Court File No. CV-09-7966-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C 1985, c. B-3, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SMURFIT-STONE CONTAINER CANADA INC. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

Applicants

BOOK OF AUTHORITIES OF MANUFACTURERS AND TRADERS TRUST COMPANY, IN ITS CAPACITY AS INDENTURE TRUSTEE

October 5, 2009

ThorntonGroutFinnigan LLP
Barristers and Solicitors
100 Wellington Street West
Suite 3200
Toronto, Ontario
M5K 1K7

Robert I. Thornton (LSUC#24266B)
Seema Aggarwal (LSUC# 50674J)
Tel: 416-304-1616
Fax: 416-304-1313

Lawyers for Manufacturers and Traders Trust Company, in its capacity as Indenture Trustee

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2008 CarswellBC 1758

Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.
Cliffs Over Maple Bay Investments Ltd. (Respondent / Petitioner / Respondent) and Fisgard Capital Corp. and Liberty Holdings Excel Corp. (Appellants / Respondents / Applicants)
British Columbia Court of Appeal
Frankel, Tysoe, D. Smith JJ.A.
Heard: August 12, 2008
Judgment: August 15, 2008
Docket: Vancouver CA036261

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Counsel: G.J. Tucker, A. Frydenlund for Appellants

H.M.B. Ferris, P.J. Roberts for Respondent

M. Sennott for Century Services Inc.

M.B. Paine for Monitor, Bowra Group

Subject: Insolvency; Corporate and Commercial

Bankruptcy and insolvency --- Proposal -- Companies' Creditors Arrangement Act -- Arrangements -- Effect of arrangement -- Stay of proceedings

Applicant creditors held mortgages registered against debtor company's property development -- Debtor commenced proceeding under Companies' Creditors Arrangement Act ("CCAA") -- Stay order was granted pursuant to s. 11 of CCAA -- Debtor applied for extension of stay and authorization for debtor-in-possession financing -- Creditors applied to have initial stay set aside and sought appointment of interim receiver -- Chambers judge granted debtor's application and dismissed creditors' application -- Creditors appealed -- Appeal allowed -- Ability of court to grant or continue stay under s. 11 of CCAA is not free standing remedy that court may grant whenever insolvent company wishes to undertake restructuring -- Section 11 is ancillary to fundamental purpose of CCAA, which is to facilitate compromises and arrangements between companies and their creditors -- Stay of proceedings freezing rights of creditors should only be granted in furtherance of CCAA's fundamental purpose -- It was not suggested that debtor intended to propose arrangement or compromise to its creditors before embarking on its restructuring plan -- In absence of such intention, it was inappropriate for stay to have been granted or extended under s. 11 -- Chambers judge failed to take this important factor into account.

Bankruptcy and insolvency --- Proposal -- Companies' Creditors Arrangement Act -- Miscellaneous issues

Applicant creditors held mortgages registered against debtor company's property development -- Debtor commenced proceeding under Companies' Creditors Arrangement Act ("CCAA") -- Stay order was granted pursuant to s. 11 of CCAA --

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2008 BCCA 327, [2008] B.C.W.L.D. 6017, [2008] B.C.W.L.D. 6018, 46 C.B.R. (5th) 7, [2008] 10 W.W.R. 575, 83 B.C.L.R. (4th) 214, 296 D.L.R. (4th) 577, 168 A.C.W.S. (3d) 785, 258 B.C.A.C. 187, 434 W.A.C. 187

Debtor applied for extension of stay and authorization for debtor-in-possession financing -- Creditors applied to have initial stay set aside and sought appointment of interim receiver -- Chambers judge granted debtor's application and dismissed creditors' application -- Creditors appealed -- Appeal allowed -- Ability of court to grant or continue stay under s. 11 is not free standing remedy that court may grant whenever insolvent company wishes to undertake "restructuring" -- Section 11 is ancillary to fundamental purpose of CCAA, which is to facilitate compromises and arrangements between companies and their creditors -- It was not suggested that debtor intended to propose arrangement or compromise to its creditors before embarking on its restructuring plan -- In absence of such intention, it was inappropriate for stay to have been granted or extended under s. 11 -- If stay under CCAA should not be extended because debtor is not proposing arrangement or compromise with creditors, it followed that DIP financing should not have been authorized to permit debtor to pursue restructuring plan that did not involve arrangement or compromise with its creditors.

Cases considered by Tysoe J.A.:

Anvil Range Mining Corp., Re (2001), 2001 CarswellOnt 1325, 25 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]) -- referred to

Anvil Range Mining Corp., Re (2002), 2002 CarswellOnt 2254, 34 C.B.R. (4th) 157 (Ont. C.A.) -- referred to

Charles Osenton & Co. v. Johnston (1941), [1942] A.C. 130, [1941] 2 All E.R. 245, 110 L.J.K.B. 420, 57 T.L.R. 515 (U.K. H.L.) -- considered

Fairview Industries Ltd., Re (1991), 1991 CarswellNS 35, 11 C.B.R. (3d) 43, (sub nom. Fairview Industries Ltd., Re (No. 2)) 109 N.S.R. (2d) 12, (sub nom. Fairview Industries Ltd., Re (No. 2)) 297 A.P.R. 12 (N.S. T.D.) -- referred to

Friends of the Oldman River Society v. Canada (Minister of Transport) (1992), [1992] 2 W.W.R. 193, [1992] 1 S.C.R. 3, 3 Admin. L.R. (2d) 1, 7 C.E.L.R. (N.S.) 1, 84 Alta. L.R. (2d) 129, 88 D.L.R. (4th) 1, 132 N.R. 321, 48 F.T.R. 160, 1992 CarswellNat 649, 1992 CarswellNat 1313 (S.C.C.) -- considered

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 1990 CarswellBC 394, 4 C.B.R. (3d) 311, (sub nom. Chef Ready Foods Ltd. v. Hongkong Bank of Canada) [1991] 2 W.W.R. 136 (B.C. C.A.) -- followed

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) -- referred to

New Skeena Forest Products Inc., Re (2005), 7 M.P.L.R. (4th) 153, [2005] 8 W.W.R. 224, (sub nom. New Skeena Forest Products Inc. v. Kitwanga Lumber Co.) 210 B.C.A.C. 247, (sub nom. New Skeena Forest Products Inc. v. Kitwanga Lumber Co.) 348 W.A.C. 247, 2005 BCCA 192, 2005 CarswellBC 705, 9 C.B.R. (5th) 278, 39 B.C.L.R. (4th) 338 (B.C. C.A.) -- considered

Reference re Companies' Creditors Arrangement Act (Canada) (1934), [1934] 4 D.L.R. 75, 1934 CarswellNat 1, 16 C.B.R. 1, [1934] S.C.R. 659 (S.C.C.) -- followed

Reza v. Canada (1994), 1994 CarswellOnt 1158, 1994 CarswellOnt 675, 24 Imm. L.R. (2d) 117, 21 C.R.R. (2d) 236, 116 D.L.R. (4th) 61, (sub nom. Reza v. Canada (Minister of Employment & Immigration)) 72 O.A.C. 348, 22 Admin. L.R. (2d) 79, [1994] 2 S.C.R. 394, (sub nom. Reza v. Canada (Minister of Employment & Immigration)) 167 N.R. 282, 18 O.R. (3d) 640 (note) (S.C.C.) -- considered

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2008 BCCA 327, [2008] B.C.W.L.D. 6017, [2008] B.C.W.L.D. 6018, 46 C.B.R. (5th) 7, [2008] 10 W.W.R. 575, 83 B.C.L.R. (4th) 214, 296 D.L.R. (4th) 577, 168 A.C.W.S. (3d) 785, 258 B.C.A.C. 187, 434 W.A.C. 187

Skeena Cellulose Inc., Re (2001), 29 C.B.R. (4th) 157, 2001 BCSC 1423, 2001 CarswellBC 2226 (B.C. S.C.) -- considered

United Used Auto & Truck Parts Ltd., Re (2000), 2000 BCCA 146, 135 B.C.A.C. 96, 221 W.A.C. 96, 2000 CarswellBC 414, 73 B.C.L.R. (3d) 236, 16 C.B.R. (4th) 141, [2000] 5 W.W.R. 178 (B.C. C.A.) -- considered

Ursel Investments Ltd., Re (1990), 2 C.B.R. (3d) 260, 1990 CarswellSask 34 (Sask. Q.B.) -- considered

Ursel Investments Ltd., Re (1992), (sub nom. Deloitte & Touche Inc. v. Ursel Investments Ltd. (Receiver of)) [1992] 3 W.W.R. 106, (sub nom. Deloitte & Touche Inc. v. Ursel Investments Ltd. (Receiver of)) 89 D.L.R. (4th) 246, 10 C.B.R. (3d) 61, (sub nom. Deloitte & Touche Inc. v. Ursel Investments Ltd. (Receiver of)) 97 Sask. R. 170, (sub nom. Deloitte & Touche Inc. v. Ursel Investments Ltd. (Receiver of)) 12 W.A.C. 170, 1992 CarswellSask 19 (Sask. C.A.) -- referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 47(1) -- referred to

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

Generally -- considered

s. 2 "debtor company" -- referred to

s. 3(1) -- referred to

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APPEAL by creditors from order of chambers judge granting debtor's application to extend stay of proceedings and to authorize debtor-in-possession financing.

***Tysoe J.A.* (orally):**

1 The appellants appeal from the order dated June 27, 2008, by which the chambers judge extended the stay of proceedings that was initially granted on May 26, 2008, until October 20, 2008, and authorized financing in the amount of $2,350,000.

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2 The proceeding was commenced by The Cliffs Over Maple Bay Investments Ltd. (the "Debtor Company") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, (the "*CCAA*") after the appellants appointed a receiver on May 23, 2008. As is often the case for initial applications under the *CCAA*, no notice was given to the appellants or any other of the Debtor Company's creditors of the application giving rise to the May 26 stay order. In accordance with section 11(3) of the *CCAA*, the stay contained in the order was expressed to expire on June 25.

3 The Debtor Company then made application for further relief at the hearing commonly called the comeback hearing. The Debtor Company requested an extension of the stay until October 20, 2008, and authorization for financing in the amount of $2,350,000. This financing, which, following upon American terminology, is commonly referred to as "debtor-in-possession" or "DIP" financing, was to be secured by a charge having priority over the security held by the appellants and all other secured and unsecured creditors. The appellants made a concurrent application requesting that the May 26 order be set aside and that an interim receiver be appointed pursuant to s. 47(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. The chambers judge granted the Debtor Company's application and dismissed the appellants' application.

Background

4 The business of the Debtor Company is the development of a 300 acre site near Duncan, British Columbia, consisting of single family lots and multi-residential units, a hotel and apartments and a golf course. The business plan was to build the golf course and to construct servicing for subdivided lots, which were to be sold to purchasers.

5 The development of the non-golf course lands was to be carried out in five phases. Phase I consists of 70 single family lots and 60 multi-residential units. Its construction is 95% complete and 54 of the 70 single family lots have been sold and conveyed to the purchasers, with the sale proceeds being applied towards the Debtor Company's mortgage financing.

6 Phase II consists of 76 single family lots and is 50% complete. Phase III consists of 69 single family lots, 112 multi-residential lots and 225 hotel units, and it is 5% complete. Phases IV and V consist of 131 single family lots and 60 multi-residential units, and each is 1% complete.

7 The golf course, which is the focal point of the development, is approximately 60 to 70% complete. A restrictive covenant in favour of the District of North Cowichan stipulates that the golf course must be at least 80% complete before more than 200 lots can be sold.

