of daily English language newspapers in Canada and the debtor employed 5,300 employees. The granting of the order was premised on an anticipated going concern sale of the newspaper business, which would serve the interests of the debtor, stakeholders and the community at large. The stay order would provide stability and enable the debtor to pursue restructuring and preserve enterprise value for stakeholders. Without the benefit of the stay, the debtor would be required to pay approximately 1.4 billion CAD and would have been unable to continue operating the business. The court endorsed a credit acquisition process: *Re Canwest Publishing Inc. /Publications Canwest Inc.* (2010), 2010 CarswellOnt 212, 63 C.B.R. (5th) 115, 2010 ONSC 222, [2010] O.J. No. 188 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice, on the debtor's motion, terminated *CCAA* proceedings, court-ordered charges and the stay of proceedings, and discharged the monitor. The applicant had sought *CCAA* protection as a result of the issuance by the Minister of Revenue for the Province of Québec ("MRQ") of a notice of assessment against the debtor. The MRQ also had commenced an oppression application against the applicant and others relating to alleged contraband tobacco activities, which mirrored claims asserted by the Attorney General of Canada against the applicant and others. The sole purpose of the *CCAA* proceedings was to deal with the claims of the MRQ in respect of contraband activities. Following extensive discussions, the debtor and the governments agreed to settle all of the contraband claims. Coincident with the settlement, the debtor pleaded guilty to a regulatory infraction under the *Excise Act* (Canada) and paid a fine of $150 million. As part of the settlement, the debtor and its affiliates were released from all contraband claims. The termination of proceedings order sought was supported by the monitor and was either supported or not opposed by the federal government and those of the provinces and territories appearing. The court accepted the recommendations of the monitor and concurred with its report that the relief sought did not unduly prejudice the stakeholders. The court was satisfied that the debtor would continue to meet its debt and trade obligations as they come due, and termination of the *CCAA* proceedings was likely to improve the operating cash flow. In these unique circumstances, the court was satisfied that the debtor no longer required *CCAA* protection: *Re JTI-MacDonald Corp.* (2010), 2010 CarswellOnt 5934, 70 C.B.R. (5th) 310, 2010 ONSC 4212 (Ont. S.C.J. [Commercial

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List]).

The British Columbia Supreme Court gave directions as to the most appropriate process for employees to follow in filing claims against directors and officers of an estate that first filed under the *CCAA* and then under the *BIA*. In making its decision, the court also considered whether it had jurisdiction under s. 11 of the *CCAA* or whether it had to consider the statutory preconditions under s. 119(2) of the *CBCA*: *Re Pope & Talbot Ltd.* (2010), 2010 CarswellBC 3648, 74 C.B.R. (5th) 210, 2010 BCSC 1902 (B.C.S.C.).

The British Columbia Supreme Court granted initial *CCAA* protection to a group of entities involved in the business of designing, manufacturing, and selling custom super yachts. The initial application was opposed by certain creditors on the basis that the B.C. court had no jurisdiction to stay *in rem* maritime law proceedings in the Federal Court. The initial order granted by the B.C. court included, as a matter of comity, a request for recognition and aid of the Federal Court with respect to the initial order. The court was of the view that priority issues as they related to claims of maritime lien holders did not have to be addressed on the initial application: *Sargeant III v. Worldspan Marine Inc.* (2011), 2011 CarswellBC 1444, 82 C.B.R. (5th) 102 (B.C.S.C. [In Chambers]). For further discussion of this case, see N§59 "Jurisdiction of Courts".

The Ontario Superior Court of Justice and the United States Bankruptcy Court for the District of Delaware referred certain issues to mediation. The courts noted that the issue of allocation of assets among various debtor entities, together with the resolution of claims including claims in the U.K. proceedings, had to be resolved before there could be any meaningful distribution to creditors. The allocation issue before the U.S. Court and the Ontario Court was complicated by the fact that it was a multi-jurisdictional issue: *Re Nortel Networks Corp.* (2011), 2011 CarswellOnt 5175, 2011 ONSC 3805, additional reasons at (2011), 2011 CarswellOnt 5740, 2011 ONSC 4012 (Ont. S.C.J.). For a detailed discussion of this case, see N§223 "Protocols".

Notwithstanding objections raised by two secured creditors, the British Columbia Supreme Court granted an order extending the stay in a *CCAA* proceeding, and also increased the administration charge and imposed a director's charge. Justice Fitzpatrick found that there was no doubt that the applicants were insolvent and that they faced substantial challenges in a restructuring. However, for the purposes of this application, it was evident that there were substantial assets that would be a potential source of refinancing or sale with respect to both resort projects. After reviewing concerns raised by the creditors, Fitzpatrick J. did not accept their submissions that there was any justification for their lack of faith in management. Fitzpatrick J. was satisfied that there was a *bona fide* intention to present a plan, and that although the secured creditors claimed they would not vote in favour of any plan, the actions of the creditors in the circumstances indicated that they were open to negotiations and that those negotiations could possibly result in a refinancing of the debt that would allow the debtors to go forward on some restructured basis. Fitzpatrick J. considered the provisions of s. 11.2 of the *CCAA*, and in particular, the factors set forth in s. 11.2 (4). She was satisfied that the requested DIP financing order was appropriate. The court distinguished the instant circumstance from cases in which there were undeveloped or partially completed real estate projects where the courts have drawn a distinction between such situations and one where there is an active business being carried on within a complicated corporate group, since as here. In Fitzpatrick J.'s view, the debtors were a highly integrated group and the protections under the *CCAA* must be for the entire group in order that they can seek a solution to their financial problems as a whole. It may be that individual solutions will be found for particular assets or debts, but that could be accommodated within the *CCAA* proceedings as currently sought by the applicants for that integrated group. Justice Fitzpatrick observed that there were a substantial number stakeholders involved: the applicants, the secured creditors, the unsecured creditors, the owner groups and strata corporations, the thousands of homeowners and the hundreds of employees. There could be no doubt that a receivership would result in a complete obliteration of every financial interest save for the first and possibly second secured lenders. The prejudice to the other stakeholders was palpable in the event of a receivership. In the result, the applicants had satisfied the onus of establishing that they were acting in good faith and with due diligence and that the making of a further order extending the stay was appropriate. The order was granted as sought, including a DIP financing charge, an increased administration charge, and a directors' charge up to $700,000. The creditor's application to appoint a receiver was dismissed: *Re Pacific Shores Resort & Spa Ltd.* (2011), 2011 CarswellBC 3500, 75 C.B.R. (5th) 248, 2011 BCSC 1775 (B.C.S.C. [In Chambers]).

The Ontario Superior Court of Justice addressed a contest between two competing *CCAA* applications. The contest was between the debtor and noteholders under a trust indenture. The court made an initial order in the application brought by the debtor and dismissed the noteholders' application. The principal asset of the debtor was its right to develop a gold mine in Venezuela, one of the largest undeveloped gold deposits in the world, the asset being in the form of an international

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arbitration claim. The debtor submitted that a settlement of the arbitration claim or recovery on an arbitration award would result in it receiving cash far in excess of what was required to pay all of its creditors in full. In its *CCAA* application, the debtor sought the authority to file a plan, in order that it remain in possession of its assets with the authority to continue to pursue the arbitration and continue to retain all the experts necessary for that purpose, a directors' and officers' indemnity and charge not exceeding $10 million, and an administration charge of $3 million, as well as authority to pursue all avenues of interim financing or a refinancing of its business and to conduct an auction to raise interim or DIP financing pursuant to procedures approved by the monitor. Expressions of interest had already been received with respect to DIP financing. Justice Newbould observed that the intention of the *CCAA* to provide a structured environment for negotiation of compromises between a debtor company and its creditors for the benefit of both; and that the *CCAA* serves the interests of a broad constituency of investors, creditors and employees. Justice Newbould was of the view that to cancel the shares of the existing shareholders at this stage was premature. There was also evidence that Venezuela had a history of settling arbitrations. Newbould J. was also of the view that the debtor's application and the terms of the initial order were not prejudicial to the legitimate interests of the noteholders. The debtor's proposed initial order was in keeping with the objectives of the *CCAA* and would permit a fair and balanced process at this initial stage. Newbould J. also approved the directors' and officers' charge and the administration charge: *Re Crystallex International Corp.* (2011), 2011 CarswellOnt 15034, 89 C.B.R. (5th) 313, 2011 ONSC 7701 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice granted a receivership order and dismissed the debtors' cross-application for an initial order under the *CCAA*. There had been ongoing default by the debtors in respect of their obligations to the secured creditors; and at the time of one advance, the debtors were in breach of their representations in a credit facility agreement. Justice Mesbur noted that a forbearance agreement also contained a promise from the debtors not to commence any restructuring or reorganization proceedings under the *BIA* or *CCAA*. Since the forbearance agreement, the debtors' financial position had deteriorated further, and the creditor terminated the forbearance agreement and advised that it would apply to court to have a receiver appointed. In determining whether a receiver should be appointed, the court will consider all the circumstances of the case, particularly, the effect on the parties of appointing the receiver, including potential costs and the likelihood of maximizing return on and preserving the subject property; the parties' conduct; and the nature of the property and the rights and interests of all parties in relation to it. The fact that the creditor has a right to appoint a receiver under its security is an important consideration. Generally, a court will appoint a receiver when it is necessary to enforce rights between the parties or to preserve assets pending judgment. Receivers will also be appointed where there is a serious apprehension about the safety of the assets. In this case, the credit agreement itself specifically contemplated appointing a receiver. Given the debtors' failure to come up with even a rudimentary restructuring plan, the court found that it was time for a receiver to take control and manage the business to the extent necessary to result in an orderly liquidation to protect the interests of all stakeholders: *Callidus Capital Corp. v. Carcap Inc.* (2012), 2012 CarswellOnt 480, 84 C.B.R. (5th) 300 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice lifted a stay of proceedings to permit the filing of a leave application to the Supreme Court of Canada, but dismissed the motion of the class action plaintiff to proceed further on the basis that the motion was premature, as the debtor should focus on the sales process. A delay in the sales process could have a negative impact on the creditors of the debtor. Conversely, the court held that the time sensitivity of the class action had been, to a large extent, alleviated by the lifting of the stay so as to permit the filing of the leave application to the Supreme Court of Canada. Justice Morawetz noted that it was also significant to recognize the position put forth by one of the defendants in the class action, that the claims were only equity claims, and as such would be subordinated to any creditor claims. The motion was dismissed without prejudice to the rights of the plaintiff to renew his request no sooner than 75 days after the date of the endorsement: *Re Timminco Ltd.* (2012), 2012 CarswellOnt 5390, 2012 ONSC 2515 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice lifted the stay in a *CCAA* proceeding to permit a class action plaintiff to file leave materials to the Supreme Court of Canada, but not otherwise. The class action was commenced several years prior to commencement of the *CCAA* proceedings and a number of steps had been taken in the litigation. The Court of Appeal had previously set aside a superior court decision declaring that s. 28 of the Ontario *Class Proceedings Act* suspended the running of the three year limitation period under s. 138.14 of the Ontario *Securities Act*. The plaintiff's counsel received instructions to seek leave to appeal to the Supreme Court of Canada, and Morawetz J. lifted the stay of proceedings such that the leave materials could be filed on time. The plaintiff submitted that the principal objectives of the *Class Proceedings Act* are judicial economy, access to justice and behaviour modification under the *Securities Act*, citing *Western Canadian Shopping Centres Inc. v. Dutton* (2001), 2001 CarswellAlta 884, 2001 CarswellAlta 885, [2001] 2 S.C.R. 534. Justice Morawetz held that the party seeking to lift the stay bears a heavy onus as the practical effect of lifting the stay is to create a scenario where one

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stakeholder is placed in a better position than other stakeholders, rather than treating stakeholders equally in accordance with their priorities. Justice Morawetz observed that courts will consider a number of factors in assessing whether it is appropriate to lift a stay, but those factors can generally be grouped under three headings: the relative prejudice to parties; the balance of convenience; and where relevant, the merits. Morawetz J. was of the view that the primary focus of the management group at the time had to be on the sales process under the *CCAA*, and held that the time sensitivity of the class action had been, to a large extent, alleviated by the lifting of the stay so as to permit the leave application to the Supreme Court of Canada. The motion was dismissed without prejudice to the rights of the plaintiff to renew his request no sooner than 75 days after the date of the endorsement: *Re Timminco Ltd.* (2012), 2012 CarswellOnt 5390, 2012 ONSC 2515 (Ont. S.C.J. [Commercial List]).

The Supreme Court of Canada in *Re AbitibiBowater Inc.* held that regulatory bodies may become involved in reorganization proceedings when they order the debtor to comply with statutory rules. As a matter of principle, reorganization does not amount to a licence to disregard rules. Yet there are circumstances in which valid and enforceable orders will be subject to an arrangement under the *CCAA*. One such circumstance is where a regulatory body makes an environmental order that explicitly asserts a monetary claim. The Supreme Court held that not all orders issued by regulatory bodies are monetary in nature and thus provable claims in an insolvency proceeding, but some may be, even if the amounts involved are not quantified at the outset of the proceedings. The Court held that in the environmental context, the *CCAA* court must determine whether there are sufficient facts indicating the existence of an environmental duty that will ripen into a financial liability owed to the regulatory body that issued the order. The Court held that subjecting such orders to the claims process does not extinguish the debtor's environmental obligations; it merely ensures that the creditor's claim will be paid in accordance with insolvency legislation: *Re AbitibiBowater Inc.*, 2012 CarswellQue 12490, 2012 CarswellQue 12491, 95 C.B.R. (5th) 200, 2012 SCC 67 (S.C.C.). For a full discussion of this judgment, see N§78 "Regulatory Bodies".

The Ontario Superior Court of Justice dismissed a motion brought by former directors and officers for an interim order restraining the Director appointed pursuant to the Ontario *Environmental Protection Act* from issuing a Director's order. The debtor had notified the MOE in 1995 that a spill at a manufacturing site had contaminated groundwater that ran beneath hundreds of residential properties in the surrounding area. Since that time, the debtor had conducted various investigation, remediation and monitoring activities in conjunction with the MOE and local authorities. The MOE issued a Director's order in 2012 ordering the debtor to develop and implement a plan to clean up contaminated groundwater ("first order"). The MOE issued a second Director's order, ordering the debtor to provide financial assistance to the MOE in the amount of $10 million. The debtor filed for *CCAA* protection and subsequently completed a court-approved sale of substantially all of its assets; the sale transaction did not include the site. On closing, the debtor was adjudged bankrupt and had no funds to continue the remediation efforts of the site. Subsequently, the Minister issued a direction pursuant to section 146 of the *EPA* directing the MOE to perform the work required by the first Director's order, and as a result, the MOE had taken over the remediation activities on the site. The bankruptcy order permitted the continuation of the *CCAA* proceedings to allow the completion of the claims process. The claims bar date for all claims under the *CCAA* process was set and the MOE filed a claim under the *CCAA* claims process. The starting point for Morawetz J. was s. 14 of the *Proceeding Against the Crown Act*, which establishes the general rule that an injunction against the Crown is prima facie impermissible; the two exceptions being when the Crown is acting *ultra vires* or is deliberately flouting the law and when the court issues injunctive relief where it is necessary to preserve the *status quo* and protect the court's process. In the circumstances, Morawetz J. was not persuaded that the *status quo* exception had application; there was no evidence that there was government wrongdoing. The exception also has application where restricting injunctive relief against the Crown to the *ultra vires* principle would leave serious gaps; however, Morawetz J. held that the *EPA* sets a complete statutory scheme for the issuance of environmental orders, including provisions for the issuance, and appeal of those orders. In view of this scheme, there was not a serious gap such that an interim order was required to ensure the effectiveness of the disposition of the issue. Further, even if the argument of the former D&O group was placed at its highest, there was still the necessity to satisfy the three-part test for injunctive relief set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CarswellQue 120F, 1994 CarswellQue 120, [1994] 1 S.C.R. 311. In the circumstances, there was no serious issue to be tried because the former D&O group's motion constituted a collateral attack on the administrative process set out in the *EPA*. It had been established that the validity of the Director's order to be issued under the *EPA* against the directors/officers must be determined by the tribunal. On the second issue of the demonstration of irreparable harm, Morawetz J. was not persuaded by the submissions put forth by the former D&O group to the effect that their professional reputations would be harmed if the Director's order was issued, as the mere risk of damage to reputation or other harm was not sufficient to establish irreparable harm: *Re Northstar Aerospace Inc.*, 2012 CarswellOnt 14149, 2012 ONSC 6362 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice dismissed a debtor's application for an initial order under the *CCAA* and instead

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granted a receivership order. The court was not satisfied that a successful plan could be developed that would receive creditor approval. The applicant sought *CCAA* protection to enable an orderly liquidation of the assets and property of the various companies and proposed interim financing and an administrative charge to secure the fees of professionals and expenses associated with *CCAA* administration. The application was opposed by approximately 75% in value of the secured creditors on the basis that: (i) in many instances the properties over which security was held were sufficiently discrete with specific remedies including sale being more appropriate than the "enterprise" approach posed by the applicants; (ii) the proposed interim financing and administration charges were an unwarranted burden to the equity of specific properties; (iii) individual receivership orders for many of the properties was a more appropriate remedy; (iv) the creditors had lost confidence in the family owners of the corporate group; and (v) it was evident that the applicants would be unable to propose a realistic plan that was capable of being accepted by creditors. Justice Campbell accepted the general propositions of law that pursuant to s. 11.02 of the *CCAA*, the court has wide discretion on any terms it may impose to make an initial order and that the breadth and flexibility of the *CCAA* to not only preserve and allow for restructuring of the business as a going concern but also to permit a sale process or orderly liquidation to achieve maximum value and achieve the highest price for the benefit of all stakeholders. Justice Campbell also accepted the general proposition that given the flexibility inherent in the *CCAA* process and the discretion available that an initial order may be made in the situation of "enterprise" insolvency where as a result of a liquidation crisis not all of the individual entities comprising the enterprise may be themselves insolvent but a number are and the purpose of the restructuring plan is to restore financial health or maximize benefit to all stakeholders by permitting further financing. The court further observed that although the *CCAA* can apply to companies whose sole business is a single land development as long as the requirements set out in the *CCAA* are met, it may be that, in view of the nature of its business and financing arrangements, such companies would have difficulty proposing an arrangement or compromise that was more advantageous than the remedies available to its creditors. Justice Campbell dismissed the request for an initial order as he was not satisfied that a successful plan could be developed that would receive approval in any meaningful fashion. Campbell J. noted that to a large extent, the principal of the applicants was the author of his own misfortune not just for the liquidity crisis in the first place but also for a failure to engage with creditors as a whole at an early date. Campbell J. was of the view that a receivership order would achieve an orderly liquidation of most of the properties and protect the revenue from the operating properties with the hope of potential of some recovery of the debtor's equity. He also observed that the use of the *CCAA* for the purpose of liquidation must be used with caution when liquidation is the end goal, particularly when there are alternatives such as an overall less costly receivership that could accomplish the same overall goal: *Re Dondeb Inc.*, 2012 CarswellOnt 15528, 97 C.B.R. (5th) 264, 2012 ONSC 6087 (Ont. S.C.J. [Commercial List]).

The Manitoba Court of Queen's Bench lifted a *CCAA* stay of proceedings to enable certain suppliers to initiate an action against the *CCAA* applicants in which they claimed priority over some of the proceeds of sale of the assets of the applicants. Leave was also granted to the suppliers to initiate proceedings against the directors and officers. The restructuring essentially involved the sale of substantially all of the debtor's assets on a going-concern basis. As part of the order approving the sale, Dewar J. ordered that the proceeds be paid to the monitor to be held pending receipt of a distribution order, and subsequently granted an order authorizing the distribution of most of the net proceeds from the sale of the assets. The monitor retained $6.75 million from the net proceeds to serve as a general holdback pending completion of the *CCAA* proceedings, including a resolution of the dispute with the purchaser and potential legal actions. In considering the balance of convenience, the relative prejudice to the parties, and the merits of the proposed action, Dewar J. noted that the same request may very well receive a different reception in the case of an application for the lifting of a stay early in a *CCAA* proceeding that contemplates a true restructuring than in the case of an application brought in a *CCAA* proceeding that involves only the sale of assets. In the former situation, the existence of a contemporaneous action might jeopardize the ability of the company to restructure. In the latter case, the restructuring, such as it is, has been accomplished and the only issue being left to sort through is who is entitled to the money. Dewar J. was of the view that a court may be more receptive to lifting the stay in the latter case than in the former. Justice Dewar concluded that any prejudice created by the delay in distribution of funds could be alleviated by requiring each named plaintiff to file an undertaking as to damages for its *pro rata* share of any damages arising from any delay in the distribution: *Re Puratone Corp.*, 2013 CarswellMan 360, 2013 MBQB 171 (Man. Q.B.).

The British Columbia Supreme Court declined to lift the stay of proceedings in a *CCAA* application. An equipment supplier argued that its loan agreement with the debtor had been voided by the actions of the debtor and that title to the equipment remained with the supplier. The parties who opposed the motion argued that under the *PPSA*, title does not determine the rights and obligations of the parties. Brown J. concluded that it would not be appropriate to lift the stay as regard to one secured creditor. The lifting of a stay is discretionary and an opposing party faces a very heavy onus to persuade the court to grant such an order. In making a determination as to whether to lift a stay, the court should consider, together with the good faith and due diligence of the debtor company, whether there are sound reasons for doing so consistent with the objectives of

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the *CCAA*, including a consideration of the balance of convenience, the relative prejudice to the parties, and where relevant, the merits of the proposed action. Here, there was no sound reason to lift the stay. The creditor retained its security over the assets and had a claim against those assets, and to lift the stay would adversely affect the interests of all stakeholders: *Re 505396 B.C. Ltd.*, 2013 CarswellBC 2638, 2013 BCSC 1580 (B.C. S.C.).

The Ontario Superior Court of Justice lifted the *CCAA* stay of proceedings with respect to proceedings by a subcontractor of the debtor. The subcontractor was involved on a project that would not form part of a restructured or reorganized debtor. Justice Morawetz held that the purpose of a stay of proceedings issued pursuant to s. 11 of the *CCAA* is to maintain the *status quo* for a period of time so that proceedings can be taken under the *CCAA* for the wellbeing of the debtor company and of the creditors. The stay order is intended to prevent any creditor from obtaining an advantage over other creditors while the company is attempting to reorganize its affairs: *Re Comstock Canada Ltd.*, 2013 CarswellOnt 13598, 2013 ONSC 6043 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice approved a settlement agreement with respect to the remaining funds available to the creditors of the debtor Indalex. Priority claims had been asserted by the U.S. Trustee, the pension administrator of the retirement plans for both salaried and executive employees and Sun Indalex Finance, LLC. After the Supreme Court of Canada rendered its judgment in *Re Indalex Ltd.*, 2013 CarswellOnt 733, 2013 CarswellOnt 734, (*sub nom.* Sun Indalex Finance LLC v. United Steelworkers) [2013] 1 S.C.R. 271, 96 C.B.R. (5th) 171, 2013 SCC 6, [2013] S.C.J. No. 6, the monitor paid the U.S. Trustee approximately US$10.75 million pursuant to an approval order. In late 2013, the monitor was holding approximately $5 million available for distribution to the creditors of the estate, subject to administration costs. The monitor was faced with a number of parties asserting priority claims: the U.S. Trustee for US$5.4 million; the salaried plan for $5 million; the executive plan for $3.3 million; and Sun Indalex Finance, LLC for $38 million. Priority for the claims by the salaried plan and the executive plan rested on the deemed trust, lien and charge provisions of the Ontario *Pension Benefits Act*. In addition, 347 creditors had filed claims of approximately $33.8 million. The monitor secured a litigation timetable order to determine threshold issues relating to the distribution of estate funds. The issues related to the claims advanced by the two pension plans included whether the deemed trust claim by the executive plan was enforceable against the debtor's accounts or inventory; the effect of a bankruptcy order on the existence, enforceability and priority of both plans' deemed trust claims; and whether the beneficiaries of the plans were "secured creditors" of Indalex for purposes of the *BIA*. In September 2013, the parties reached a settlement agreement under which the funds would be distributed. The monitor recommended approval of the settlement agreement because costly and lengthy litigation would be required to determine the outstanding competing claims against the estate funds. This recommendation was accepted by Brown J., who noted that no interested party voiced any opposition to the approval order sought. He held that the settlement agreement was a reasonable, proportional resolution of the outstanding claims: *Re Indalex Ltd.*, 2013 CarswellOnt 18028, 9 C.B.R. (6th) 270, 2013 ONSC 7932 (Ont. S.C.J. [Commercial List]).