8 There are four mortgages registered against the development. The first two mortgages are not significant -- the first mortgage secures an amount of $900,000 that is also secured by a cash collateral deposit, and the second mortgage secured a loan from Liberty Mortgage Services Ltd. that has not yet been discharged because there is a dispute between the Debtor Company and Liberty Mortgage Services Ltd. as to whether $85,000 of interest is still owing.

9 The third mortgage is held by the appellants. It is in the principal sum of $19,500,000 and has an interest rate of 19.75% per annum. It matured on March 1, 2008, and its balance is approximately $21,160,000 as of June 15, 2008. The fourth mortgage is held by the appellant, Liberty Holdings Excell Corp., and The Canada Trust Company. It is in the principal sum of $7,650,000 and has an interest rate of 28% per annum. It matured on January 1, 2008, and its balance is approximately $8,800,000 as of June 15, 2008.

10 In addition to the indebtedness secured by the mortgages, the Debtor Company has liabilities in the following approximate amounts:

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$4,460,000    -- trade creditors
1,700,000     -- equipment leases
1,135,000     -- loans from related parties
45,000        -- unpaid source deductions
$7,340,000
```

11 The Debtor Company was having some difficulties with respect to the development prior to March 2008 as a result of delays and substantial budget overruns. Ongoing construction on the development was limited. The main two mortgages had matured or were about to mature, and the Debtor was unsuccessful in its efforts to obtain refinancing. However, matters came to a head in March 2008 when the Debtor Company learned that its anticipated water source for the irrigation of the golf course was problematic.

12 It had been contemplated that the Debtor Company would obtain water for the golf course's irrigation from a joint utilities board consisting of representatives of the City of Duncan, the District of North Cowichan and the Cowichan First Nation. The joint utilities board had jurisdiction over reclaimed water from sewage lagoons located on the lands of the Cowichan First Nation. The joint utilities board was apparently prepared to provide water from the sewage lagoons for the irrigation of the golf course but it was unable to enter into an agreement with the Debtor Company because three members of the Cowichan First Nation had rights of possession over part of the sewage lagoons and were being advised by their consultant that they should not agree to an extension of the lease of the lagoons.

13 The Debtor Company advised the mortgage lenders of the water problem, and the lenders reacted by serving the Debtor Company with notices of intention to enforce their security in April 2008. On May 23, 2008, the mortgage lenders appointed a receiver, which precipitated the commencement of the *CCAA* proceeding by the Debtor Company. On May 26, 2008, the chambers judge granted the Debtor Company's *ex parte* application under the *CCAA* and directed the holding of the comeback hearing after notice had been given to the Debtor Company's creditors. The Debtor Company applied for authorization of the DIP financing at the comeback hearing.

14 When the chambers judge granted the *ex parte* application on May 26, 2008, he appointed The Bowra Group Inc. as monitor pursuant to s. 11.7 of the *CCAA* (the "Monitor"). The first report of the Monitor dated June 16, 2008, was before the chambers judge at the comeback hearing. Based on two previous appraisals and discussions with the realtor having the listing for the development, the Monitor estimated the value of the development under the following three scenarios:

(a) liquidation value with no source of water for irrigation -- $10 million;

(b) liquidation value with a source of water for irrigation -- $28 million;

(c) going concern value with completion of the development -- $50 million.

The Monitor also reported that the realtor believes that if the development were to be completed, there would be suffi-

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cient sale proceeds to satisfy all obligations of the Debtor Company. The appellants took issue with the going concern valuation and submitted that the development should be re-appraised by an appraiser they consider to be trustworthy.

15 In its report, the Monitor also recommended that the court authorize the DIP financing to enable it to pursue a water source for the irrigation of the golf course. The Monitor stated that it believes that the existing management of the Debtor Company will be unable to execute the restructuring in the absence of assistance and direction. The Monitor requested that it be given additional powers so that it could pursue the water source and to receive any offers for the purchase of all or part of the development, with the view that once a water source is secured, it would make further recommendations to the court with respect to the completion of the development. The application of the Debtor Company at the comeback hearing included a request for the expansion of the Monitor's powers.

Decision of the Chambers Judge

16 The appellants argued before the chambers judge, as they did on this appeal, that this matter should not be under the *CCAA* because the business of the Debtor Company is a single real estate development and the business was essentially dormant as at the date of the application. The chambers judge considered s. 11(6) of the *CCAA*, which reads as follows:

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

The chambers judge concluded that the preconditions contained in s. 11(6) had been met. He did not state why he considered a stay order to be appropriate in the circumstances, although his reasons reflect that he understood the nature and state of the Debtor Company's business.

17 The chambers judge considered various authorities in relation to the application for the DIP financing. After considering the benefits and prejudice of the DIP financing, the chambers judge concluded that it was appropriate to authorize it.

18 Finally, the chambers judge granted the expanded powers to the Monitor. This aspect of the order was not directly challenged on appeal, but it may be affected by the outcome on the first ground of appeal.

Appraisal Evidence

19 The affidavit of the principal of the Debtor Company filed at the time of the commencement of the *CCAA* proceeding exhibited the first 11 pages of two appraisals of portions of the development. As a result of the dispute between the parties over the value of the development, the Debtor Company applied for leave to file a supplemental appeal book containing complete copies of the appraisals. We tentatively received the supplemental appeal book subject to a subsequent ruling on the leave application.

20 In view of my conclusion on this appeal, the value of the development is not relevant. I would decline to grant the requested leave.

Standard of Review

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21 Both aspects of the order challenged on appeal were discretionary in nature. The standard of review in respect of discretionary orders has been expressed in various ways. In *Reza v. Canada*, [1994] 2 S.C.R. 394, 116 D.L.R. (4th) 61 (S.C.C.), the standard of review was expressed in terms of whether the judge at first instance "has given sufficient weight to all relevant circumstances" (¶ 20).

22 In *Friends of the Oldman River Society v. Canada (Minister of Transport)* , [1992] 1 S.C.R. 3 at 76-7, 88 D.L.R. (4th) 1 (S.C.C.), the Court quoted the following statement in *Charles Osenton & Co. v. Johnston*, [1942] A.C. 130 (U.K. H.L.) at 138 with approval:

> The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified.

This passage was also referred to by this Court in a case involving the *CCAA*, *New Skeena Forest Products Inc., Re*, 2005 BCCA 192 (B.C. C.A.) at ¶ 20. Newbury J.A. also made reference in that paragraph to the principle that appellate courts should accord a high degree of deference to decisions made by chambers judges in *CCAA* matters and will not exercise their own discretion in place of that already exercised by the chambers judge. She also stated at ¶ 26 that appellate courts should not interfere with an exercise of discretion where "the question is one of the weight or degree of importance to be given to particular factors, rather than a failure to consider such factors or the correctness, in the legal sense, of the conclusion."

23 In my opinion, the comments of Newbury J.A. in *New Skeena* were directed at ongoing *CCAA* matters and do not necessarily apply to the granting and continuation of a stay of proceedings at the hearing of the initial *ex parte* application or the comeback hearing. However, in view of my conclusion on this appeal, I need not decide whether a different standard of review applies in respect of threshold decisions to grant or continue stays of proceedings in the early stages of *CCAA* proceedings.

Analysis

24 On this appeal, the appellants challenge the decision of the chambers judge to continue the stay of proceedings until October 20, 2008, on the same basis as they opposed the application before the chambers judge. They say that the *CCAA* should not apply to companies whose sole business is a single land development or to companies whose business is essentially dormant. However, the real question is not whether the *CCAA* applies to the Debtor Company because it falls within the definition of "debtor company" in s. 2 of the *CCAA* and it satisfies the criterion contained in s. 3(1) of the *CCAA* of having liabilities in excess of $5 million. The *CCAA* clearly applies to the Debtor Company, and it is entitled to propose an arrangement or compromise to its creditors pursuant to the *CCAA*. The real question is whether a stay of proceedings should have been granted under s. 11 of the *CCAA* for the benefit of the Debtor Company.

25 I agree with the submission on behalf of the Debtor Company that the nature and state of its business are simply factors to be taken into account when considering under s. 11(6) whether it is appropriate to grant or continue a stay. If the more deferential standard of review is applicable to the granting and continuation of the stay of proceedings at the initial and comeback hearings, there would be insufficient basis to interfere with the decision of the chambers judge be-

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cause he did give weight to these factors. However, there is another, more fundamental, factor that was not considered by the chambers judge.

26 In my opinion, the ability of the court to grant or continue a stay under s. 11 is not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring", a term with a broad meaning including such things as refinancings, capital injections and asset sales and other downsizing. Rather, s. 11 is ancillary to the fundamental purpose of the *CCAA*, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the *CCAA*'s fundamental purpose.

27 The fundamental purpose of the *CCAA* is expressed in the long title of the statute:

> An Act to facilitate compromises and arrangements between companies and their creditors.

28 This fundamental purpose was articulated in, among others, two decisions quoted with approval by this Court in *United Used Auto & Truck Parts Ltd., Re* , 2000 BCCA 146, 16 C.B.R. (4th) 141 (B.C. C.A.). The first is *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659, 16 C.B.R. 1 at 2, [1934] 4 D.L.R. 75 (S.C.C.), where the following was stated:

> . . . the aim of the Act is to deal with the existing condition of insolvency in itself to enable arrangements to be made in view of the insolvent condition of the company under judicial authority which, otherwise, might not be valid prior to the initiation of proceedings in bankruptcy. *Ex facie* it would appear that such a scheme in principle does not radically depart from the normal character of bankruptcy legislation."
>
> The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors.

29 The second decision is *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.) at 315-16, where Gibbs J.A. said the following:

> The purpose of the *C.C.A.A.* is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the *C.C.A.A.*, the Court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay, hence the powers vested in the Court under s. ll.

30 Sections 4 and 5 of the *CCAA* provide that the court may order meetings of creditors if a debtor company proposes a compromise or an arrangement between it and its unsecured or secured creditors or any class of them. Section 6 authorizes the court to sanction a compromise or arrangement if a majority in number representing two-thirds in value of each class of creditor has voted in favour of it, in which case the compromise or arrangement is binding on all of the creditors.

31 The filing of a draft plan of arrangement or compromise is not a prerequisite to the granting of a stay under s. 11:

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see *Fairview Industries Ltd., Re* (1991), 109 N.S.R. (2d) 12, 11 C.B.R. (3d) 43 (N.S. T.D.). In my view, however, a stay should not be granted or continued if the debtor company does not intend to propose a compromise or arrangement to its creditors. If it is not clear at the hearing of the initial application whether the debtor company is intending to propose a true arrangement or compromise, a stay might be granted on an interim basis, and the intention of the debtor company can be scrutinized at the comeback hearing. The case of *Ursel Investments Ltd., Re* (1990), 2 C.B.R. (3d) 260 (Sask. Q.B.), rev'd on a different point (1991), 89 D.L.R. (4th) 246 (Sask. C.A.) is an example of where the court refused to direct a vote on a reorganization plan under the *CCAA* because it did not involve an element of mutual accommodation or concession between the insolvent company and its creditors.

32 Counsel for the Debtor Company has cited two decisions containing comments approving the use of the *CCAA* to effect a sale, winding up or liquidation of a company such that its business would not be ongoing following an arrangement with its creditors: namely, *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at ¶ 7 and *Anvil Range Mining Corp., Re* (2001), 25 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]) at ¶ 11), aff'd (2002), 34 C.B.R. (4th) 157 (Ont. C.A.) at ¶ 32. I agree with these comments if it is intended that the sale, winding up or liquidation is part of the arrangement approved by the creditors and sanctioned by the court. I need not decide the point on this appeal, but I query whether the court should grant a stay under the *CCAA* to permit a sale, winding up or liquidation without requiring the matter to be voted upon by the creditors if the plan of arrangement intended to be made by the debtor company will simply propose that the net proceeds from the sale, winding up or liquidation be distributed to its creditors.