The British Columbia Supreme Court considered competing applications relating to the debtor. One group sought protection under the *CCAA*. The other group applied for the appointment of a receiver. The project involved the development of a small scale LNG liquefaction facility which was planned to be in operation for the gas year 2015-16. Justice Masuhara held that in regard to obtaining a stay and the appointment of a monitor under the *CCAA*, the test generally is where the circumstances exist that make the order appropriate. As stated in s. 11, the debtor is required to show that there is a reasonable possibility of a restructuring. Masuhara J. was of the view that an opportunity to form a plan was warranted. The application for a stay of the initial one-month period was granted. Masuhara J. noted that certain entities did not neatly fit within the definitions of the *CCAA*; however, the court exercised its broad authority to include those entities under an initial order. Masuhara J. observed that resolution would probably have to occur within a narrow window. Therefore, the inclusion of these entities would be appropriate and Masuhara J. was not aware of any prejudice at this point that would affect the inclusion. The Court concluded that there was a reasonable possibility for a restructuring and *CCAA* protection was granted: *Douglas Channel LNG Assets Partnership v. DCEP Gas Management Ltd.*, 2013 CarswellBC 3990, 2013 BCSC 2358 (B.C. S.C.).

The Ontario Superior Court of Justice granted protection under the *CCAA* to a debtor holding company and its subsidiaries to effect a recapitalization that was supported by 93% of noteholders who held the bulk of the debt. The court was satisfied that the debtor was a company to which the *CCAA* applied; the debtor had greater than $5 million in debts, was insolvent, was facing a looming liquidity crisis, had assets in Canada, and had its registered office in Canada. It was appropriate to extend the stay to the debtor's U.S. subsidiaries as the debtor was dependent on them for income, and absent a stay, various creditors would be in a position to enforce claims, which could conceivably lead to a failed restructuring that would not be in the best interests of the debtor's stakeholders: *Re Jaguar Mining Inc.*, 2013 CarswellOnt 18630, 12 C.B.R. (6th) 290, 2014 ONSC

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494 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice lifted the stay of proceedings in a *CCAA* proceeding to permit a class action that had not been filed by the claims bar date, to be dealt with on its merits. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so, consistent with the objectives of the *CCAA*, including a consideration of the balance of convenience; the relative prejudice to the parties; and where relevant, the merits of the proposed action. Morawetz J. held that there is an additional factor to be taken into account, namely, no *CCAA* plan or plan for one. In addressing the prejudice experienced by a director in not having a final resolution to the proposed class action, Morawetz J. noted that it had to be weighed as against the rights of the class action plaintiff to have this matter heard in court. To the extent that time constituted a degree of prejudice to the defendants, it could be alleviated by requiring the parties to agree on a timetable to have this matter addressed on a timely basis with case management: *Re Timminco Ltd.*, 2014 CarswellOnt 9328, 14 C.B.R. (6th) 113, 2014 ONSC 3393 (Ont. S.C.J.). See also the discussion of claims bar date in this judgment under N§143(1) "Scope of Claims of Creditors — Claims Barring Procedure".

The Ontario Superior Court of Justice granted an initial order under the *CCAA* to the applicant and extended the protection to a partnership whose interests were intertwined with the applicant and to the insurer of the partnership. This relief is appropriate where the operations of a debtor company are so intertwined with those of a partner or limited partnership in question that not extending the stay would significantly impair the effectiveness of a stay in respect of the debtor company. Liabilities included various post-retirement obligations owed to former partners; approximately $16 million payable in loans; a costs award of approximately $18.7 million; and contingent liabilities relating to or arising from additional litigation of $1.5 billion. Newbould J. held that contingent liabilities must be taken into account in an insolvency analysis, and accepted that the applicant was insolvent at the time of the commencement of the *CCAA* proceeding. Justice Newbould observed that the purpose of *CCAA* protection is to attempt to make the best of a bad situation without great debate about whether the business in the past was properly carried out, and here, there was no issue as to the good faith of the applicant in this *CCAA* proceeding. A contingent creditor of the partnership was then unsuccessful in moving to set aside the initial order, or, in the alternative, to vary it to delete the appointment of a creditors' committee and the provision for payment of the committee's legal fees and expenses. The initial order provided for a creditors' committee comprised of one representative of the German bank group, one representative of the Canadian bank group, and the trustee in bankruptcy of a creditor. Justice Newbould noted that *CCAA* courts routinely recognize and accept *ad hoc* creditors' committees and that it was common for critical groups of critical creditors to form an *ad hoc* creditors' committee and confer with the debtor prior to a *CCAA* filing as part of out-of-court restructuring efforts and to continue to function during the *CCAA* proceedings: *Re 4519922 Canada Inc.*, 2015 CarswellOnt 178, 2015 ONSC 124 (Ont. S.C.J. [Commercial List]).

See Barbara Walancik, "Principles and Best Practices in Administering Hardship Funding during Insolvency", in Janis Sarra and Barbara Romaine, eds., *Annual Review of Insolvency Law 2014* (Toronto: Carswell, 2015) at 531-544.

The Ontario Superior Court of Justice granted a broad initial order in *CCAA* proceedings in which the applicant Canadian debtor entities intended to wind down their operations. The stay of proceedings was extended to partnerships that were not applicants but were related to or carried on operations that were integral to the business of the applicants. The court accepted the applicants' submissions that an orderly wind-down under court supervision, with the oversight of the proposed monitor, provided a framework in which the Canadian debtor entities could, among other things: pursue initiatives such as the sale of real estate portfolios and the sale of inventory; develop and implement support mechanisms for employees affected by the wind-down, particularly an employee trust funded by the U.S. parent corporation and appoint employee representative counsel; and create a level playing field to ensure that all affected stakeholders were treated as fairly and equitably as the circumstances allowed; and avoid the significant manoeuvring among creditors and other stakeholders that could be detrimental to all stakeholders, in the absence of a court-supervised process. Justice Morawetz held that "insolvent" is not expressly defined in the *CCAA*; however, for the purposes of the *CCAA*, a debtor is insolvent if it meets the definition of an "insolvent person" in s. 2 of the *BIA* or if it is "insolvent" as described in *Re Stelco Inc.*, 2004 CarswellOnt 1211, 48 C.B.R. (4th) 299, [2004] O.J. No. 1257 (Ont. S.C.J. [Commercial List]) ["*Stelco*"], leave to appeal refused 2004 CarswellOnt 2936, [2004] O.J. No. 1903 (Ont. C.A.), leave to appeal to S.C.C. refused 2004 CarswellOnt 5200, 2004 CarswellOnt 5201, [2004] S.C.C.A. No. 336 (S.C.C.), where Farley J. found that "insolvency" includes a corporation "reasonably expected to run out of liquidity within [a] reasonable proximity of time as compared with the time reasonably required to implement a restructuring". The decision of Farley J. in *Stelco* was followed in *Re Priszm Income Fund*, 2011 CarswellOnt 2258, 75 C.B.R. (5th) 213, 2011 ONSC 2061, [2011] O.J. No. 1491 (Ont. S.C.J.) and *Re Canwest Global Communications Corp.*, 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72, [2009] O.J. No. 4286 (Ont. S.C.J. [Commercial List]) ["*Canwest*"]. Under these

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tests, Justice Morawetz was satisfied that the Canadian debtor entities were insolvent, and were debtor companies to which the *CCAA* applied. Justice Morawetz accepted the submission of the applicants that without the continued financial support of the parent corporation, the Canadian debtor entities faced too many legal and business impediments and too much uncertainty to wind-down their operations without the "breathing space" afforded by a stay of proceedings under the *CCAA*. He was also satisfied that the court had jurisdiction over the proceeding, as the head office and chief place of business were Ontario. Morawetz R.S.J. accepted the applicants' submissions that although there was no prospect of a restructured "going concern" solution involving the Canadian debtor entities, the use of the protections and flexibility afforded by the *CCAA* was appropriate in these circumstances. Morawetz R.S.J. noted the comments of the Supreme Court of Canada in *Century Services Inc. v. Canada (A.G.)*, [2010] 3 S.C.R. 379 that "courts frequently observe that the *CCAA* is skeletal in nature", and does not "contain a comprehensive code that lays out all that is permitted or barred". The flexibility of the *CCAA*, particularly in the context of large and complex restructurings, allows for innovation and creativity, in contrast to the more "rules-based" approach of the *BIA*. Justice Morawetz held that prior to the 2009 amendments to the *CCAA*, Canadian courts accepted that, in appropriate circumstances, debtor companies were entitled to seek the protection of the *CCAA* where the outcome was not going to be a going concern restructuring, but instead, a "liquidation" or wind-down of the debtor companies' assets or business. The 2009 amendments did not expressly address whether the *CCAA* could be used generally to wind-down the business of a debtor company. However, Morawetz R.S.J. was satisfied that the enactment of s. 36 of the *CCAA*, which establishes a process for a debtor company to sell assets outside the ordinary course of business while under *CCAA* protection, is consistent with the principle that the *CCAA* can be used as a vehicle to downsize or wind-down a debtor company's business. The initial order also included an administration charge, a directors' and officers' charge, and a key employee retention (KERP) charge. Justice Morawetz recognized that there were many aspects of the initial order that went beyond the usual first day provisions. He determined that it was appropriate to grant broad relief at this point in time so as to ensure that the *status quo* was maintained. The comeback hearing was to be a "true" comeback hearing. In moving to set aside or vary any provisions of the initial order, moving parties did not have to overcome any onus of demonstrating that the order should be set aside or varied: *Re Target Canada Co.*, 2015 CarswellOnt 620, 2015 ONSC 303 (Ont. S.C.J.).

The Ontario Superior Court of Justice granted an initial order in *CCAA* proceedings for a group of companies involved in real estate development. Justice Penny held that both an order appointing a receiver and an initial order under the *CCAA* are highly discretionary in nature, requiring the court to balance the competing interests of the various economic stakeholders, and the specific factors taken into account by a court are very circumstance-oriented. The court cited *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 CarswellBC 1758, 46 C.B.R. (5th) 7, 2008 BCCA 327, [2008] B.C.J. No. 1587, 83 B.C.L.R. (4th) 214, 258 B.C.A.C. 187 (B.C. C.A.), where the B.C. Court of Appeal held that the priorities of the security against the land development are often straightforward and there may be little incentive for the creditors having senior priority to agree to an arrangement or compromise that involves money being paid to more junior creditors before the senior creditors are paid in full; and *Re Encore Developments Ltd.*, 2009 CarswellBC 84, 52 C.B.R. (5th) 30, 2009 BCSC 13, [2009] B.C.J. No. 62 (B.C. S.C.), where Brenner C.J.S. found that where the "project" was raw land, there was no project development work in progress, no business activity being carried out, no equity in the project and a likely shortfall to secured lenders, there was no principled basis for putting in place or maintaining a stay that would prevent the real estate lenders from enforcing their security in the conventional manner. Justice Penny also referenced the decision of Brown J. in *Romspen Investment Corp. v. 6711162 Canada Inc.*, 2014 CarswellOnt 5836, 13 C.B.R. (6th) 136, 2014 ONSC 2781 (Ont. S.C.J. [Commercial List]), additional reasons 2014 CarswellOnt 7939, 19 C.B.R. (6th) 131, 2014 ONSC 3480 (Ont. S.C.J. [Commercial List]) that there is no "generic" prohibition against a land development business being subject to a *CCAA* process. Here, Penny J. noted that if the applicants' proposal was to tie the capital up for several years in the hope that there would be a sufficient return after payment of development expenses, the proposal would be doomed to fail as unfair or prejudicial. However, the applicants had negotiated a restructuring agreement that provided the framework for what could be a viable *CCAA* plan in that it would provide the financial and other means to enable the applicants to avoid an "as is" liquidation and proceed with an orderly "build out" of the projects with a view to maximizing value for the benefit of all the applicants' creditors. Justice Penny found it important to note that the interim lender's charge along with the other charges sought to be given a super-priority secured against the applicant's assets would be secured on a project-specific basis, based, in the case of the financing, at least, on where the funds, or the benefits of the expenditure of the funds, go. The restructuring agreement governing the interim financing provided that the monitor would make recommendations with respect to the allocation of fees and expenses that would have to be approved and allocated by the court. He further noted that the vast majority of the interim financing was forecast to be spent on two projects. The court further found that there was a proposal to pay out the mortgagee's first mortgage in full and assume the first mortgagee position, and thus the mortgagee would be in a better position under the applicants' *CCAA* plan than it would have been if it had gone through with its power of sale, which would have resulted in a shortfall. Penny J. stated it was clear that there were issues that would have to be resolved by the

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court in the event of either a receivership or a *CCAA* claims process. In conclusion, Penny J. found that the concerns which led other courts to dismiss some *CCAA* applications concerned with land development businesses were not present in this case. He found, on the unique facts of this case, that the "prejudice" to the mortgagee, that is, the risks it would face in seeking recovery on its mortgage security, was roughly the same whether realization took place in the receivership scenario or the *CCAA* scenario: *Re Hush Homes Inc.*, 2015 CarswellOnt 558, 22 C.B.R. (6th) 67, 2015 ONSC 370 (Ont. S.C.J.).

The Ontario Superior Court of Justice held that certain lump sum retention bonuses were not affected by the *CCAA* stay of proceedings. Representative counsel for the non-unionized active employees and retirees sought an order directing the debtor to pay amounts to each of three applicants pursuant to severance agreements entered into between each of these individuals and the debtor. The initial order permitted the payment of such bonuses. The Court held that the payments were not payments in respect of pre-filing obligations or non-ordinary course payments. Justice Wilton-Siegel held that the severance agreements constituted an agreement between the debtor and each of the applicants for the payment of certain amount to each of them for their agreement to make themselves available to the debtor during the periods contemplated by their respective agreements. In each case, the lump sum retention bonus constituted an acceleration and compromise of certain monthly salary continuation payments otherwise payable over a further twelve-month period of working notice for the continued provision of post-filing services. Justice Wilton-Siegel did not think that such compromise, in the form of a lump sum payment, would change the fundamental nature of the payments. The obligation to pay the lump sum retention bonuses did not become absolute until the completion of the performance of these services, that is, upon expiry of the relevant period of working notice. In the result, Wilton-Siegel J. held that the applicants were entitled to an order directing the debtor to pay the lump sum retention bonuses contemplated by the severance agreements to the applicants: *Re U.S. Steel Canada Inc.*, 2015 CarswellOnt 15634, 2015 ONSC 5990 (Ont. S.C.J.).

The Québec Superior Court held that a *CCAA* stay of proceedings did not prevent a creditor from taking enforcement proceedings against a director who had personally guaranteed the debtor's obligations. Justice Paquette held that pursuant to s. 11.03(1) of the *CCAA*, proceedings against directors are stayed if they relate to their liability under the law, in their capacity as director, for the payment of obligations of the debtor company. Subsection 11.03(1) thus applies to the liability that exists by law, as a result of his or her position as a director of the debtor company. In this case, the creditor's action was in relation to the personal guarantee. Subsection 11.03(2) of the *CCAA* states that the stay of proceedings against the directors of a debtor company does not apply in respect of actions "against a director on a guarantee given by the director relating to the company's obligations". Thus, in spite of the *CCAA* stay of proceedings, actions may be initiated or continued against the director of a debtor company, if such proceedings arise from such director's contractual commitment to personally guarantee the obligations of the debtor company. Justice Paquette noted that s. 11.03 of the *CCAA* distinguishes between proceedings seeking the director's personal liability under the law, in his (her) capacity as director and proceedings seeking the director's personal liability pursuant to a personal contract which he (she) gave to guarantee the obligations of the debtor company. Paquette J. concluded that the personal guarantee was not a "guarantee" within the meaning of s. 11.03(2). Justice Paquette noted that the word "surety" is not unknown to federal insolvency and restructuring statutes; s. 179 of the *BIA* uses the word "surety", while such word is absent from the *CCAA*. Paquette J. went on to note that the *BIA* also uses a wide array of words such as "security", "guarantee", "suretyship", "mortgage", and "hypothec". Justice Paquette held that ruling that all such concepts are not captured by the expression "guarantee" used in s. 11.03(2) of the *CCAA* would unduly restrict the scope and purported effect of this legal provision; finding that such a narrow interpretation, based on a mechanical comparison of the terms used in the *CCAA* and the *BIA*, is not desirable and bears a risk of distorting the true meaning and ambit of the *CCAA*. Justice Paquette concluded that in the absence of any allegation or demonstration that the continuation of the action against the director would hinder or complicate the restructuring process, there was no justification to extend the stay to this action: *Re Magasin Laura (PV) inc./Laura's Shoppe (PV) Inc.*, 2015 CarswellQue 9722, 31 C.B.R. (6th)168, 2015 QCCS 4716 (Que. Bktcy.).

The Ontario Superior Court of Justice granted *CCAA* protection to the applicants. The stay of proceedings was extended to two non-applicants to address concerns that third party termination rights affecting the non-applicants could prejudice the applicants. In addition, a receivership order was granted to enable terminated employees to access the Wage Earner Protection Program: *Re Victorian Order of Nurses for Canada*, 2015 CarswellOnt 19150, 32 C.B.R. (6th) 236, 2015 ONSC 7371 (Ont. S.C.J.).

The Ontario Superior Court of Justice approved a securities class action settlement in a *CCAA* proceeding. Morawetz J. held that within the *CCAA* context, the court looks at three factors in approving a settlement: whether the settlement is fair and reasonable; whether it provides substantial benefit to other stakeholders; and whether it is consistent with the purpose and

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spirit of the *CCAA*. Further, where a settlement also provides for a release, courts assess whether there is a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan. Applying this "nexus" test requires consideration of the following factors: are the claims to be released rationally related to the purpose of the plan; are the claims to be released necessary for the plan of arrangement; are the parties who have claims released against them contributing in a tangible and realistic way; and will the plan benefit the debtor and the creditors generally? Morawetz J. noted that the test for whether a class action settlement ought to be approved is similar to the test for approval of a settlement under the *CCAA*. Having reviewed the record, Morawetz J. was satisfied that the securities settlement was fair and reasonable in all the circumstances and provided substantial benefit to other stakeholders. He was also satisfied that the release of the defendants was fair and reasonable in the circumstances and that the release was justified as part of the plan of compromise or arrangement. There was a reasonable connection between the third party claim being compromised and the restructuring achieved by the plan: *Re 1511419 Ontario Inc.*, 2015 CarswellOnt 20336, 33 C.B.R. (6th) 110, 2015 ONSC 7538 (Ont. S.C.J.).

Justice Newbould of the Ontario Superior Court dealt with issues of *forum non conveniens* and the single control of proceedings model. Two contract counterparties objected to the jurisdiction of the court to hear a motion brought by the debtor companies for relief in connection with a supply contract under which the counterparties supplied the debtor for a number of years until the counterparties purported to terminate the contract shortly before *CCAA* proceedings commenced. Justice Newbould concluded that the court had jurisdiction over the claim of the debtor. The current *CCAA* proceeding commenced in November 2015, and shortly after, the debtor commenced ancillary insolvency proceedings under Chapter 15 of the U.S. *Bankruptcy Code*. What was at issue in this motion was the rights of the debtor under the contract to the end of 2024. Newbould J. held that the court has broad statutory authority granted under the *CCAA* and an inherent and equitable jurisdiction when supervising a reorganization. The Court held that the "single control" model favours a *CCAA* court to deal with the issues in this case, including a public interest in the expeditious, efficient and economical clean-up of the aftermath of a financial collapse. Here the issues were completely interwoven and it would make no sense to require the debtor to litigate its claim against the counterparties in the U.S. when their claim against the debtor must be dealt with in the Ontario Court. Here, the counterparties had raised significant damage claims against the debtor and its purported termination of the contract was an important factor that led to the *CCAA* proceedings. Newbould J. held that to establish jurisdiction *simpliciter*, a plaintiff need only establish that there is a good arguable case for assuming jurisdiction. If the plaintiff establishes that, the defendant has the burden of rebuttal and must establish facts that demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum. In this case, the genesis of the contract was a 2001 *CCAA* proceeding, the contract was part of the court-approved restructuring. Newbould J. held that based on the traditional rules governing where a contract is made, the debtor had made an arguable case that the contract and its amendments generally were contracts made in Ontario. Moreover, the fact that the original contract became effective only when approved in Ontario by the *CCAA* judge is a strong indicator of a strong and substantial connection to Ontario. The presumption had been met and the counterparties did not meet the burden of rebuttal. Newbould J. further held that a party raising *forum non conveniens* has the burden of showing that the alternative forum is clearly more appropriate, fairer and more efficient. The non-exhaustive factors to be considered include: the cost of transferring the case or of declining the stay; the impact of a transfer on the conduct of the litigation or on related parallel proceedings; the possibility of conflicting judgments; location of evidence; applicable law; recognition and enforcement of an Ontario judgment. Newbould J. held that the evidence did not establish *forum non conveniens* in this case. The counterparties had not met its burden of showing that the alternative forum in the U.S. was clearly more appropriate: *Re Essar Steel Algoma Inc.*, 2016 CarswellOnt 1040, 33 C.B.R. (6th) 313, 2016 ONSC 595 (Ont. S.C.J. [Commercial List]).

The Ontario Court of Appeal held that contract counterparties were required to apply for leave to appeal, and ordered a stay pending that motion. The counterparties had argued that leave was not required on the basis that the order was not "made under" the *CCAA*. Section 13 of the *CCAA* requires that "any person dissatisfied with an order or decision made under this Act" obtain leave to appeal. Justice Brown held that the inquiry should be purpose-focused. When asked to determine whether an order requires leave to appeal under s. 13 of the *CCAA*, an appellate court should ascertain whether the order was made in a *CCAA* proceeding in which the judge was exercising his or her discretion in furtherance of the purposes of the *CCAA* by supervising an attempt to reorganize the financial affairs of the debtor company, either by way of plan of arrangement or compromise, sale, or liquidation. If the order resulted from such an exercise of judicial decision-making, it is an order "made under" the *CCAA* for purposes of s. 13. Here, Brown J.A. concluded that the order was made under the *CCAA* by the judge. Justice Brown determined that the counterparties' motion for leave to appeal was be heard by a panel of the Court of Appeal on an expedited basis. As set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CarswellQue 120, [1994] 1 S.C.R. 311, [1994] S.C.J. No. 17 (S.C.C.), the three-part test for obtaining a stay pending appeal requires the

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moving party to demonstrate: there is a serious question to be determined on the appeal, the moving party will suffer irreparable harm if the stay is not granted, and the balance of convenience favours granting the stay. Justice Brown noted that over the past decade, judges of the Court of Appeal sitting in chambers on stay motions have expressed different views about whether a party risks attorning to the jurisdiction of the Ontario court by performing court-ordered procedural steps in the face of the party's ongoing challenge to the court's jurisdiction. Some decisions have viewed such participation as risking attornment, thereby creating some risk of irreparable harm, whereas others, such as the court in *Van Damme v. Gelber*, 2013 CarswellOnt 7839, 115 O.R. (3d) 470, 2013 ONCA 388, [2013] O.J. No. 2750 (Ont. C.A.), minimized any such risk from court-ordered participation. Justice Brown was of the view that the balance of convenience favoured granting a stay; ordering the leave to appeal motion to be heard within two weeks: *Re Essar Steel Algoma Inc.*, 2016 CarswellOnt 2444, 33 C.B.R. (6th) 172, 2016 ONCA 138 (Ont. C.A.).