33 Counsel for the Debtor Company also relies upon the decision in *Skeena Cellulose Inc., Re* (2001), 29 C.B.R. (4th) 157 (B.C. S.C.), where a creditor unsuccessfully opposed an extension of the stay of proceedings on the basis that the restructuring plan was wholly dependent upon the debtor company finding a purchaser of its assets. I note that the debtor company in that case was planning to make an arrangement with its creditors. I again query, without deciding, whether the court should continue the stay to allow the debtor company to attempt to fulfil a critical prerequisite to its plan of arrangement without requiring a vote by the creditors. I appreciate that it is frequently necessary for insolvent companies to satisfy certain prerequisites before negotiating a plan of arrangement with its creditors, but some prerequisites may be so fundamental that they should properly be regarded as an element of the debtor company's overall plan of arrangement.

34 In the present case, the Debtor Company described its proposed restructuring plan in the following paragraphs of the petition commencing the *CCAA* proceeding:

> 47 The Petitioner intends to proceed with a three-part strategic restructuring plan consisting of:
>
> (a) securing sufficient funds to complete Phase 2 and 3;
>
> (b) securing access to water for the irrigation system of the golf course; and
>
> (c) finishing the construction of the golf course.
>
> 48 Upon completion of the matters described in the preceding paragraph, the Petitioner believes that proceeds generated from the sale of the remaining units in Phases 1-3, will be sufficient to fund the balance of the costs that will be incurred in completing the remaining portions of the Development.

35 It was not suggested in the petition, nor in the Monitor's report before the chambers judge at the comeback hearing, that the Debtor Company intended to propose an arrangement or compromise to its creditors before embarking on its restructuring plan. In my opinion, in the absence of such an intention, it was not appropriate for a stay to have been granted

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or extended under s. 11 of the *CCAA*. The chambers judge failed to take this important factor into account, and it is open for this Court to interfere with his exercise of discretion. To be fair to the chambers judge, I would point out that this factor was not drawn to his attention by counsel, and it was raised for the first time at the hearing of the appeal.

36 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. 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. If the developer is insolvent and not able to complete the development without further funding, the secured creditors may feel that they will be in a better position by exercising their remedies rather than by letting the developer remain in control of the failed development while attempting to rescue it by means of obtaining refinancing, capital injection by a new partner or DIP finan- cing.

37 The failure of the chambers judge to consider the fundamental purpose of the *CCAA* and his error in extending the stay also infects his exercise of discretion in authorizing the DIP financing. If a stay under the *CCAA* should not be extended because the debtor company is not proposing an arrangement or compromise with its creditors, it follows that DIP financing should not be authorized to permit the debtor company to pursue a restructuring plan that does not involve an arrangement or compromise with its creditors. It also follows that expanded powers should not have been given to the Monitor.

38 I wish to add that it was open, and continues to be open, to the Debtor Company to propose to its creditors an arrangement or compromise along the lines of the restructuring plan described in paragraph 47 of the petition, although it may be a challenge to make such a plan attractive to its creditors. The creditors could then vote on such an arrangement or compromise which would involve, on their part, the concession that their rights would remain frozen while the Debtor Company carried out its restructuring. What the Debtor Company was endeavouring to accomplish in this case was to freeze the rights of all of its creditors while it undertook its restructuring plan without giving the creditors an opportunity to vote on the plan. The *CCAA* was not intended, in my view, to accommodate a non-consensual stay of creditors' rights while a debtor company attempts to carry out a restructuring plan that does not involve an arrangement or compromise upon which the creditors may vote.

Other Matters

39 In addition to the appellants and the Debtor Company, two persons appeared at the hearing of the appeal without having obtained intervenor status. The first was the Monitor, which also filed a factum. Other than clarifying certain facts, the factum was limited to the issue of preserving the charge against the assets of the Debtor Company as security for the Monitor's fees and disbursements in the event that the appeal was allowed on the appellants' first ground. In my opinion, the Monitor should have obtained intervenor status if it wished to make submissions on appeal, but the issue became academic when counsel for the appellants advised that his clients did not object to the Monitor retaining the priority charge for its fees and disbursements up to the day on which the decision on appeal is pronounced.

40 The second additional person appearing at the hearing of the appeal was Century Services Inc., which is the lender arranged by the Debtor Company to provide the DIP financing authorized by the chambers judge. Century Services Inc. wished to make submissions with respect to the priority charge for its financing, the first tranche of which was apparently advanced last week. After counsel for the appellants advised us that there were evidentiary matters subsequent to the de-

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cision of the chambers judge bearing on this issue, we declined to hear submissions on behalf of Century Services Inc. We did not have affidavits dealing with this matter, and the Supreme Court is better suited to deal with issues that may turn on the evidence.

Disposition

41 I would allow the appeal and set aside the order dated June 27, 2008. I would declare that the powers and duties of the Monitor contained in the orders dated May 26, 2008, and June 27, 2008, continued until today's date and that the Administration Charge created by the May 26 order shall continue in effect until all of the Monitor's fees and disbursements, including the fees and disbursements of its counsel, have been paid. I would remit to the Supreme Court any issues relating to the DIP financing that has been advanced.

***Frankel J.A.*:**

42 I agree.

***D. Smith J.A.*:**

43 I agree.

***Frankel J.A.*:**

44 The respondent's application to file a supplemental appeal book is dismissed. The appeal is allowed in the terms stated by Mr. Justice Tysoe.

Appeal allowed.

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TAB 2

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Canadian Airlines Corp., Re
In the Matter of Canadian Airlines Corporation and Canadian Airlines International Ltd.
The Bank of Nova Scotia Trust Company of New York, As Trustee for the Holders of Senior Secured Notes and Montreal Trust Company of Canada, As Collateral Agent for the Holders of Senior Secured Notes, Plaintiffs and Canadian Airlines Corporation, Canadian Airlines International Ltd., Canadian Regional Airlines Ltd., Canadian Regional Airlines (1998) Ltd. and Canadian Airlines Fuel Corporation Inc., Defendants
Alberta Court of Queen's Bench
Paperny J.
Judgment: May 4, 2000
Docket: Calgary 0001-05071, 0001-05044

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Counsel: G. Morawetz, A.J. McConnell and R.N. Billington, for Bank of Nova Scotia Trust Co. of New York and Montreal Trust Co. of Canada.

A.L. Friend, Q.C., and H.M. Kay, Q.C., for Canadian Airlines.

S. Dunphy, for Air Canada and 853350 Alberta Ltd.

R. Anderson, Q.C., for Loyalty Group.

H. Gorman, for ABN AMRO Bank N.V.

P. McCarthy, for Monitor - Price Waterhouse Cooper.

D. Haigh, Q.C., and D. Nishimura, for Unsecured noteholders - Resurgence Asset Management.

C.J. Shaw, for Airline Pilots Association International.

G. Wells, for NavCanada.

D. Hardy, for Royal Bank of Canada.

Subject: Corporate and Commercial; Insolvency

Corporations --- Arrangements and compromises -- Under Companies' Creditors Arrangement Act -- Arrangements -- Effect of arrangement -- Stay of proceedings

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Senior secured noteholders brought application for appointment of receiver over collateral on same day that airline was granted CCAA protection -- Noteholders constituted separate class that intended to vote against plan and had voted to realize on security -- Noteholders brought application for order lifting stay of proceedings against them to allow for appointment of receiver and manager over assets and property charged in their favour, and for order appointing court officer with exclusive right to negotiate sale of assets or shares of airline's subsidiary -- Application dismissed -- In determining whether stay should be lifted, court had to balance interests of all parties who stood to be affected -- This would include general public, which would be affected by collapse of airline -- Evidence indicated that liquidation would be inevitable were noteholders to realize on collateral -- Objective of stay was not to maintain literal status quo but to maintain situation that was not prejudicial to creditors while allowing airline "breathing room" -- It was premature to conclude that plan would be rejected or that proposal acceptable to noteholders could not be reached -- Evidence indicated that airline was moving to effect compromises swiftly and in good faith -- Appointment of receiver to manage collateral would negate effect of stay and thwart purposes of Act -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Corporations --- Arrangements and compromises -- Under Companies' Creditors Arrangement Act -- Miscellaneous issues

Senior secured noteholders brought application for appointment of receiver over collateral on same day that airline was granted CCAA protection -- Noteholders constituted separate class that intended to vote against plan and voted to realize on security -- Noteholders brought application for order lifting stay of proceedings against them to allow for appointment of receiver and manager over assets and property charged in their favour, and for order appointing court officer with exclusive right to negotiate sale of assets or shares of airline's subsidiary -- Application dismissed -- Proposal that airline make interim payments for use of security was not viable -- Suggestion that other airline financially supporting plan should pay out airline's debts to noteholders was without legal foundation -- Existence of solvent entity financially supporting plan with view to obtaining economic benefit for itself did not create obligation on that entity to pay airline's creditors -- Noteholders could not require sale of assets or shares of airline's subsidiary -- Subsidiary was not debtor company but was itself property of airline -- Marketing of subsidiary's assets would constitute "proceeding in respect of petitioners' property" within meaning of s. 11 of Act -- Even if marketing of subsidiary's assets did not so qualify, court has inherent jurisdiction to grant stays in relation to proceedings against third parties where exercise of jurisdiction is important to reorganization process -- In deciding whether to exercise inherent jurisdiction, court weighs interests of insolvent corporation against interests of parties who would be affected by stay -- Threshold of prejudice required to persuade court not to exercise inherent jurisdiction to grant stay is lower than threshold required to persuade court not to exercise discretion under s. 11 of Act -- Noteholders failed to meet either threshold -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Cases considered by Paperny J.:

Alberta-Pacific Terminals Ltd., Re (1991), 8 C.B.R. (3d) 99 (B.C. S.C.) -- considered

Campeau v. Olympia & York Developments Ltd. (1992), 14 C.B.R. (3d) 303, 14 C.P.C. (3d) 339 (Ont. Gen. Div.) -- considered

Citibank Canada v. Chase Manhattan Bank of Canada (1991), 5 C.B.R. (3d) 165, 2 P.P.S.A.C. (2d) 21, 4 B.L.R. (2d) 147 (Ont. Gen. Div.) -- referred to

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311,

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(sub nom. Chef Ready Foods Ltd. v. Hongkong Bank of Canada) [1991] 2 W.W.R. 136 (B.C. C.A.) -- referred to

Meridian Development Inc. v. Toronto Dominion Bank, [1984] 5 W.W.R. 215, 52 C.B.R. (N.S.) 109, 32 Alta. L.R. (2d) 150, 53 A.R. 39, 11 D.L.R. (4th) 576 (Alta. Q.B.) -- referred to

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 64 Alta. L.R. (2d) 139, [1989] 2 W.W.R. 566, 72 C.B.R. (N.S.) 20, 72 C.R. (N.S.) 20 (Alta. Q.B.) -- referred to

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, (sub nom. Elan Corp. v. Comiskey) 1 O.R. (3d) 289, (sub nom. Elan Corp. v. Comiskey) 41 O.A.C. 282 (Ont. C.A.) -- referred to

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

Philip's Manufacturing Ltd., Re (1992), 9 C.B.R. (3d) 25, 67 B.C.L.R. (2d) 84, 4 B.L.R. (2d) 142 (B.C. C.A.) -- considered

Philip's Manufacturing Ltd., Re (1992), 15 C.B.R. (3d) 57 (note), 143 N.R. 286 (note), 70 B.C.L.R. (2d) xxxiii (note), 15 B.C.A.C. 240 (note), 27 W.A.C. 240 (note), 6 B.L.R. (2d) 149 (note) (S.C.C.) -- referred to

Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 80 C.B.R. (N.S.) 98 (B.C. S.C.) -- considered

Woodward's Ltd., Re (1993), 17 C.B.R. (3d) 236, 79 B.C.L.R. (2d) 257 (B.C. S.C.) -- considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally -- referred to

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

Generally -- considered

s. 11 -- considered

s. 11(4) -- considered

APPLICATION by holders of senior secured notes in corporation for order lifting stay of proceedings against them in Companies' Creditors Arrangement Act proceeding to allow for appointment of receiver and manager over assets and property charged in their favour and for order appointing court officer with exclusive right to negotiate sale of assets or shares of corporation's subsidiary.

***Paperny J.* (orally):**

1 Montreal Trust Company of Canada, Collateral Agent for the holders of the Senior Secured Notes, and the

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Bank of Nova Scotia Trust Company of New York, Trustee for the holders of the Senior Secured Notes, apply for the following relief:

1. In the CCAA proceeding (Action No. 0001-05071) an order lifting the stay of proceedings against them contained in the orders of this court dated March 24, 2000 and April 19, 2000 to allow for the court-ordered appointment of Ernst & Young Inc. as receiver and manager over the assets and property charged in favour of the Senior Secured Noteholders; and

2. In Action No. 0001-05044, an order appointing Ernst & Young Inc. as a court officer with the exclusive right to negotiate the sale of the assets or shares of Canadian Regional Airlines (1998) Ltd.

2 Canadian Airlines Corporation ("CAC") is a Canadian based holding company which, through its majority owned subsidiary Canadian Airlines International Ltd. ("CAIL") provides domestic, U.S.-Canada transborder and international jet air transportation services. CAC also provides regional transportation through its subsidiary Canadian Regional Airlines (1998) Ltd. ("Canadian Regional"). Canadian Regional is not an applicant under the CCAA proceedings.

3 The Senior Secured Notes were issued under an Indenture dated April 24, 1998 between CAC and the Trustee. The principal face amount is $175 million U.S. As well, there is interest outstanding. The Senior Secured Notes are directly and indirectly secured by a diverse package of assets and property of the CCAA applicants, including spare engines, rotables, repairables, hangar leases and ground equipment. The security comprises the key operational assets of CAC and CAIL. The security also includes the outstanding shares of Canadian Regional and the $56 million intercompany indebtedness owed by Canadian Regional to CAIL.

4 Under the terms of the Indenture, CAC is required to make an offer to purchase the Senior Secured Notes where there is a "change of control" of CAC. It is submitted by the Senior Secured Noteholders that Air Canada indirectly acquired control of CAC on January 4, 2000 resulting in a change of control. Under the Indenture, CAC is then required to purchase the notes at 101 percent of the outstanding principal, interest and costs. CAC did not do so. According to the Trustee, an Event of Default occurred, and on March 6, 2000 the Trustee delivered Notices of Intention to Enforce Security under the Bankruptcy and Insolvency Act.

5 On March 24, 2000, the Senior Secured Noteholders commenced Action No. 0001-05044 and brought an application for the appointment of a receiver over their collateral. On the same day, CAC and CAIL were granted CCAA protection and the Senior Secured Noteholders adjourned their application for a receiver. However, the Senior Secured Noteholders made further application that day for orders that Ernst & Young be appointed monitor over their security and for weekly payments from CAC and CAIL of $500,000 U.S. These applications were dismissed.

6 The CCAA Plan filed on April 25, 2000, proposes that the Senior Secured Noteholders constitute a separate class and offers them two alternatives:

1. To accept repayment of less than the outstanding amount; or

2. To be unaffected by the CCAA Plan and realize on their security.

7 On April 26th, 2000, the Senior Secured Noteholders met and unanimously rejected the first option. They passed a resolution to take steps to realize on the security.

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8 The Senior Secured Noteholders argue that the time has come to permit them to realize on their security. They have already rejected the Plan and see no utility in waiting to vote in this regard on May 26th, 2000, the date set by this court.

9 The Senior Secured Noteholders submit that since the CCAA proceedings began five weeks ago, the following has occurred:

-interest has continued to accrue at approximately $2 million U.S. per month;

-the security has decreased in value by approximately $6 million Canadian;

-the Collateral Agent and the Trustee have incurred substantial costs;

-no amounts have been paid for the continued use of the collateral, which is key to the operations of CAIL;

-no outstanding accrued interest has been paid; and- they are the only secured creditor not getting paid.

10 The Senior Secured Noteholders emphasize that one of the end results of the Plan is a transfer of CAIL's assets to Air Canada. The Senior Secured Noteholders assert that the Plan is sponsored by this very solvent proponent, who is in a position to pay them in full. They are argue that Air Canada has made an economic decision not to do so and instead is using the CCAA to achieve its own objectives at their expense, an inappropriate use of the Act.

11 The Senior Secured Noteholders suggest that the Plan will not be impacted if they are permitted to realize on their security now instead of after a formal rejection of the Plan at the court-scheduled vote on May 26, 2000. The Senior Secured Noteholders argue that for all of the preceding reasons lifting the stay would be in accordance with the spirit and intent of the CCAA.

12 The CCAA is remedial legislation which should be given a large and liberal interpretation: See, for example, *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3d) 165 (Ont. Gen. Div.). It is intended to permit the court to make orders which will effectively maintain the status quo for a period while the struggling company attempts to develop a plan to compromise its debts and ultimately continue operations for the benefit of both the company and its creditors: See for example, *Meridian Development Inc. v. Toronto Dominion Bank* (1984), 52 C.B.R. (N.S.) 109 (Alta. Q.B.), and *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.).

13 This aim is facilitated by the power to stay proceedings provided by Section 11 of the Act. The stay power is the key element of the CCAA process.

14 The granting of a stay under Section 11 is discretionary. On the debtor's initial application, the court may order a stay at its discretion for a period not to exceed 30 days. The burden of proof to obtain a stay extension under Section 11(4) is on the debtor. The debtor must satisfy the court that circumstances exist that make the request for a stay extension appropriate and that the debtor has acted, and is acting, in good faith and with due diligence. CAC and CAIL discharged this burden on April 19, 2000. However, unlike under the Bankruptcy and Insolvency Act, there is no statutory test under the CCAA to guide the court in lifting a stay against a certain creditor.

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15 In determining whether a stay should be lifted, the court must always have regard to the particular facts. However, in every order in a CCAA proceeding the court is required to balance a number of interests. McFarlane J.A. states in his closing remarks of his reasons in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]):

> In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and problems.

16 Also see Blair J.'s decision in *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.P.C. (3d) 339 (Ont. Gen. Div.), for another example of the balancing approach.

17 As noted above, the stay power is to be used to preserve the status quo among the creditors of the insolvent company. Huddart J., as she then was, commented on the status quo in *Re Alberta-Pacific Terminals Ltd.* (1991), 8 C.B.R. (3d) 99 (B.C. S.C.). She stated:

> The status quo is not always easy to find... Nor is it always easy to define. The preservation of the status quo cannot mean merely the preservation of the relative pre-stay debt status of each creditor. Other interests are served by the CCAA. Those of investors, employees, and landlords among them, and in the case of the Fraser Surrey terminal, the public too, not only of British Columbia, but also of the prairie provinces. The status quo is to be preserved in the sense that manoeuvres by creditors that would impair the financial position of the company while it attempts to reorganize are to be prevented, not in the sense that all creditors are to be treated equally or to be maintained at the same relative level. It is the company and all the interests its demise would affect that must be considered.

18 Further commentary on the status quo is contained in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 80 C.B.R. (N.S.) 98 (B.C. S.C.). Thackray J. comments that the maintenance of the status quo does not mean that every detail of the status quo must survive. Rather, it means that the debtor will be able to stay in business and will have breathing space to develop a proposal to remain viable.

19 Finally, in making orders under the CCAA, the court must never lose sight of the objectives of the legislation. These were concisely summarized by the chambers judge and adopted by the British Columbia Court of Appeal in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]):

> (1) The purpose of the CCAA is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and court.
>
> (2) The CCAA is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and employees.
>
> (3) During the stay period, the Act is intended to prevent manoeuvres for positioning amongst the creditors of the company.
>
> (4) The function of the court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.

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(5) The status quo does not mean preservation of the relative pre-stay debt status of each creditor. Since the companies under CCAA orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, the preservation of the status quo is not intended to create a rigid freeze of relative pre-stay positions.

(6) The court has a broad discretion to apply these principles to the facts of th particular case.

20 At pages 342 and 343 of this text, Canadian Commercial Reorganization: Preventing Bankruptcy (Aurora: Canada Law Book, looseleaf), R.H. McLaren describes situations in which the court will lift a stay:

1. When the plan is likely to fail;

2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor);

3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence);

4. The applicant would be severely prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors;

5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passage of time;

6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.

21 I now turn to the particular circumstances of the applications before me.

22 I would firstly address the matter of the Senior Secured Noteholders' current rejection of the compromise put forward under the Plan. Although they are in a separate class under CAC's Plan and can control the vote as it affects their interest, they are not in a position to vote down the Plan in its entirety. However, the Senior Secured Noteholders submit that where a plan offers two options to a class of creditors and the class has selected which option it wants, there is no purpose to be served in delaying that class from proceeding with its chosen course of action. They rely on the *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101 (Ont. C.A.) at 115, as just one of several cases supporting this proposition. *Re Philip's Manufacturing Ltd.* (1992), 9 C.B.R. (3d) 25 (B.C. C.A.) at pp. 27-28, leave to appeal to S.C.C. refused (1992), 15 C.B.R. (3d) 57 (note) (S.C.C.), would suggest that the burden is on the Senior Secured Noteholders to establish that the Plan is "doomed to fail". To the extent that Nova Metal and Philip's Manufacturing articulate different tests to meet in this context, the application of either would not favour the Senior Secured Noteholders.

23 The evidence before me suggests that progress may still be made in the negotiations with the representatives of the Senior Secured Noteholders and that it would be premature to conclude that any further discussions would be unsuccessful. The parties are continuing to explore revisions and alternative proposals which would satisfy the Senior Secured Noteholders.

24 Mr. Carty's affidavit sworn May 1, 2000, in response to these applications states his belief that these ef-

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forts are being made in good faith and that, if allowed to continue, there is a real prospect for an acceptable proposal to be made at or before the creditors' meeting on May 26, 2000. Ms. Allen's affidavit does not contain any assertion that negotiations will cease. Despite the emphatic suggestion of the Senior Secured Noteholders' counsel that negotiations would be "one way", realistically I do not believe that there is no hope of the Senior Secured Noteholders coming to an acceptable compromise.

25 Further, there is no evidence before me that would indicate the Plan is "doomed to fail". The evidence does disclose that CAC and CAIL have already achieved significant compromises with creditors and continue to work swiftly and diligently to achieve further progress in this regard. This is reflected in the affidavits of Mr. Carty and the reports from the Monitor.

26 In any case, there is a fundamental problem in the application of the Senior Secured Noteholders to have a receiver appointed in respect of their security which the certainty of a "no" vote at this time does not vitiate: It disregards the interests of the other stakeholders involved in the process. These include other secured creditors, unsecured creditors, employees, shareholders and the flying public. It is not insignificant that the debtor companies serve an important national need in the operation of a national and international airline which employs tens of thousands of employees. As previously noted, these are all constituents the court must consider in making orders under the CCAA proceeding.

27 Paragraph 11 of Mr. Carty's May 1, 2000 affidavit states as follows:

> In my opinion, the continuation of the stay of proceedings to allow the restructuring process to continue will be of benefit to all stakeholders including the holders of the Senior Secured Notes. A termination of the stay proceedings as regards the security of the holders of the Senior Secured Notes would immediately deprive CAIL of assets which are critical to its operational integrity and would result in grave disruption of CAIL's operations and could lead to the cessation of operations. This would result in the destruction of value for all stakeholders, including the holders of the Senior Secured Notes. Furthermore, if CAIL ceased to operate, it is doubtful that Canadian Regional Airlines (1998) Ltd. ("CRAL98"), whose shares form a significant part of the security package of the holders of the Senior Secured Notes, would be in a position to continue operating and there would be a very real possibility that the equity of CAIL and CRAL, valued at approximately $115 million for the purposes of the issuance of the Senior Secured Notes in 1998, would be largely lost. Further, if such seizure caused CAIL to cease operations, the market for the assets and equipment which are subject to the security of the holders of the Senior Secured Notes could well be adversely affected, in that it could either lengthen the time necessary to realize on these assets or reduce realization values.

28 The alternative to this Plan proceeding is addressed in the Monitor's reports to the court. For example, in Paragraph 8 of the Monitor's third report to the court states:

> The Monitor believes the if the Plan is not approved and implemented, CAIL will not be able to continue as a going concern. In that case, the only foreseeable alternative would be a liquidation of CAIL's assets by a receiver and manager and/or by a trustee. Under the Plan, CAIL's obligations to parties it considers to be essential in order to continue operations, including employees, customers, travel agents, fuel, maintenance, catering and equipment suppliers, and airport authorities, are in most cases to be treated as unaffected and paid in full. In the event of a liquidation, those parties would not, in most cases, be paid in full and, except for specific lien rights, statutory priorities or other legal protection,

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> would rank as ordinary unsecured creditors. The Monitor estimates that the additional unsecured claims which would arise if CAIL were to cease operation as a going concern and be forced into liquidation would be in excess of $1.1 billion.

29 This evidence is uncontradicted and flies in the face of the Senior Secured Noteholders' assertion that realizing on their collateral at this point in time will not affect the Plan. Although, as the Senior Secured Noteholders heavily emphasized the Plan does contemplate a "no" vote by the Senior Secured Noteholders, the removal of their security will follow that vote. 9.8(c) of the Plan states that:

> If the Required Majority of Affected Secured Noteholders fails to approve the Plan, arrangements in form and substance satisfactory to the Applicants will have been made with the Affected Secured Noteholders or with a receiver appointed over the assets comprising the Senior Notes Security, which arrangements provide for the transitional use by [CAIL], and subsequent sale, of the assets comprising the Senior Notes Security.

30 On the other side of the scale, the evidence of the Senior Secured Noteholders is that the value of their security is well in excess of what they are owed. Paragraph 15(a) of the Monitor's third report to the court values the collateral at $445 million. The evidence suggests that they are not the only secured creditor going unpaid. CAIL is asking that they be permitted to continue the restructuring process and their good faith efforts to attempt to reach an acceptable proposal with the Senior Secured Noteholders until the date of the creditors meeting, which is in three weeks. The Senior Secured Noteholders have not established that they will suffer any material prejudice in the intervening period.

31 The appointment of a receiver at this time would negate the effect of the order staying proceedings and thwart the purposes of the CCAA.

32 Accordingly, I am dismissing the application, with leave to reapply in the event that the Senior Secured Noteholders vote to reject the Plan on May 26, 2000.

33 An alternative to receivership raised by the Senior Secured Noteholders was interim payment for use of the security. The Monitor's third report makes it clear that the debtor's cash flow forecasts would not permit such payments.

34 The Senior Secured Noteholders suggested Air Canada could make the payments and, indeed, that Air Canada should pay out the debt owed to them by CAC. It is my view that, in the absence of abuse of the CCAA process, simply having a solvent entity financially supporting a plan with a view to ultimately obtaining an economic benefit for itself does not dictate that that entity should be required to pay creditors in full as requested. In my view, the evidence before me at this time does not suggest that the CCAA process is being improperly used. Rather, the evidence demonstrates these proceedings to be in furtherance of the objectives of the CCAA.

35 With respect to the application to sell shares or assets of Canadian Regional, this application raises a distinct issue in that Canadian Regional is not one of the debtor companies. In my view, Paragraph 5(a) of Chief Justice Moore's March 24, 2000 order encompasses marketing the shares or assets of Canadian Regional. That paragraph stays, inter alia:

> ...any and all proceedings ... against or in respect of ... any of the Petitioners' property ... whether held by the Petitioners directly or indirectly, as principal or nominee, beneficially or otherwise...

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36 As noted above, Canadian Regional is CAC's subsidiary, and its shares and assets are the "property" of CAC and marketing of these would constitute a "proceeding ... in respect of ... the Petitioners' property" within the meaning of Paragraph 5(a) and Section 11 of the CCAA.

37 If I am incorrect in my interpretation of Paragraph 5(a), I rely on the inherent jurisdiction of the court in these proceedings.

38 As noted above, the CCAA is to be afforded a large and liberal interpretation. Two of the landmark decisions in this regard hail from Alberta: *Meridian Development Inc. v. Toronto Dominion Bank*, supra, and *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.). At least one court has also recognized an inherent jurisdiction in relation to the CCAA in order to grant stays in relation to proceedings against third parties: *Re Woodward's Ltd.* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.). Tysoe J. urged that although this power should be used cautiously, a prerequisite to its use should not be an inability to otherwise complete the reorganization. Rather, what must be shown is that the exercise of the inherent jurisdiction is important to the reorganization process. The test described by Tysoe J. is consistent with the critical balancing that must occur in CCAA proceedings. He states:

> In deciding whether to exercise its inherent jurisdiction, the court should weigh the interests of the insolvent company against the interests of parties who will be affected by the exercise of the inherent jurisdiction. If, in relative terms, the prejudice to the affected party is greater than the benefit that will be achieved by the insolvent company, the court should decline to its inherent jurisdiction. The threshold of prejudice will be much lower than the threshold required to persuade the court that it should not exercise its discretion under Section 11 of the CCAA to grant or continue a stay that is prejudicial to a creditor of the insolvent company (or other party affected by the stay).

39 The balancing that I have described above in the context of the receivership application equally applies to this application. While the threshold of prejudice is lower, the Senior Secured Noteholders still fail to meet it. I cannot see that it is important to the CCAA proceedings that the Senior Secured Noteholders get started on marketing Canadian Regional. Instead, it would be disruptive and endanger the CCAA proceedings which, on the evidence before me, have progressed swiftly and in good faith.

40 The application in Action No. 0001-05044 is dismissed, also with leave to reapply after the vote on May 26, 2000.

41 I appreciate that the Senior Secured Noteholders will be disappointed and likely frustrated with the outcome of these applications. I would emphasize that on the evidence before me their rights are being postponed and not eradicated. Any hardship they experience at this time must yield to the greater hardship that the debtor companies and the other constituents would suffer were the stay to be lifted at this time.

Application dismissed.

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TAB 3

5 C.B.R. 367, [1924] 3 W.W.R. 850, [1925] 1 D.L.R. 27

1924 CarswellAlta 70

Irma Co-operative Co., Re
In re Irma Co-Operative Company, Limited
In re Love and Knudson
Alberta Supreme Court
Tweedie, J.
Judgment: November 25, 1924

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Counsel: G. H. Allen, for trustee.

J. R. Love, for contributory in person.

Subject: Corporate and Commercial; Insolvency; Estates and Trusts

Bankruptcy --- Administration of estate -- Payment by contributories for shares.

Corporations --- Winding-up -- Under Dominion Act -- Scope and application of Act -- General.

I. Company -- Shareholders as Contributories -- Liability for Immediate Payment of Amounts Unpaid on Shares -- Bankruptcy Act, Sec. 36(2), 1 C.B.R. 41, Sec. 36(3), 1 C.B.R. 41, 585 -- Contract with Company Postponing Payment -- Effect of Sec. 47, Companies Ordinance -- Set-off of Dividends.

In the case of the bankruptcy of a company incorporated under The Companies Ordinance, 1901, ch. 20, the trustee may enforce immediate payment by shareholders therein of the amount unpaid on their shares even though under the contract between them and the company such amount is not yet payable. The shareholders are not entitled to set off against such liability any dividends owing to them.

II. "Unjust" -- Meaning of, in Sec. 36(9) Bankruptcy Act, 1 C.B.R. 40.

"Unjust" in sec. 36(9) of The Bankruptcy Act, which provides that "If the contributory considers the demand excessive or unjust he may apply to the Court to reduce or disallow it," means illegal, i.e., that the contributory is under no legal liability.

III. Constitutional Law -- Validity of Sec. 36(3), Bankruptcy Act, 1 C.B.R. 41.

Quaere whether sec. 36(3) of The Bankruptcy Act would be ultra vires in the case of a company which is not subject to such a provision as sec. 47 of The Companies Ordinance.

IV. Companies -- Sec. 47, Companies Ordinance -- Meaning of "Being Wound Up" -- Whether Insolvency Legislation.

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In sec. 47 (quoted in the judgment) of The Companies Ordinance, 1901, ch. 20, the words "being wound up" do not refer to a winding-up under any particular Act as in the sense of a dissolution but mean a winding-up of the company in the sense of a realization of the assets, a distribution of the proceeds among the creditors and an adjustment of the rights of shareholders among themselves, and, therefore, a company may be "being wound up" in this sense under The Bankruptcy Act as well as under either the Dominion or provincial winding-up Acts.

Said sec. 47 is not insolvency legislation.

An application on behalf of the authorized trustee pursuant to subsec. 8 of sec. 36 of The Bankruptcy Act, 1919, ch. 36, as amended by sec. 9 of The Bankruptcy Act Amendment Act, 1920, ch. 34, [1 C.B.R. 42] under Bankruptcy Rules 124 and 125 [1 C.B.R. 217] for several summary judgments against J. Russell Love and Fred W. Knudson, alleged contributories -- hereinafter referred to as contributories -- for the amount owing by each on the shares held by them respectively in the Irma Co-operative Company, Limited, authorized assignor. Judgment for trustee without costs against contributories; costs of trustee to be paid out of estate.

***Tweedie, J.* [after stating nature of application]:**

1 The company in question was incorporated for provincial purposes under *The Companies Ordinance*, 1901, Ord. N.W.T., ch. 20, which was re-enacted as *The Companies Act*, R.S.A., 1922, ch. 156: the liability of the shareholders was limited, as hereinafter indicated, to the amount unpaid on their respective shares: its head office was situated, and it carried on business within the province of Alberta. On July 19 and on October 9, 1920, the contributories, Love and Knudson, each, upon forms used by the company for that purpose, made application, pursuant to the terms of the issue, for five shares of the par value of $25 each, of the capital stock of the company. The applications, except as to date and signature, are similar and purport to be for shares in a company with a "non-personal liability" as well as one in which the liability was "limited by shares." The shares were to be paid for "$5.00 with application. $_____ every two months until the whole amount has been paid," and the directors were authorized to register them forthwith as shareholders.

2 The use of the words "non-personal liability" indicates that the company is one in which the liability of a shareholder in respect to any unpaid balance on his shares is limited under sec. 67 of *The Companies Ordinance, supra*, to the proceeds realized from the sale of shares by the company and forfeiture of moneys previously paid on account thereof. The company in question was incorporated for trading purposes and the above limitation applies only to mining companies incorporated under secs. 63-67 of the Ordinance and the liability of the shareholders is not restricted in the way indicated by the use of those words. In regard to the amount of the instalments being left blank it was admitted by counsel, on behalf of the trustee, that while the amount payable every two months was omitted from the application, the application was made and accepted upon the understanding that such payment was to be $5.

3 The applications were accepted on behalf of the company, and the shares were duly allotted to the applicants and they became and continued to be and were at the time of the authorized assignment registered shareholders of the company.

4 The cash payment of $5 was made by each at the time of the application and subsequent to the authorized assignment and the demand for payment hereinafter referred to, Love paid on June 30, 1922, on account of his shares, $30.76, and Knudson on November 1, 1922, on account of his, $50. Beyond these amounts nothing has been paid.