The Québec Superior Court issued an inital stay order under the *CCAA* for the sole purpose of protecting the interests of stakeholders and to allow a principal secured creditor to prepare its contestation of the petition. Without protection provided by the *CCAA*, the petitioners would be facing serious liquidity contstraints that would jeopardize operations. The Court held that the creditor had not presented sufficient evidence to remove the director on the basis of failing to act in good faith or because there was not a germ of a realistic plan; the appointment of a CRO was premature at the time: *Re Bluberi Gaming Technologies Inc./Bluberi jeux et technologies inc.*, 2015 CarswellQue 11016, 33 C.B.R. (6th) 128, 2015 QCCS 5373 (Que. S.C.).

The Ontario Superior Court of Justice dismissed the motion of representative counsel for the non-unionized employees and retirees, and counsel for a union and a municipality, who had sought production of a complete copy of a settlement agreement between the debtor corporation, the debtor U.S. entity and the federal government on a "for counsel's eyes only" basis. Justice Wilton-Siegel noted that the applicants had already received certain information regarding the content of the agreement, the status of undertakings and a redacted copy of the agreement. The principles governing the application of the doctrine of settlement privilege are set out in *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 CarswellNS 428, 2013 CarswellNS 429, [2013] 2 S.C.R. 623, 2013 SCC 37, [2013] S.C.J. No. 37 (S.C.C.), in which Wilton-Siegel J. noted that the Supreme Court held that settlement privilege is a class privilege for which there are limited exceptions based on a balancing of competing public interests, including encouraging settlement. Justice Wilton-Siegel held that the parties were unable to demonstrate how they would be prejudiced by not having had access to the undertakings in the agreement prior to a forthcoming motion. He accepted that a disparity in knowledge could give rise to an unfairness on the forthcoming motion that would call for limited disclosure, but only if the disparity related to material information. In this case, he concluded that the subject matter of the undertakings was public, and the information sought was specific detail regarding the undertakings. Justice Wilton-Siegel held that it is incumbent on a party seeking to obtain an exemption from the operation of settlement privilege to identify potential circumstances in which knowledge of the specific information sought could be relevant given the available public information. In his view, the applicants had not demonstrated how knowledge of the specific details of the undertakings in the agreement was necessary in order to frame their arguments on the motion. He held that the union had not demonstrated how knowledge of the undertakings would be relevant to its claims, given that the undertakings were given to the Government of Canada. Representative counsel had not demonstrated how knowledge of the details of the undertakings could be relevant in negotiations for a restructuring: *Re U.S. Steel Canada Inc.*, 2016 CarswellOnt 6966, 36 C.B.R. (6th) 333, 2016 ONSC 3012 (Ont. S.C.J.).

The Ontario Superior Court of Justice granted relief under the *CCAA* to a number of subsidiaries of the debtor corporation, including a number of non-applicant affiliated limited partnerships. Some of the applicants had earlier filed a notice of intent to make a proposal ("NOI") under s. 50.4(1) of the *BIA*. These applicants applied to continue the NOI proceedings under the *CCAA*. A recognition order was granted to the foreign representative of the debtor, partly on the basis that the parties had entered into a cooperation protocol: *Re Urbancorp Inc.*, 2016 CarswellOnt 8410, 37 C.B.R. (6th) 44, 2016 ONSC 3288 (Ont. S.C.J. [Commercial List]). For a discussion of this judgment, see N§215 "Recognition of Foreign Proceeding".

The British Columbia Supreme Court declined to exempt the union from a *CCAA* stay of proceedings. The union had sought to proceed with grievance procedures for group termination and for severance pay: *Re Walter Energy Canada Holdings, Inc.*, 2016 CarswellBC 2117, 39 C.B.R. (6th) 159, 2016 BCSC 1413 (B.C. S.C.). For a discussion of this judgment, see N§80 "Labour Relations During Insolvency".

The Ontario Superior Court of Justice held that the statutory stay of proceedings under s. 69.3(1) of the *BIA* applied to an injunctive proceeding that the plaintiff intended to bring against the debtor to prevent post-filing conduct on the part of the

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debtor. Justice Newbould held that every attempt should be made to interpret the provisions of s. 69(1)(a) harmoniously with s. 11.02 of the *CCAA*, thus giving effect to the *Century Services Inc. v. Canada (A.G.)*, [2010] 3 S.C.R. 379 principles, which could be done by interpreting the word "remedy" to include injunctive proceedings regarding post-filing conduct of a debtor that has filed a proposal. If a debtor were to misuse this protection from a stay, an application could be made to lift the stay. Justice Newbould then considered whether the stay should be lifted under section 69.4. Under this provision, the applicant had to establish to the satisfaction of the court that it was likely to be materially prejudiced by the stay or that it was equitable on other grounds to lift the stay. Justice Newbould found that the injunction proceedings would be a large impediment to a successful restructuring. In the result, having considered all of the evidence, Newbould J. was not prepared to lift the automatic stay provided under s. 69(1)(a) of the *BIA*: *Re Emergency Door Service Inc.*, 2016 CarswellOnt 13556, 40 C.B.R. (6th) 104, 2016 ONSC 5284 (Ont. S.C.J. [Commercial List]).

The Court of Appeal for Ontario considered whether the *CCAA* judge could apply the American legal doctrine of "equitable subordination" to subordinate the claims of the parent company of the debtor. The Court of Appeal held that, applying the principles of statutory interpretation, nowhere in the words of the *CCAA* is there authority, express or implied, to apply the doctrine of equitable subordination. Nor does it fall within the scheme of the legislation, which focuses on a plan of arrangement. The Court was also of the view that there is no "gap" in the legislative scheme to be filled by equitable subordination through the exercise of discretion, the common law, the court's inherent jurisdiction or by equitable principles: *Re U.S. Steel Canada Inc.*, 2016 CarswellOnt 14104, 39 C.B.R. (6th) 173, 2016 ONCA 662 (Ont. C.A.), additional reasons 2016 CarswellOnt 16446, 2016 ONCA 791 (Ont. C.A.). For a discussion of this judgment, see G§160 "Postponement of Claims — Equitable Subordination".

The Ontario Superior Court of Justice dismissed a motion brought by the Ontario Nurses Association ("ONA") who had sought an order under s. 11 of the *CCAA* directing VON Canada to restructure its pension plan. The VON group suffered liquidity problems, and VON Canada, VON East and VON West sought protection under the *CCAA*. There was no evidence that VON Ontario was insolvent, and there was no intention to effect any restructuring with respect to VON Ontario. VON Canada has a multi-jurisdictional pension plan with members drawn from all five corporate entities. There was evidence that the pension plan had a sufficiency of assets over liabilities on a going-concern basis, but a solvency deficit on a wind-up basis. Justice Penny was prepared to accept, for the purposes of the motion, that the ONA, by virtue of representing some members of the pension plan had an "interest" in the future administration of that plan. Justice Penny held that the essential question was: should the proposal of a party with a limited and undeniably self-interested stake take precedence over the considered business judgment of the applicant, acting in conjunction with the court-appointed monitor, creditors and other stakeholders? In his view, the implementation of the ONA proposal was more likely to invite, than to avoid, liquidation. Justice Penny found that when VON Canada withdrew its motion to restructure the pension plan on the basis of a partial wind up, it did so because it was concerned that the pension plan restructuring proposal might materially impair its ongoing restructuring opportunities. The board decided to complete a going-concern restructuring of VON Canada, hoping to preserve the business, preserve the pension plan, and avoid a pension plan wind up. This approach, in the view of Penny J., was entirely consistent with the policy objectives of the *CCAA* as articulated by the Supreme Court of Canada in *Century Services Inc. v. Canada (A.G.)*, [2010] 3 S.C.R. 379. There was no suggestion that the board had a conflict of interest or had acted negligently or in bad faith. Penny J. was of the view that the board's decision not to pursue pension plan restructuring fell within a range of reasonable alternatives clearly available to the VON Canada board, and deference should be given to its business judgment. Justice Penny concluded that the ONA motion was, in substance, an attempt to invoke the discretion of the court under s. 11 to effect a result that was not consistent with the policy objectives of the *CCAA*, i.e., would not foster going concern restructuring or would tend to avoid the economic and social cost of liquidation. Justice Penny also added that the declaration sought by the ONA, which concerned potential future liabilities of VON Ontario for pension plan deficits, was premature: *Re Victorian Order of Nurses for Canada*, 2016 CarswellOnt 14285, 40 C.B.R. (6th) 39, 2016 ONSC 5540 (Ont. S.C.J.).

The Ontario Superior Court of Justice declined to exercise its discretion under s. 11 of the *CCAA* to order payment to a counterparty of pre-filing arrears. The counterparty had consented to the assignment of its contracts with the *CCAA* debtor without the payment of pre-filing arrears, but now argued that its consent to the assignment was obtained in a manner that was not transparent or fair. Justice Penny held that that the requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority, referencing *Century Services Inc. v. Canada (A.G.)*, [2010] 3 S.C.R. 379. Justice Penny also referenced *Re Veris Gold Corp.*, 2015 CarswellBC 1949, 26 C.B.R. (6th) 310, 2015 BCSC 1204 (B.C. S.C.) that, under s. 11.3 of the *CCAA*, the court should consider whether an assignment will meet the twin goals of assisting the reorganization process while also treating the counterparty fairly and

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equitably. Here, Justice Penny found that nothing in the consent request letters was incorrect. The asset purchase agreement was not disclosed initially because it was not yet in the public realm; but as soon as it was, it was posted on the monitor's website and the counterparty was repeatedly advised to check the monitor's website for new and updated information. Justice Penny stated that commercial parties do not have an obligation to provide each other with legal advice in the ordinary course their dealings. Contract and commercial law assumes that parties are vigilant in the pursuit of their own interests. Here, there was no misrepresentation; the preconditions for application of the doctrine of unilateral mistake were not met; the monitor was not aware of the counterparty's misunderstanding of the assignment process and no advantage was taken of this mistaken understanding. The parties were both clearly sophisticated players in the telecommunications business and had comparable bargaining power. There was no duress. Justice Penny was of the view that the consent letters were fair and transparent: *Re Primus Telecommunications Canada Inc.*, 2016 CarswellOnt 14295, 40 C.B.R. (6th) 123, 2016 ONSC 5251 (Ont. S.C.J. [Commercial List]), additional reasons 2016 CarswellOnt 17127, 41 C.B.R. (6th) 259, 2016 ONSC 6943 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice dismissed the motion of Port of Algoma Inc. for orders that the *CCAA* debtor make payment of post-filing amounts owing. Justice Newbould held that the validity of the agreements was to be dealt with in related party proceedings. To permit Portco to effectively shut down the operations of the debtor would be completely contrary to the interests of all stakeholders. Such an order would have the effect of giving Portco complete control over the entire proceeding. That would not be in the interests of the majority of stakeholders: *Re Essar Steel Algoma Inc.*, 2016 CarswellOnt 16408, 41 C.B.R. (6th) 298, 2016 ONSC 6459 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice granted an initial order to the debtor and related entities in a *CCAA* proceeding. The Court commented on the propriety of using the administrative charge to cover pre-filing fees and disbursements: *Re Performance Sports Group Ltd.*, 2016 CarswellOnt 17492, 41 C.B.R. (6th) 245, 2016 ONSC 6800 (Ont. S.C.J. [Commercial List]). See the discussion of this judgment under N§93 "Interim Financing" and N§111 "Security or Priority Charge for Financial, Legal or Other Experts Engaged by Debtor Company".