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5 On January 21, 1922, the insolvent company made an authorized assignment to the Canadian Credit Men's Trust Association as authorized trustee. On June 2, 1922, pursuant to sec. 36(6) of *The Bankruptcy Act*, [1 C.B.R. 42] the authorized trustee made a demand, which was duly served, upon each of the alleged contributories for the sum of $120, being the amount unpaid on their respective shares. The sum demanded was made up of instalments which were in arrears and payable prior to or at the time of the making of the authorized assignment, instalments which became due and payable subsequent thereto and prior to the demand, and instalments which would become payable under the terms of the agreement under which the shares were issued at dates subsequent to the demand. The contributories failed to comply with the demand and after the expiration of thirty days, from the date of service thereof -- the time fixed by sec. 36(8) of the Act [1 C.B.R. 42] as the time within which payment must be made -- the trustee commenced the proceedings.

6 In their respective answers to the demands, which answers were wholly informal and contained in letters, the contributories raised for consideration four points, as follows:

7 (a) Their liability as contributories;

8 (b) The right of the trustee to demand and enforce payment forthwith of instalments which, by the terms of the agreement in accordance with which the shares were acquired were not at the time of the demand nor at the time of this application payable.

9 (c) Their right to have disallowed by the Court the demand in so far as it affects instalments which are not yet due on the ground that the demand is unjust; and,

10 (d) The right to set off against the demand unpaid dividends in respect of their shares, which dividends had been declared out of profits and were payable prior to the time of the making of the assignment.

11 As to (a), their liability as contributories: Section 36(2) of *The Bankruptcy Act* [1 C.B.R. 41] reads as fol- lows:

> 36. (2) Every shareholder or member of a corporation or his representative shall be liable to contribute the amount unpaid on his shares of the capital or on his liability to the corporation or to its members or creditors, as the case may be, under the Act, charter or instrument of incorporation of the company or otherwise; such shareholder or member will hereinafter be referred to as the "contributory".

12 The provisions of this subsection are very wide and dispense with the necessity of fixing the list of contributories by an order of the Court as required under various other statutes which have to do with the winding-up of companies. By the words of the subsection shareholders and members of corporations, or their representatives, are declared to be "contributories", and are liable to the extent provided therein.

13 The instalments, whether past due or not, represent "the amount unpaid on his (or their) shares of the capital" which constitute "a liability to the corporation" in respect of their shares and they are contributories within the meaning of the section. They are contributories by virtue of the statute itself, without the necessity of any order of the Court.

14 As to (b), the right of the trustee to demand and enforce payment forthwith: As between the company itself and the shareholder the latter would be bound to pay only in accordance with the terms of the agreement under which the shares were issued.

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> A shareholder is bound, indeed, to pay the full amount unpaid on his shares, but he is not bound (unless, indeed, the terms of issue so provide) to pay up at once. He is only bound to pay *in accordance with the articles, e.g.*, by instalments, according to the terms of issue, or in response to calls:

Palmer's Company Law, 10th ed., p. 146; *Alexander v. Automatic Telephone Co.* , [1900] 2 Ch. 56, 69 L.J. Ch. 428, 82 L.T. 400, 48 W.R. 546, 16 T.L.R. 339.

15 Subsection 3 of sec. 36, of *The Bankruptcy Act* as amended 1921, ch. 21, sec. 57 [1 C.B.R. 41, 585], provides, however, as follows:

> 36. (3) The amount which the contributory is liable to contribute shall be deemed an asset of the corporation and a debt payable to the trustee forthwith upon the making of a receiving order against the corporation or on the execution by the corporation of an authorized assignment.

16 What is the effect of this subsection upon the liability of the shareholder? Notwithstanding the fact that the Parliament of Canada has, under sec. 91(21) of *The B.N.A. Act*, exclusive jurisdiction over "Bankruptcy and Insolvency", it is contended that the provisions of this subsection making the amount unpaid on their respective shares "a debt payable to the trustee forthwith" is *ultra vires* of the Parliament of Canada in so far as it purports to impose upon a shareholder an obligation to pay forthwith instalments which by the express terms of the agreement under which the shares were acquired are not yet due and payable. The basis of the contention is that it varies a contract and is substantive legislation in respect of a civil right, concerning which the Legislature of the province has exclusive jurisdiction (sec. 92(13) *The B.N.A. Act*) to effect a result which is not reasonably necessary for, nor incidental to, the administration of an estate under *The Bankruptcy Act*.

17 In view of the provisions contained in *The Companies Ordinance* in regard to the liability of members or shareholders of companies it is not necessary to determine the question of *ultra vires* for the purpose of this case. The agreement, under which the shares were acquired, must be construed in the light of the Ordinance under which the company (authorized assignor) was incorporated. It is clearly the intention of the Ordinance that the rights of creditors of a company incorporated under it should be protected by making speedily available for the satisfaction of their claims the nominal capital of the company to the extent of the unpaid balance on that portion for which shares have been issued.

18 Section 44 renders a shareholder liable, to the extent of the amount unpaid on his shares, to a creditor who has an execution against a company which has been returned unsatisfied in whole or in part; sec. 17 imposes a "liability on the part of the members to contribute to the assets of the company in the event of the same being wound up as is hereinafter mentioned."

19 Section 47 provides as follows:

> 47. In the event of a company formed under this Ordinance or any other Ordinance of the Territories being wound up every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company and the costs, charges and expenses of the winding up and for payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves with the qualifications following, that is to say:
>
> (*d*) In the case of a company limited by shares no contribution shall be required from any member ex-

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ceeding the amount if any unpaid on the shares in respect of which he is liable as a present or past member.

20 The liability which is imposed by this last section is, as indicated by subsec. (*d*), not an additional liability to that which the shareholders are under for the unpaid balance of their shares but relates to the same obligation, the one assumed by a shareholder when he becomes such. This was the construction placed upon the corresponding section of *The Companies Act*, 1862 (Imp.), sec. 38, by Lindley, L.J., in *In re Pyle Works* (1890), 44 Ch. D. 559, at p. 584, 59 L.J. Ch. 498, 62 L.T. 887, 38 W.R. 674.

21 It is suggested that this sec. 47 of the Ordinance can be effective only in the case of a company which is in the course of "being wound up" under a winding-up Act so called, such as *The Winding-up Act*, R.S.C., 1906, ch. 144, or *The Companies Winding Up Act*, R.S.A., 1922, ch. 170, and that it has no application to a proceeding under *The Bankruptcy Act, supra*, or in any event it can be effective only in regard to solvent companies which are being wound up voluntarily, otherwise it would be insolvency legislation and *ultra vires* of the Legislative Assembly.

22 The section imposes the liability to contribute in the case of any company incorporated as therein provided "being wound up." These last words do not refer to a winding-up under any particular Act as in the sense of a dissolution. A complete winding-up may be a condition precedent to a dissolution (See *The Companies Winding Up Act, supra*, secs. 3, 34-36.) The words as here used mean a winding-up of the business of the company in the sense of a realization of the assets, a distribution of the proceeds amongst the creditors and an adjustment of the right of shareholders amongst themselves. A company may be wound up just as effectively in this sense under *The Bankruptcy Act* as under either of *The Winding-up Acts, supra*, and, if desirable, proper proceedings by way of an application to the Court may be taken for the dissolution of the company.

23 Nor is this section, in my opinion, insolvency legislation. It was within the competency of the legislative body enacting it. It is a provision of *The Companies Ordinance, supra*, under which the company was incorporated and has to do with the liability of a shareholder *ab initio*, and is one in contemplation of which all articles of association of companies incorporated under the Ordinance, and all agreements entered into by such companies under which shares are issued, must be deemed to have been made. It has to do with liability assumed by shareholders at the time when they become such, rather than the administration of the affairs of insolvent companies. The provisions of this section are similar to the provisions contained in sec. 38, *The Companies Act*, 1862, referred to above, which section was included under the general heading of "Liability of Members." It was subsequently re-enacted as sec. 123, *The Companies (Consolidation) Act*, 1908 (Imp.), ch. 69, in which it is included for convenience, no doubt, in Part IV., which has to do with the winding-up of companies. The effect of the section is that upon the happening of a contingency, namely, the winding-up of a company, any provisions, whether contained in the articles of association or an express agreement whereby the payment for the shares in whole or in part is delayed beyond the commencement of the winding-up proceedings, are abrogated and the shareholder is bound to pay in accordance with the terms prescribed by the statute governing the winding-up.

24 The liability of the shareholders to pay for their shares in this case arose at the time they became shareholders of the company. The time at which they would pay for their shares was determined by the agreement under which the shares were purchased. This section (47) sets aside those terms, but does not release the shareholder from liability to pay for his shares. They are in the same position as if no agreement had been entered into, ordinary subscribers to whom shares had been allotted and in connection with which a balance remains unpaid. The terms and conditions upon which that obligation is to be discharged, the procedure for the enforcement

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of the payment and the distribution of the moneys realized, is left to be determined in accordance with legislation enacted by a competent legisla tive authority which, in the case of an insolvent corporation, is the Parliament of Canada, whether that legislation be such as is contained in *The Winding-up Act* or under *The Bankruptcy Act*, as in this case. The contributories being liable for the payment of the balance unpaid on their respective shares in accordance with the terms laid down in the statute under which the authorized assignor is being wound up *The Bankruptcy Act*, and subsec. 3 of sec. 36 [1 C.B.R. 41, 585] of that Act, having constituted these balances debts "payable to the trustee forthwith ** on the execution ** of an [the] authorized assignment," the trustee is entitled to judgment for the full amount of the unpaid balance, unless effect is to be given to the contentions of the contributories, which remain to be considered.

25 As to (c), their right to have the demand disallowed on the ground that it is unjust: Sec. 36, (9) of *The Bankruptcy Act* [1 C.B.R. 42] provides as follows:

> If the contributory considers the demand excessive or unjust he may apply to the court to reduce or disallow it.

26 It is suggested that the demand should be disallowed for the reason that it proceeds to enforce the payment of instalments before the time agreed upon with the company when they became shareholders.

27 As I have already indicated, the trustee is entitled to demand payment immediately. To hold that it would be unjust to allow him to enforce his demand would be to say that the right which was given to him by statute was unjust and to relieve against it would practically amount to setting aside the statute, which the Court has no power to do. I do not think that "unjust" is used here in the sense contended for. It is probably intended to give an opportunity to those who are registered in the books of the company as shareholders, and consequently summarily made contributories by the Act, to show cause why on legal or equitable grounds they should have their names removed from the register and thus be relieved from their liability as contributories. "Unjust" here means illegal in the sense that there is no legal liability. If the contributories desired to be relieved on the ground of hardship the Court has power in the exercise of its discretion, under Bankruptcy Rule 127 [1 C.B.R. 218], to stay the issue of execution upon such terms as to security or otherwise as it sees fit. I can see no reason for staying the executions in this case. It is the duty of the trustee to realize as speedily as possible the assets of the estate and to distribute the proceeds amongst the creditors.

28 As to (d), their right of set-off: The right of set-off is provided for in sec. 28 (1) of *The Bankruptcy Act* [1 C.B.R. 35] which provides:

> 28. (1) The law of set-off shall apply to all claims made against the estate, and also to all actions instituted by the trustee for the recovery of debts due to the debtor in the same manner and to the same extent as if the debtor were plaintiff or defendant, as the case may be, except in so far as any claim for set-off shall be affected by the provisions of this Act respecting frauds or fraudulent preferences.

29 The law of set-off applicable is that in force in the various provinces which, in regard to the right of a shareholder to set-off against his liability for unpaid balance on his shares dividends out of profits to which he is entitled, is that contained in sec. 47 (*g*) of *The Companies Ordinance, supra*, which provides:

> 47. (*g*) No sum due to any member of a company in his character of a member by way of dividends, profits, or otherwise shall be deemed to be a debt of the company payable to such member in a case of competition between himself and any other creditor not being a member of the company.

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30 There is in this case clearly a competition between shareholders and a large body of creditors who are not members of the company, and the contributories are not entitled to set-off against their liability for the unpaid balance of their shares moneys which are owing to them by way of dividends.

31 Having determined the questions raised by the contributories adversely to them, the trustee is entitled to judgment for the full amount of the demand, less any amounts which may have been paid on account thereof, which I find to be on account of Love $35.76, and on account of Knudson $55.

32 There will be no order for costs against the contributories and the trustee will have his costs out of the es- tate.

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TAB 4

C
2001 CarswellBC 3560

Redekop Properties Inc., Re
In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
And In the Matter of the Company Act, R.S.B.C. 1966, C.62
And In the Matter of Redekop Properties Inc., 535401 B.C. Ltd., and 546837 B.C. Ltd.
British Columbia Supreme Court [In Chambers]
J.S. Sigurdson J.
Heard: March 2, 2001
Oral reasons: March 2, 2001
Docket: Vancouver L003294

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Counsel: D.K. Fitzpatrick for Co-creditors

G. Thompson for SunLife

J.Z. Ahmad for VanCity

M.I.A. Buttery for Monitor

M.L. Palleson for Global

Subject: Insolvency; Civil Practice and Procedure

Bankruptcy and insolvency --- Proposal -- Companies' Creditors Arrangement Act -- Application of Act

Company owned mall subject to three mortgages from two secured lenders -- Real estate developer and numbered company were shareholders in company -- Company's secured lenders threatened foreclosure -- Company successfully applied for stay of proceedings under Companies' Creditors Arrangement Act -- Developer's debenture holders gave notice of default -- Developer and numbered company successfully applied for stay of proceedings under Act and order was made joining them -- Company, developer, and numbered company brought petitions for order to continue protection under Act -- Petitions dismissed -- Company was exempted from proceedings under Act and stay order in that respect was not continued -- It was unlikely there was sufficient equity to satisfy charge holders -- Protection company wished to obtain was available in practical terms in foreclosure proceeding and foreclosure proceeding allowed secured creditors to begin to enforce security -- There was relative absence of unsecured creditors and no real ongoing business -- Orders under Act in connection with developer and numbered company were not continued -- There was no reasonable prospect of success for plan due to factors such as lack of equity in mall and absence of sufficient equity in various projects to satisfy in full debt to first debenture holder -- It had been several months since first order and plan was still tentat-

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ively formulated -- Nature of enterprise was not going concern.

Cases considered by J.S. Sigurdson J.:

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 1990 CarswellBC 394, 4 C.B.R. (3d) 311, (sub nom. Chef Ready Foods Ltd. v. Hongkong Bank of Canada) [1991] 2 W.W.R. 136 (B.C. C.A.) -- followed

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) -- considered

Pacific National Lease Holding Corp., Re (August 17, 1992), Doc. A922870 (B.C. S.C.) -- followed

Philip's Manufacturing Ltd., Re (1992), 9 C.B.R. (3d) 25, 67 B.C.L.R. (2d) 84, 4 B.L.R. (2d) 142, 1992 CarswellBC 542 (B.C. C.A.) -- distinguished

Royal Bank v. Fracmaster Ltd. (1999), (sub nom. UTI Energy Corp. v. Fracmaster Ltd.) 244 A.R. 93, (sub nom. UTI Energy Corp. v. Fracmaster Ltd.) 209 W.A.C. 93, 11 C.B.R. (4th) 230, 1999 CarswellAlta 539, 1999 ABCA 178 (Alta. C.A.) -- followed

United Used Auto & Truck Parts Ltd., Re (1999), 12 C.B.R. (4th) 144, 1999 CarswellBC 2673 (B.C. S.C. [In Chambers]) -- considered

Statutes considered:

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

Generally -- referred to

s. 11(3) -- considered

s. 11(4) -- considered

s. 11(6) -- considered

PETITIONS by debtors to continue orders staying proceedings under Companies' Creditors Arrangement Act.

***J.S. Sigurdson J.*:**

1 The question before me is whether *ex parte* orders that I made granting a stay of proceedings under the *Companies' Creditors Arrangement Act* (the *C.C.A.A.*) should continue. These orders were made in favour of three companies: 535401 B.C. Ltd. (the "numbered Middlegate company"); Redekop Properties Inc. ("R.P.I."); and 546837 B.C. Ltd. That last company, as to 80 percent, and R.P.I., as to 20 percent, are the shareholders in the numbered Middlegate company.

2 R.P.I. is a real estate developer. It, alone or with other companies, owns the shares in seven companies that are involved in property development and the sale of commercial real estate. R.P.I. is a public company trading on the Toronto Stock Exchange.

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History of the Applications

3 I will start with a brief history of the orders that I have made. On December 4, 2000, I made an *ex parte* order on the application of the numbered Middlegate company for a stay of proceedings under the *C.C.A.A.* That company was the sole petitioner and the owner of the Middlegate Mall in Burnaby, which was subject to three mortgages totalling almost $20 million. Foreclosure proceedings had been threatened by the secured lenders, VanCity and SunLife. A comeback hearing, as it is called, was set to consider whether to continue that order after notice was set. After some adjournments, the application to continue the original order made under the *C.C.A.A.* was set for early February 2001.

4 Counsel for the numbered Middlegate company apparently came to the realization, while evaluating Middlegate's assets and considering the elements of a possible plan of arrangement, that the Middlegate numbered company could not be considered in isolation. There were, it appears, 103 condominiums in 4 developments held by separate numbered companies owned in whole or in part by R.P.I. By the time of the original comeback hearing, the first and second debenture holders of R.P.I. had given notice of default.

5 An application was made by R.P.I. and 546837 B.C. Ltd. for an order that a stay of proceedings against them also be granted. Although I heard some argument on whether to set aside or continue the original order, I made an order to join those two new petitioners and extend *C.C.A.A.* protection to them as well. I considered that order to be essentially *ex parte*.

6 After I made an initial order joining those parties, I adjourned until February 22 the applications whether to continue the *C.C.A.A.* protection in connection with the three companies. Therefore, the applications before me on February 22 and 23 were the comeback hearings to determine whether any or all of the orders should continue after hearing submissions from interested parties.

Background

7 Under the initial *ex parte* order and the subsequent *ex parte* orders, Ernst & Young Inc. were appointed monitor of the three companies. They have reported to me on the circumstances affecting all three companies. Through different entities, Peter Redekop has been a successful real estate developer in British Columbia. R.P.I. is the parent of seven companies in the Redekop Group, which are involved in the rental and sale of commercial real estate. The Middlegate numbered company is owned 20 percent by the petitioner, R.P.I., and 80 percent by the other petitioner, a numbered company beneficially owned by Peter Redekop.

8 The Middlegate numbered company initially bought the property known as the Middlegate Shopping Centre in 1997, intending to redevelop the site. The company, the monitor points out, has of late been under-capitalized and is unable to complete its rezoning phase. However, it operates the shopping centre as landlord through an agent. The largest creditors of the Middlegate numbered company total $19.9 million and hold mortgage security. VanCity has a first and third mortgage and Sun Life has a second mortgage. Sun Life made its demand under the mortgage on November 22, 2000, shortly before the first order. R.P.I. has provided financial support to the numbered Middlegate company to help it meet the interest payments on the first, second, and third mortgages to the extent that the revenue from the shopping centre was deficient.

9 I will briefly list the other companies in the Redekop Group and the name of the project that they are involved in: 549884 B.C. Ltd. (Blenheim Terrace); 543714 B.C. Ltd. (the Madison); 529901 B.C. Ltd. (the Citadel); 406751 B.C. Ltd. (Abbotsford Lane); Redekop Properties Hampton Place 3 Inc. (the Regency).

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10 Historically, R.P.I. has provided support to its subsidiaries on an ongoing basis amounting to about $64,000 per month. Recently and presently the majority of the funding has been going to Middlegate to meet its interest payments. As of January 31, 2001, R.P.I.'s cash balance was about $1.5 million, the main source being an advance on the equity that R.P.I. expects to receive in the Regency project.

11 I will describe R.P.I.'s projects through its subsidiaries. The Madison is a 63-unit residential building with 10 strata retail units. It is located on 4th Avenue in Vancouver and it presently holds the remaining 34 residential suites and eight retail suites. It is managed by a management company and R.P.I. supplements its debt service by about $6,500 each month.

12 The Regency is a joint venture project in which R.P.I. has a 50 percent interest. It is a 123-unit condominium development near UBC with 19 units sold or subject to sale. R.P.I. does not receive any proceeds from the sales as its equity in each unit is being used to pay off a loan totalling about $1.5 million from its joint venture partner.

13 The Middlegate Shopping Centre's only source of funding is the cash flow from the shopping centre. R.P.I. has been required to provide funding, estimated to average $44,000, to supplement the shopping centre's income to enable it to meet expenses and debt servicing.

14 Blenheim Terrace is a multi-level, mixed use building on Blenheim and 4th Avenue. The 50 residential units were sold en bloc and of the eight commercial units, two are occupied by R.P.I., one is leased, and the remaining five are unoccupied. R.P.I. has been providing funding to the extent of $3,000 for ongoing costs and $9,500 for debt service. The company expects an offer to lease on one unit and an offer for sale on three units shortly.

15 The Citadel is a 33-unit apartment building in Surrey that is managed by Colliers. All suites are rented. R.P.I. supplements the cash on a monthly basis to the extent of about $1,000 for expenses and debt servicing.

16 According to the Monitor, equity beyond the secured debt is assured in the Regency, Citadel, and Madison projects, but not in the Middlegate or Blenheim. In recent years, R.P.I.'s practice has been to incorporate a new entity for each project. Newer projects have yet to be launched.

17 There are first and second debenture holders charging the assets of R.P.I. The first debenture holders are owed about $5.7 million and the second debenture holders are owed $10.25 million. They charge the various assets of R.P.I.

The Plan

18 In the first Monitor's report of January 30, 2001, it described a plan. At that stage it was to salvage the numbered Middlegate company as that was the only company then seeking protection of the *C.C.A.A.* The plan was described as two strategies being pursued concurrently: (1) source a joint venture partner to finance the project and proceed with the development of the shopping centre, and; (2) sell the shopping centre in its present state.

19 By the recent hearing last week concerning the joinder of R.P.I. and the other numbered company, the plan had changed somewhat. It was described in the petitioner's brief that the company would sell each project in the ordinary course of business and pay its registered lenders in accordance with their priority. It would continue to

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seek a joint venture partner for Middlegate and develop same unless a sale was available. The company's "germ of a plan", as Mr. Fitzpatrick referred to it, was that it would pay a million dollars immediately upon approval of the plan, the company would appraise the value of its property on a liquidation basis and the company would issue shares. The shares would be the only prospect of recovery for the unsecured creditors and the common shareholders of R.P.I. would get nothing if there were no plan.

20 The petitioner sought an order to extend the stay under the *C.C.A.A.* until April 30, 2001, to put a plan in place and to obtain the requisite approval of the creditors.

21 The Monitor reported on the prospects of the plan by indicating that the primary stakeholders, in presenting any plan of arrangement to the creditors of R.P.I., would be the holders of the first and second debentures. Both sets of debentures hold security against all the assets of R.P.I. The Monitor's view was that if there was no recovery on the inter-company loan made by R.P.I. to Middlegate, in the liquidation proceeding the amounts owing to the first series debentures would not be paid in full. This inter-company loan from R.P.I. to the numbered Middlegate company appears to be in the range of $6.3 million.

22 There are a limited number of unsecured creditors. The Monitor thought that it appeared that there would only be partial recovery available to certain of the secured creditors and no recovery available to the unsecured creditors unless there was a successful restructuring plan. For the plan to be successful, the Monitor thought the proposal would have to be more attractive than any other alternative. This plan would also need to appeal to the unsecured creditors who, on the information currently available to the Monitor, would appear to be facing the prospect of receiving no recovery on their outstanding debt.