The Québec Superior Court lifted the stay of proceedings for the limited purpose of permitting the moving party to apply in proceedings before the Newfoundland and Labrador Supreme Court for an order to compel production of evidence by the *CCAA* debtor. Justice Hamilton noted that the language of ss. 11.02(1) and (2) of the *CCAA* and of paragraphs 7 and 15 of the initial order was very broad. The notion of "proceedings" clearly includes judicial proceedings such as an action by an unsecured creditor against the debtor to collect a debt, or a proceeding by a secured creditor to enforce its rights against the debtor's property. The courts have interpreted the term proceedings broadly to also cover extra-judicial proceedings that could prejudice an eventual arrangement, and as including a mere procedural step that is part of a larger action or special proceeding. In this case, the debtor was merely being asked to provide evidence. The stay was not intended to protect third parties, even if the third party is a related party. The purpose of the stay is to promote the reorganization and restructuring of the debtor by maintaining the *status quo*, giving the debtor some breathing room, protecting the debtor from the claims of the creditors and preserving the debtor's assets for the benefit of all of the creditors and other stakeholders. Justice Hamilton was of the view that the Newfoundland court was in a better position to evaluate whether the evidence that was sought was relevant to a live issue in the Newfoundland action, whether there were other avenues to obtain the evidence, whether the request was reasonable, and whether the notion of proportionality favoured the issuance of the order or not. However, the Québec Superior Court was in the best position to undertake the analysis of the potential impact of this order on the *CCAA* process. Justice Hamilton held that the prejudice to the debtor was limited to matters of inconvenience and expense, which could properly be considered by the Newfoundland court in deciding whether to issue the order: *Wabush Iron Co. v. Royal Bank of Canada*, 2016 CarswellQue 11725, 2016 QCCS 6061 (Que. Bktcy.).

The Ontario Superior Court of Justice dismissed a motion brought by a municipality for an order requiring immediate payment of all the debtor company's post-filing property tax obligations currently outstanding. An initial order granted by Newbould J. under the *CCAA* provided that the applicants were to pay post-filing realty taxes in the ordinary course. However, since the filing date, the applicants had not made any property tax or interest payments. The municipality brought a motion requiring the debtor to pay all post-filing property taxes since the initial order, and the debtor brought a motion for an order relieving it from the obligation during the *CCAA* process. The debtor's motion was granted, the Court noting that the cash flow forecasts made clear that the debtor's financial position was precarious, and other obligations were not being paid. Newbould J. recognized that an order previously made in a *CCAA* proceeding should not lightly be overturned without a proper basis for doing so, such as changed circumstances, a situation very normal in a *CCAA* proceeding that stretches out, as this proceeding had. The municipality's position was that as the interim financing loan had matured, there was no right for

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the financiers to a cash sweep and that the $22 million should be used to pay creditors for post-filing arrears, asking for a stay of the interim financier's right to be repaid in full under its security. Justice Newbould held that it was more than a dispute between two creditors; there was the issue of the debtor having enough cash to survive. New interim financing was needed and its sources and the terms were not yet known. Justice Newbould recognized that the lack of payment of taxes was causing great difficulty to the municipality; however, he concluded that it was not appropriate for the post-filing back taxes to be paid yet; there were too many uncertainties in the cash flow projection. The motion of the municipality was dismissed, but it was done so on the statement of the debtor that it would pay $350,000 per month going forward for taxes: *Re Essar Steel Algoma Inc.*, 2017 CarswellOnt 7800, 48 C.B.R. (6th) 289, 2017 ONSC 3031 (Ont. S.C.J. [Commercial List]).

The Saskatchewan Court of Queen's Bench considered competing applications, one for the appointment of a receiver under the *BIA* and the *PPSA*, and the other for an initial order and a stay of proceedings under the *CCAA*. The Court granted the receivership application. Since early 2015, the creditor had accommodated financial difficulties being faced by the debtor and had agreed, under various forbearance agreements, to interest only payments in return for various undertakings of the debtor. The creditor took the position that the debtor had breached those undertakings. The creditor gave notice of intention to enforce its security pursuant to s. 244(1) of the *BIA* and demanded payment in full of the indebtedness owed to it. The debtor failed to pay. The debtor was in the business of drilling oil wells, and took the position that its financial difficulties were the direct result of the significant drop in the price of oil that occurred in 2014 and has continued to date. It debtor argued that the economic climate in the Western Canadian oil industry is improving, and it expected a substantial improvement in its cash flow. Justice Scherman held that a *CCAA* applicant bears the burden of establishing each of the requirements of appropriateness, good faith, and due diligence; and that an applicant under s. 243 of the *BIA* bears the burden of satisfying the court that it would be just and convenient to appoint a receiver in the circumstances. Justice Scherman found, on the evidence, that there had been elements of bad faith in the debtor's dealings with the creditor. Good faith of the applicant is a baseline consideration for a court in considering *CCAA* applications. In this case, the debtor had provided inaccurate information relating to its accounts payable, and it also made a significant payment to another creditor that was in breach of its agreement with the forbearing creditor. Scherman J. concluded that it was not appropriate to make an initial order pursuant to the *CCAA* application; it was just and convenient that a receiver be appointed. Justice Scherman indicated that the court was fully alive to the consequences that appointing a receiver may have upon employees, unsecured creditors, shareholders, and business associates. However, he was satisfied on the evidence that the creditor had provided significant relief from the contractual terms over a two-year period, and thus had already effectively provided the debtor with much of the remedial opportunity contemplated by the *CCAA*: *Affinity Credit Union 2013 v. Vortex Drilling Ltd.*, 2017 CarswellSask 399, 50 C.B.R. (6th) 220, 2017 SKQB 228 (Sask. Q.B.).

The Ontario Superior Court of Justice granted an initial order pursuant to the *CCAA*. Justice Morawetz was satisfied that the debtor was insolvent and had met the other threshold requirements including the filing of cash flow statements required by s. 10 of the *CCAA*. He was further satisfied that it was both necessary and appropriate to grant a stay of proceedings to allow a stabilization of operations while alternatives were considered: *Index Energy Mills Road Corporation (Re)*, 2017 CarswellOnt 13040, 51 C.B.R. (6th) 216, 2017 ONSC 4944 (Ont. S.C.J.). For a discussion of the initial order, see N§65 "Scope of Order under Initial Application".

The Alberta Court of Queen's Bench held, in a *CCAA* proceeding, that court ordered "super priority" security interests take priority over statutory deemed trusts in favour of CRA for unremitted source deductions. The court also commented on recourse through a comeback clause: *Canada North Group Inc. (Companies' Creditors Arrangement Act)*, 2017 CarswellAlta 1631, 2017 ABQB 550 (Alta. Q.B.).

The Ontario Superior Court of Justice granted the debtor protection under the *CCAA*. The debtor was an indirect, wholly-owned subsidiary of a U.S. parent company. The U.S. parent, several affiliates and the Canadian debtor filed for bankruptcy protection in the U.S. Bankruptcy Court for the Eastern District of Virginia while they explored restructuring options. Justice Myers noted that the Canadian debtor's operations are generally autonomous from the parent's; however, the debtor's pre-filing US$200 million secured revolving credit facility and its US$125 million secured term loan facility were both provided under a wider asset-backed lending ("ABL") facility provided by the pre-filing ABL lenders to the U.S. and Canadian companies. The filing for U.S. bankruptcy protection resulted in defaults being committed under the ABL facilities. Although the Canadian debtor was generally cash flow positive, it found itself without borrowing facilities and within two weeks of being unable to meet its obligations as they became due. Justice Myers was satisfied that as a result of its looming liquidity crisis, the debtor met the definition of a debtor company to whom the *CCAA* applies. Justice Myers found it was an appropriate case in which to grant a stay as sought under s. 11.02 of the *CCAA*. An interim financing facility was approved

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but the interim financiers were not granted enhanced enforcement rights: *Re TOYS "R" US (CANADA) LTD.*, 2017 CarswellOnt 14645, 2017 ONSC 5571 (Ont. S.C.J. [Commercial List]). For a discussion of interim financing in this judgment, see N§93 "Interim Financing", and see also N§102 "Critical Suppliers".

The British Columbia Supreme Court approved a settlement of certain claims in a *CCAA* proceeding prior to the consideration of a plan of arrangement and approved an extension of the stay period to permit the completion of the unresolved restructuring claims: *Re Walter Energy Canada Holdings, Inc.*, 2017 CarswellBC 3037, 54 C.B.R. (6th) 57, 2017 BCSC 1968 (B.C. S.C.). For a discussion of the settlement of the claims, see N§126(4) "Negotiation and Mediation of Claims".

An application was brought by a *CCAA* monitor to determine whether the petitioner had entered into an agreement to grant a licence to use the petitioner's intellectual property in India. The British Columbia Supreme Court determined that no agreement had been entered into. The issue was the scale and quantum of costs. The Court held that courts should be cautious of making an award of costs amounting to a full indemnity in *CCAA* proceedings in the absence of a contractual right to such costs. Justice Sewell noted that there was no impediment to a court awarding special costs, but he thought that the same principles should apply to the making of such an award in all litigation, including *CCAA* proceedings. Justice Sewell also observed that the argument that having the petitioner bear its own legal costs would not further the objectives of the *CCAA* can only be taken so far. There will be cases in which furtherance of the objectives of the *CCAA* will require ordering an unsuccessful party to indemnify the petitioner for the full amount of its legal expenses in defending an application. However, to make such an award in all cases would in effect be creating a different costs regime in *CCAA* proceedings than that which governs the court in other matters. Such an order should not be made without specific evidence that it is necessary to prevent material harm to the process of reorganization. In this case, Sewell J. was not persuaded that an indemnity of these costs was required to avoid such harm. The jurisprudence with respect to costs has established that a litigant should only be required to pay special costs if it engages in reprehensible conduct in the litigation. There was no such conduct in this proceeding. Sewell J. was of the view that the circumstance that the matter was summarily decided in a *CCAA* proceeding is not a sufficient reason to require payment in costs than it would have in an ordinary civil action. In the result, Sewell J. ordered payment of the petitioner's application as well as the monitor's costs on a party and party scale: *Re BuildDirect.com Technologies Inc.*, 2018 CarswellBC 360, 57 C.B.R. (6th) 322, 2018 BCSC 210 (B.C. S.C.).

The Ontario Superior Court of Justice held that it has jurisdiction to stay bankruptcy proceedings in respect of a debtor notwithstanding s. 50.4(8)(a) of the *BIA*, which provides that if no proposal is filed by the insolvent person by the end of the last *BIA* stay period, the insolvent person is deemed to have made an assignment. Section 187(11) of the *BIA* permits the court to extend the time for doing anything on such terms as the court thinks fit to impose, and Dunphy J. held that this language was sufficiently broad to provide the court with authority to extend the time being deemed to make an assignment in bankruptcy pursuant to s. 50.4(8)(a) of the *BIA*. The Court further held that s. 11 of the *CCAA* provides the court with broad authority to make any order it thinks fit in connection with a *CCAA* application, and that jurisdiction under the *CCAA* can be exercised harmoniously with s. 187(11) of the *BIA*, having regard to the objects of the *CCAA* and *BIA* and the interest of harmonization. He concluded that there was sufficient jurisdiction to be found in the combination of s. 187(11) of the *BIA*, s. 11 and s. 11.6 of the *CCAA* to enable the court to harmonize the operation of these two statutes to better achieve the common objectives of both: *Re Dundee Oil and Gas Limited*, 2018 CarswellOnt 2174, 58 C.B.R. (6th) 326, 2018 ONSC 1070 (Ont. S.C.J.).

The British Columbia Supreme Court granted an initial order under the *CCAA* over the objections of the secured creditor, who had given notice of its intention to enforce its security. Weatherill J. was satisfied that circumstances existed that made an initial order under s. 11.02(1) of the *CCAA* appropriate and necessary as the continued care and maintenance of the mine was critical to the preservation of its assets. Weatherill J. appointed a monitor with a fixed limit on an administration charge. Justice Weatherill also noted that counsel for the petitioners had conceded that there was insufficient evidence to support an additional charge priority in respect of the potential exposure of the petitioners' directors and, accordingly, no such order was made: *Re Purcell Basin Minerals Inc.*, 2018 CarswellBC 1485, 61 C.B.R. (6th) 127, 2018 BCSC 949 (B.C. S.C.).

In a *CCAA* proceeding, the Ontario Superior Court of Justice appointed a claims officer to arbitrate the current value of a property, as opposed to appointing a second arbitrator. Hainey J. reasoned that the issues of determining the value of the property and determining the value of the claim in the *CCAA* proceeding were inextricably linked and it would be more cost effective to have a single process established to determine the issues: *Re Sears Canada Inc., et al.*, 2018 CarswellOnt 16569, 2018 ONSC 5852 (Ont. S.C.J. [Commercial List]).

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The Ontario Superior Court of Justice granted an initial order in the *CCAA* proceedings commenced by the debtor company. The order extended the stay of proceedings to other defendants in the pending litigation (as defined). The order also authorized the applicant to pay pre-filing and post-filing obligations in respect of suppliers and employees and to appeal the Québec judgment to the Supreme Court of Canada: *Re JTI-Macdonald Corp.* (2019), 2019 CarswellOnt 3653, 2019 ONSC 1625 (Ont. S.C.J. [Commercial List]). For a discussion of this judgment, see N§92 "Jurisdiction to Stay Proceedings Against Third Parties".

The Ontario Superior Court of Justice addressed the issue of a *CCAA* stay of proceedings and its impact on a possible leave to appeal application by the debtor applicants to the Supreme Court of Canada from a decision of the Québec Court of Appeal. The Court imposed a stay of all proceedings by and against the debtor applicants along with a stay of any applicable limitation periods. The applicant debtor tobacco companies ("debtors") filed for protection pursuant to the *CCAA*, seeking a resolution of multiple, significant litigation claims that have been made against them. The *CCAA* applications were triggered as a result of the judgment of the Québec Court of Appeal ("QCCA") released March 1, 2019, which largely upheld a trial decision awarding approximately $13.5 billion to the Québec class action plaintiffs ("Québec plaintiffs"). In addition to this action, there are a significant number of ongoing proceedings against the applicants, including government-initiated litigation and other class actions. The initial orders obtained in the *CCAA* proceedings granted the applicants protection from their creditors on an interim basis and allowed for any interested party to apply to the court to vary or amend the initial order. The parties attended at the come-back hearing on April 4 and 5, 2019 and were able to agree on certain orders and deferred other issues to be dealt with at a later date. Two of the three debtors sought to obtain orders permitting them to file SCC leave applications but suspending all further proceedings before the SCC. The third debtor sought a stay of all proceedings by and against the applicants along with a stay of any applicable limitation periods, arguing that it would be the best balance between all stakeholders and would preserve the *status quo* without giving any particular stakeholder an advantage. Justice McEwen was satisfied that he had jurisdiction to deal with the QCCA proceeding and was further persuaded that the stay proposal was the most sensible at this time and should be incorporated into all three initial orders. The parties agreed that there are no cases directly on point with respect to the issue of whether s. 11 of the *CCAA* provides the Ontario Superior Court of Justice with jurisdiction to stay the effect of the QCCA decision and subsequently any SCC leave application. Justice McEwen reviewed ss. 11 and 11.02(2)(b) of the *CCAA* and noted the court's broad jurisdiction to "make any order that it considers appropriate in the circumstances", which includes restraining further proceedings in any action, suit, or proceeding against the applicants. The purpose of the *CCAA* is to facilitate compromises and arrangements between companies and their creditors, and to avoid the devastating social and economic effects of commercial bankruptcies. It permits the debtor to continue to carry on business and allows the court to preserve the *status quo* while "attempts are made to find common ground among stakeholders for a reorganization that is fair to all", the Court citing *Re U.S. Steel Canada Inc.*, 2016 CarswellOnt 14104, 2016 ONCA 662, 39 C.B.R. (6th) 173 (Ont. C.A.) and *Re Stelco Inc.* 2005 CarswellOnt 1188, 9 C.B.R. (5th) 135, [2005] O.J. No. 1171 (Ont. C.A.). Justice McEwen held that in order to allow for the proper restructuring of debtor companies, or, in this case, settlement of multiple significant lawsuits, it would be undesirable to restrict the discretion of this court to matters at the superior court level. It would lead to a chaotic situation where only proceedings before the superior court and/or other provincial trial courts were stayed, but proceedings that had reached the appeal courts were allowed to proceed. Justice McEwen held that the stay provides for a temporary pause that does not amend or usurp the provisions of the *Supreme Court Act* or the Québec Code of Civil Procedure. The Ontario Superior Court requests the aid and recognition of those courts with respect to the initial order. The *Supreme Court Act*, which provides for time periods for appeals, appears to be broad enough to include the jurisdiction of the *CCAA* to stay the QCCA proceeding and any further SCC leave applications at this time. An order was granted staying any and all current proceedings by or against the applicants and related entities and prohibiting the commencement of any further proceedings by or against them. The Court held that, to the extent of any prescription, time, or limitation period relating to any proceeding against the applicants that is stayed pursuant to this order may expire, the term of such prescription, time, or limitation period is deemed to be extended by a period equal to the stay period: *In The Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, As Amended and In The Matter of a Plan of Compromise or Arrangement*, 2019 CarswellOnt 6071, 2019 ONSC 2222 (Ont. S.C.J.).

The Ontario Superior Court of Justice dismissed a motion brought by the Province of Ontario to lift the *CCAA* stay of proceedings. Ontario wanted to proceed with its action to recover damages for health care costs expended with respect to smoking-related diseases. The Ontario action had been ongoing for approximately ten years. Ontario had recently amended its statement of claim to seek damages of $330 billion. McEwen J. noted that the lawsuit will take approximately one year or more of trial time. The lawsuit raises the issue as to whether provinces can recover damages for health care costs expended with respect to smoking-related diseases. The other provinces also have litigation pending seeking the same relief, all of

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which is stayed. McEwen J. held that it is critical to preserve the *status quo* as it existed at the time of the filings for *CCAA* protection to provide a level playing field needed to attempt to resolve several, significant claims; and that the proposal put forward by Ontario would alter the *status quo* in its favour. Justice McEwen noted that this *CCAA* process is at its very early stages and it must be given an opportunity to evolve and succeed without multiple, significant, and expensive distractions. In the result, Ontario's motion to lift the stays in all three applications was dismissed: *In The Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, As Amended and In The Matter of a Plan of Compromise or Arrangement*, 2019 CarswellOnt 6533, 2019 ONSC 2611 (Ont. S.C.J.).

The Alberta Court of Appeal affirmed a decision of the chambers judge, which held that super-priority charges made in favour of the monitor, interim financier, and directors had priority over statutory deemed trusts in favour of the Crown for unremitted deductions for income tax, Canada Pension Plan, and Employment Insurance: *Canada v. Canada North Group Inc.*, 2019 CarswellAlta 1815, 2019 ABCA 314 (Alta. C.A.). For a discussion of this judgment, see N§94 "Court May Order Priority Charge".

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TAB 2

2017 NSSC 80
Nova Scotia Supreme Court

Kocken Energy Systems Inc., Re

2017 CarswellNS 187, 2017 NSSC 80, 277 A.C.W.S. (3d) 21, 50 C.B.R. (6th) 168

In the Matter of the Proposal of Kocken Energy Systems Inc.

Gerald R.P. Moir J.

Heard: January 5, 2017
Judgment: January 10, 2017
Written reasons: March 22, 2017
Docket: Hfx. 458774, 40675, Estate No. 51-2097016

Counsel: Tim Hill, Q.C., for Kocken Energy Systems Incorporated
Gavin MacDonald, for Bank of Montreal

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
VI Proposal
VI.2 Time period to file
VI.2.a Extension of time

Headnote

Bankruptcy and insolvency --- Proposal — Time period to file — Extension of time
Applicant company manufactured process equipment for oil and gas industry — In 2011, two shareholders of company moved manufacturing from Alberta to Nova Scotia and company acquired plant in New Brunswick in 2015 and incorporated in Barbados — Company's main secured creditor bank had 3 million dollars in venture — Company brought motion for 45 day extension to file proposal for bankruptcy pursuant to Bankruptcy and Insolvency Act — Motion granted with conditions — Since cross-examinations had not been heard, there was no resolve to conflicting evidence on company's side and generalized opinions without raw facts on bank's side — However, judge was satisfied on three points that absence of information left bank and insolvency practitioners with serious questions relevant to bank's interest in company's inventory and receivables and they had rationally founded suspicion that equipment could be transferred to Barbados company without payment, compromising bank's interest in inventory and receivables — On conditional approval, reservation stemmed from strange purchase orders from Barbados company to Canadian company with large prices — It was ordered that company give four business days' notice of bank before shipping anything out of Canada and advise bank of amount to be paid and arrangements for payment.

Table of Authorities

Cases considered by *Gerald R.P. Moir J.*:

H & H Fisheries Ltd., Re (2005), 2005 NSSC 346, 2005 CarswellNS 541, 239 N.S.R. (2d) 229, 760 A.P.R. 229, 18 C.B.R. (5th) 293 (N.S. S.C.) — considered

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NS United Kaiun Kaisha, Ltd. v. Cogent Fibre Inc. (2015), 2015 ONSC 5139, 2015 CarswellOnt 12962, 30 C.B.R. (6th) 315 (Ont. S.C.J.) — considered

Statutes considered:

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

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

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

s. 178 — considered

MOTION for 45 day extension to file proposal pursuant to *Bankruptcy and Insolvency Act.*

Gerald R.P. Moir J. **(orally):**

Introduction

1 Kocken Energy Systems Incorporated filed a notice of intention to make a proposal on December 7, 2016. It moves to extend the deadline for filing the proposal by the maximum allowed under the *Bankruptcy and Insolvency Act*, forty five days. Its major secured creditor, the Bank of Montreal, opposes the extension. It says that the stay should end and Kocken should be bankrupt. Alternatively, the extension should be no more than thirty days.

Facts

2 Kocken manufacturers specialized process equipment for the oil and gas industry. The company's predecessor did business in Alberta since about 2005. By 2007, it had just two shareholders, William Famulak and Arthur Sager. In 2011, they decided to move manufacturing to Eastern Canada. In 2015, Kocken acquired a plant at St. Antoine, New Brunswick.

3 The Bank of Montreal provided financing to purchase the plant as well as current financing. Kocken also had a relationship with the Royal Bank of Canada.

4 On Tuesday, November 8, 2016 the Bank of Montreal stopped extending current credit. Kocken reverted to the Royal Bank. The Bank of Montreal invited PricewaterhouseCoopers to review Kocken's performance and make recommendations. PricewaterhouseCoopers prepared, and Bank of Montreal and Kocken endorsed, an engagement letter dated November 14. Mr. David Boyd took charge of the assignment. (I have an affidavit from him.)

5 PricewaterhouseCoopers studied the St. Antoine plant, read accounting records, and interviewed Kocken operatives until about November 21, 2015. After that, it reported to the Bank of Montreal. The bank issued a notice of intention to enforce security on November 25.

Kocken and Bank of Montreal Breakdown

6 I have the affidavit of Ms. Anna Graham for the bank. She swears to a debt well over $3 million dollars and security in the St. Antoine plant, personal property, accounts receivable, and inventory. She also swears to these defaults at para. 9 of her affidavit:

Based on the information available to BMO, the Borrower has breached its obligations to BMO including the following:

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insufficient working capital to meet financial covenants, inability to fund current operations, entering into the Reorganization, as defined in the Boyd Affidavit, failing to provide financial statements and information, ceasing to conduct its banking with BMO and disposing of assets subject to the Security.

7 In para. 10, Ms. Graham swears that these defaults continue. She adds that Kocken failed to respond to requests for basic information. She offers her opinion that Kocken is deliberately hiding information.

8 At the heart of Ms. Graham's concerns is the belief that Kocken underwent some kind of reorganization and Kocken assets are being transferred to a related company recently incorporated in Barbados. That company is Kocken Energy Systems International Incorporated.

9 That this is the fundamental concern underlying the bank's decisions to suspend current financing, to enforce security, and to oppose the proposal is apparent from para. 16 of Mr. Boyd's affidavit as well as Ms. Graham's affidavit as a whole.

10 According to Mr. Sager, Kocken was simply a manufacturer. Most contracts for the sale of manufactured equipment and the intellectual property behind the equipment were with Mr. Famulak independently. Mr. Sager retained Mr. Rick Ormston, an accountant and consultant of Halifax about establishing a company that would be the design and engineering base for Mr. Famulak. That consultation lead to the Barbados company I mentioned, which I shall refer to as Kocken Barbados.

11 Mr. Ormston developed a plan, the details of which were unknown to the Bank of Montreal or PricewaterhouseCoopers. There are numerous contradictions between Mr. Boyd's affidavit and Mr. Sager's second affidavit, which responded to Mr. Boyd's. The contradictions concern what one said to the other, what Mr. Sager informed Mr. Boyd, and the subjects on which information was withheld or unavailable.

12 No one was cross-examined and I am in no position to resolve the evidentiary contradictions. The conflicting evidence is therefore unhelpful for making findings. Similarly, Ms. Graham's affidavit contains many generalized opinions without the raw facts required for findings on her subjects. I am, however, satisfied on three points.

13 Firstly, neither the Bank of Montreal nor PricewaterhouseCoopers knew the details of the Ormston plan. The absence of information left the bank and the insolvency practitioners with serious questions, itemized at para. 18 of Mr. Boyd's affidavit. Secondly, these questions were relevant to the bank's interest in Kocken inventory and receivables. Thirdly, the bank and the insolvency practitioners had a rationally founded suspicion that equipment may be transferred to Kocken Barbados without payment, compromising the bank's interest in inventory and receivables.

Recent Developments

14 In the last three working days, Kocken made some disclosure to the bank and PricewaterhouseCoopers. Most importantly, Kocken delivered a copy of the Ormston plan. It referred to draft documents that had not been disclosed yet, but the bank and the trustee must now know what the plan was really about.

Disposition

15 Subsection 50.4(9) provides three thresholds that the insolvent must prove before the court has any discretion to grant an extension:

(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.

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16 I am not prepared to embrace the generalized allegations made in Ms. Graham's affidavit because this court makes findings on evidence of raw fact. Nor can I resolve the evidentiary contradictions between Mr. Sager and Mr. Boyd. What is left suggests good faith and due diligence.

17 I reject the submission that Kocken's initial evidence failed to disclose material facts. This submission is premised on the PricewaterhouseCoopers characterization of the relationship between Kocken and Kocken Barbados. As I said, the contradictions between the evidence of Mr. Boyd and Mr. Sager are irresolvable at present. The rest of the evidence supports good faith and due diligence.

18 I am satisfied on the first threshold.

19 Next is the requirement that a viable proposal is likely to be made.

20 Ms. Graham swears that the Bank of Montreal "has lost all confidence and trust in current management and ownership". "BMO will not engage in negotiations." She is of the view "that any proposal is doomed to fail". The Bank of Montreal is the primary secured creditor and its support will be necessary when the time comes for a vote.

21 Such statements by a secured creditor with a veto are not determinative. They are forecasts rather than evidence of present fact. We must not assume intransigence in a world in which misunderstandings occur, they are sometimes corrected, and trust is sometimes restored in whole or in part. Nor may we, in this case, assume that the proposed terms will require a restoration of confidence or trust or a continuing relationship with the Bank of Montreal.

22 I have some difficulty with the decision of Justice Penny in *NS United Kaiun Kaisha, Ltd. v. Cogent Fibre Inc.*, 2015 ONSC 5139 (Ont. S.C.J.), which suggests that s. 50.4(9)(b) requires at least a hint of what the insolvent will offer to the secured creditor and what the proposal will contain. It is in the nature of proposals that they are developed and, if an extension is needed, the proposal is developing.

23 The requirement is "would likely be able to make a viable proposal", not "has settled on terms likely to be accepted". I think that is the point made by Justice Goodfellow in *H & H Fisheries Ltd., Re*, 2005 NSSC 346 (N.S. S.C.), when he says that s. 50.4(9)(b) 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."

24 The affidavits prove the cash flow projections, the preparation of other documents or reports, arrangements for appraisals, the trustee's investigation of accounts receivable, and the trustee's opinion that time is required for analysis of revenue and expense. Further, terms for a proposal are being discussed and need more development. In the meantime, Kocken has remained in operation. I am told that one appraisal has been delivered and another is close. All of this has been done over the holiday season. This evidence satisfies me that there is a better than even chance of a viable proposal being developed.

25 Finally, I have only one reservation about "no creditor would be materially prejudiced". The reservation stems from very strange purchase orders from Kocken Barbados to Kocken with very large prices. They purport to be conditional on resolving issues between Kocken and the Bank of Montreal.

26 By virtue of its s. 178 security, the bank owns the inventory. The extension would prejudice the bank if it was used to deliver inventory off shore without getting paid first.

27 I can diminish my concern by exercising my inherent jurisdiction to control this proceeding and the parties to it. I will order that Kocken give four business days' notice to the bank before it ships anything out of Canada and, along with the notice, advise the bank of the amount to be paid and the arrangements for payment. In view of my willingness to make such an order, I find that no creditor will be prejudiced by the order extending time.

28 I am prepared to extend the period for filing a proposal by the full 45 days, counting from last Thursday.

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Motion granted with conditions.

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TAB 3

2017 NSSC 215
Nova Scotia Supreme Court

Kocken Energy Systems Inc., Re

2017 CarswellNS 598, 2017 NSSC 215, 282 A.C.W.S. (3d) 15, 51 C.B.R. (6th) 339

In the Matter of the Proposal of Kocken Energy Systems Incorporated

Gerald R.P. Moir J.

Heard: June 28, 2017
Judgment: August 11, 2017
Docket: Hfx. 458774

Proceedings: additional reasons to *Kocken Energy Systems Inc., Re* (2017), 2017 CarswellNS 187, 2017 NSSC 80, Gerald R.P. Moir J. (N.S. S.C.)

Counsel: Tim Hill, Q.C., for Kocken Energy Systems Incorporated
Gavin MacDonald, for Bank of Montreal

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
VI Proposal
VI.2 Time period to file
VI.2.a Extension of time

Headnote

Bankruptcy and insolvency --- Proposal — Time period to file — Extension of time
Major secured creditor (bank) of oil and gas equipment manufacturer, K Inc., provided K Inc. with financing to purchase plant — Bank became concerned that K Inc. was transferring assets to related Barbados company, considered that K Inc. breached its obligations to have sufficient working capital to meet obligations, was unable to fund current operations, failed to provide financial statements and information, and was banking with another bank and disposing of secured assets — Bank withdrew credit and issued notice of intention to enforce security — K Inc. filed notice of intention to make proposal in bankruptcy and then obtained 45-day extension of deadline for filing proposal from court despite bank's opposition — Court granted extension on condition that K Inc. gave bank prior notice of any shipments out of Canada and payment arrangements therefor — Court noted bank's reasonable suspicion that equipment might be transferred to Barbados company without payment given strange purchase orders with very large prices from K Inc. Barbados to K Inc., and noted that extension would prejudice bank if used to deliver inventory off shore without first being paid — Extension decision was apparently interpreted in manner unfavourable to K Inc.'s reputation with some international businesses — K Inc. brought motion for order clarifying extension decision — Motion granted — Earlier decision was regrettably misinterpreted by some to cast doubt on K Inc.'s business efficacy — Reference to suspicion about equipment transfers was reference to bank's suspicion, not court's findings — Reference in earlier decision to concerns that K Inc. underwent some kind of reorganization and that its assets were being transferred to related, recently incorporated company in Barbados was statement about bank's concerns, not finding court made against K Inc. on that issue.

ADDITIONAL REASONS to judgment reported at *Kocken Energy Systems Inc., Re* (2017), 2017 NSSC 80, 2017

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CarswellNS 187 (N.S. S.C.), extending bankrupt's time to file proposal in bankruptcy.

Gerald R.P. Moir J. **(orally):**

1 Last winter, the Bank of Montreal opposed Kocken's motion to extend time for it to make a proposal. I granted the motion on reasons given from the bench. Kocken requested transcription. The transcript was published.

2 I am told that the decision lead to news reports unfavourable to Kocken, and these reports hurt its reputation with some international businesses.

3 This summer I heard an uncontested motion to approve Kocken's proposal. I read the proposal and studied the Trustee's report. I found the creditors voted unanimously in favour of the proposal and the proposal provides a much better recovery for creditors than bankruptcy would have done. Therefore, I was prepared to grant the motion.

4 However, Kocken asked that I issue reasons in writing because of the news reports. I agreed. The reports should be corrected.

5 Also, we have here an example of something seldom written about but relevant in early challenges to a reorganization effort. A secured creditor who is able to veto a proposal, or a plan of arrangement, vehemently opposes the effort from the beginning and says it is doomed because the creditor will exercise its veto when the time comes. That forecast does not always come true.

6 My earlier decision was published as *Kocken Energy Systems Inc., Re*, 2017 NSSC 80 (N.S. S.C.). I summarized the bank's concerns and expressed a reservation. I also noted the banks present intention to veto any proposal.

7 I said at para. 8, "At the heart of [the bank's] concerns is the belief that Kocken underwent some kind of reorganization and Kocken assets are being transfered to a related company recently incorporated in Barbados." Note that this is a statement about the bank's concerns, and it would be wrong to report that the court made any finding against Kocken on that score. Further, at the time of the hearing for an extension, Kocken made a disclosure relevant to the expressed concern. See para. 14.

8 At para. 13, I said "...the bank and the insolvency practitioners had a rationally founded suspicion that equipment may be transferred to Kocken Barbados without payment...". This refers to the bank's suspicion, not my findings.

9 I found Kocken acted in good faith (para. 18). I found there was a good chance a viable proposal would be developed (para. 24). Subject to one reservation, I found that no creditor would be materially prejudiced by the extension (para. 25).

10 I said at para. 25, "The reservation stems from very strange purchase orders from Kocken Barbados to Kocken with very large prices." I said at para. 26, "The extension would prejudice the bank if it was used to deliver inventory off shore without getting paid first." The solution was an injunction restraining Kocken from shipping product out of Canada without notice to the bank: para. 27. Nothing came of this.

11 As I said, the creditors voted unanimously to accept the proposal that was developed further in the extended period. That included the positive vote of the Bank of Montreal, who is to receive substantial funds under a formula and write off any balance.

12 In conclusion, the outcome bore out Kocken's submission that a threat to veto a developing proposal is always subject to assessment. See para. 21. I regret that my earlier decision was misinterpreted by some to cast doubt on Kocken's business efficacy. I have granted the requested order.

Additional reasons clarifying original judgment extending time to file proposal issued.

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