23 The Monitor's view was that for a real estate company such as R.P.I. to execute a successful restructuring, the following elements would need to be available and attractive to these creditors most affected by a plan:

> 1. some level of currency to provide short term appeal to induce creditors to await the longer term benefits being offered in the plan;
>
> 2. prospective new profitable projects;
>
> 3. sufficient capital available to undertake and execute those projects.

24 The Monitor pointed out that as a public company R.P.I. has available the currency of its publicly traded shares to offer to creditors as an inducement and a substantial cash position (it appears over one million or more) available as an initial payment available to secured creditors, but not subordinated creditors.

25 The Monitor also pointed out that the petitioners have provided information as to the projects it advises are presently under consideration and the basis on which such projects could be financed, even in light of R.P.I.'s present substantial shortage of capital. At the last hearing, when the stay of proceedings was extended to the additional companies, I suggested that the adjournment date for this hearing gave the company an opportunity to provide more cogent evidence about their plan.

26 The Monitor points out that the petitioners are contemplating a planned structure that would provide recovery to secured creditors of at least what would be realized in the event of the liquidation of the group. The Monitor gave this rather guarded assessment in his second written report as follows:

> Based on the foregoing, it would appear that R.P.I. has available to it the necessary elements with

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> which to construct a plan of arrangement for presentation to its creditors. **What is not in evidence at this time, however, is whether each of these elements is available in sufficient amounts that such a plan of arrangement would be acceptable to creditors. Until the petitioners have quantified the financial benefits of those future projects, and secured commitments with respect to financing of those projects, the future appeal of R.P.I. as a going concern will be uncertain. As the going concern future of R.P.I. will have a significant bearing on the value of any shares which it may propose to offer creditors in partial settlement of present liabilities, that element of the petitioner's plan also cannot be quantified at this time.**
>
> [emphasis added]

27 In the concluding paragraph of the Monitor's report, it reported as follows:

> In the view of the Monitor, it is feasible that the petitioner can present to the creditors an appropriate plan of arrangement to effect a general restructuring of their affairs. The group has significant cash available, and the prospect of offering shares in the public company, to provide an early incentive for support by creditors. The group also has prospects for new development projects which would be a basis for continuing operations. **However, not all of the elements which, in the Monitor's view, would be required to formulate such a plan are known with sufficient certainty at this time to be able to assess whether that plan would be acceptable to the affected creditors.**
>
> [emphasis added]

Positions on the application

28 Mr. Fitzpatrick, counsel for the petitioner companies, sought the continuation of the protection of the *C.C.A.A.* until April 30, 2001, in order to put a plan together that might be successful. Mr. Thompson, representing SunLife, and Ms. Ahmad, representing VanCity, opposed the stay, or alternatively took the position that the Middlegate property should be excluded from the *C.C.A.A.* proceeding and I should exercise my discretion to allow them to proceed with their planned foreclosure proceedings.

29 Mr. Palleson appeared for the first debenture holders and opposed the order sought. No one appeared for the second debenture holders, although they were duly served, nor did anyone appear for any unsecured creditors. Mr. Knowles appeared for the Monitor.

30 The relevant sections of the *C.C.A.A.* are as follows. Section 11(3) provides:

> (3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,
>
> > (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
> >
> > (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
> >
> > (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

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31 Section 11(4) provides that on an application that is not an initial application, a court may make the following types of orders on such terms as it may impose:

> (a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

32 The *Act* in s. 11(6) sets out the burden of proof on the applicant companies, and it provides:

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

33 To summarize, the statute makes it clear that the burden on the applicant on this application is to satisfy the court that the circumstances exist that make such an order appropriate and the applicant has acted and is acting in good faith and with due diligence.

34 The appropriateness of the order, I think, has to be considered with the purpose of the statute in mind, and I turn to some authority in that respect.

35 In the leading case of *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 (B.C. C.A.) at 88, the Court said:

> The purpose of the ***C.C.A.A.*** is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company or a loan company. When a company has recourse to the ***C.C.A.A.*** the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11.

36 In dealing with the broad policy objectives of the *Act*, the Court said at p. 91:

> Almost inevitably liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government

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> of the day sought, through the ***C.C.A.A.***, to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business.

37 In *Pacific National Lease Holding Corp., Re*, [1992] B.C.J. No. 3070 (B.C. S.C.); (17 August 1992), Vancouver Registry, A922870 (B.C.S.C.), the principles to consider on an application under the *Act* were set out by Mr. Justice Brenner (as he then was) in a case where leave to appeal was denied by the Court of Appeal. He said the following:

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

38 I pause here to observe that I do not think that the burden is on the creditors opposing this order to prove that it is doomed to fail. The position the creditors are taking is not framed that way. They are simply opposing the order that is sought by the petitioners to continue the *C.C.A.A.* protection after notice to them. This is an application to confirm or continue an original *ex parte* order. I think the burden rests on the company to show not only that they have acted with due diligence and in good faith, but that the continued protection of the *Act* is appropriate. This is not a case like *Philip's Manufacturing Ltd., Re* (1992), 67 B.C.L.R. (2d) 84 (B.C. C.A.), which involved an application to set aside an order of another Chambers judge on the ground that the plan was doomed to fail.

39 On an application of this sort, I must weigh the interests of all affected parties. I pause also to note this observation in *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at 32:

> The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and *all* the creditors ...

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40 The applicants argue that an application of those considerations requires a stay to determine whether, prior to April 30, a plan, which they now concede is just a germ of a plan, can be formulated that would be approved and in the interest of everyone. The respondents, i.e., the secured creditors including the first debenture holders, all argue that there is really no plan, simply a hope and a prayer, and that there is no broad constituency or wide public interest or ongoing business that requires the support of a court order staying proceedings under the *C.C.A.A.*

The Middlegate Numbered Company

41 I will deal first with the Middlegate property. The secured creditors on this property argued that the order should not be extended or that this property at least should be exempted from the *C.C.A.A.* proceedings so that they can pursue their foreclosure remedy.

42 The Middlegate property was bought by the Middlegate numbered company in 1997. The shopping centre is 120,000 square feet and was built in 1960 on a 9.78 acre site. It is on Kingsway in South Burnaby. The owner's intention was to redevelop the site. Since 1997, the company has operated the shopping centre as landlord using the services of Colliers Macaulay Nicolls to collect rents and manage the property. As the owner is undercapitalized, other than initial planning and the completion of rezoning applications, the redevelopment of the site has not commenced. It requires $2.27 million to proceed with the rezoning. The registered charges against the Middlegate property are: VanCity's first mortgage of $10 million; Sun Life's mortgage of $7.915 million; and VanCity's third mortgage of $2 million, for a total of $19.915 million, together with some accumulated interest over the last while. Under the order I made on February 5, 2001, those parties as of that date are not receiving interest payments.

43 The Middlegate numbered company's arguments are as follows. They say that given time the Middlegate numbered company would find a joint venture partner or a sale sufficient to generate proceeds to pay out the mortgages and to pay money on its indebtedness to R.P.I. for the benefit of all R.P.I.'s creditors. They say that they have pursued the application for a stay in connection with Middlegate in good faith and with due diligence. The Middlegate numbered company submits there is sufficient equity in the property to satisfy the three mortgages and more.

44 The parties have filed appraisal evidence. R.P.I. filed an appraisal dated October 2000 from Duncan Elliott Appraisers, which stated the estimated current market value under the present zoning was $22,100,000 and under the proposed rezoning was $28,480,000. On December 15, 2000, Sun Life obtained an appraisal from CB Richard Ellis indicating the market value as of December 15, 2000, was $14,200,000.

45 The petitioner argues that the intended purpose of the Ellis appraisal, as I will refer to it, was a court ordered sale, whereas the Elliott appraisal was to estimate the proper value as a development site. The petitioner argues that the Ellis appraisal indicates the market has bottomed out. In a letter of January 31, 2001, Mr. Elliott indicated that the fundamental difference between the value conclusions was based on terms of reference, his being based on a conventional definition of market value, and that at this time, "we are still clearly in the lower part of the cycle although there are some signs that some sectors of the real estate market are or have been already recovered significantly." He says that at this time, in order to meet the criteria of a willing seller and buyer, a longer than normal market exposure period is required to effect a sale. He suggests that the Ellis appraisal appears to have been severely discounted to effect a forced sale. Mr. Elliott says in his opinion, "the conclusions drawn in the CB Richard Ellis valuation and expressed in a letter provided to us suggests that the value

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conclusions drawn are based on two different concepts of market value and that there are additional fundamental disagreements about methodology in arriving at a final conclusion." In a more recent letter, Mr. Elliott challenges the approach that was taken by Ellis and says that it significantly understates the value, ignores its substantial size, and in essence double discounts the land by using low unit rates on land sales he challenges and then again discounting to reflect a long holding period.

46 Mr. Luke Zych, a real estate investment officer for SunLife Assurance, deposed that based on his extensive experience in real estate and in reviewing the Ellis appraisal, he did not believe that the development of the shopping centre was feasible at this time and will not be for at least two years. He notes Ellis indicates as fol- lows:

> Under current conditions it is highly questionable that redevelopment is viable. Housing starts in British Columbia have dropped from 25,210 in 1997 to 16,309 in 1999 reflecting the current recessionary housing environment. Specifically in Burnaby housing starts dropped from 1,058 units to 483 units during the same period. This situation has occurred due to the slow economic growth currently being experienced by British Columbia. As well, condominium sales have been negatively impacted by 'leaking condo' concerns ... current new projects have experiencing slow absorption. Typical sale rates arranging from 1 to 4 units per month per project and averaging around 2-1/2 units per month. (See Addendum "K"). The proposed redevelopment of the subject will provide approximately 750 to 800 residential units. At a sales rate of 2.5 units per month this represents an absorption period of approximately 300 months or 25 years. This goes well beyond any reasonable time horizon for development. Accordingly, new development is not considered to be viable at this time.
>
> With this in mind, the highest and best use for the property is considered to be a holding property until marketing conditions improve substantially in order to allow for redevelopment to occur. Once the market is healthy, it is expected that the whole project will take four to five years to absorb.

47 Mr. Zych contends that, taking into account poor market conditions, declining land values, and declining rental income, the Ellis appraisal of $14,200,000 is more appropriate. He said neither appraisal provides any discount for sale, but given the *C.C.A.A.* proceedings, he thinks that a discount is appropriate. He indicates that the Ellis appraisal indicates a 25- year absorption rate for development, whereas in a healthy market a four to five-year absorption period is expected. He also notes that the Ellis appraisal indicates that net income from the mall has declined from $1,025,000 in 1997 to around $800,000 today, and this downward trend, he says, will probably continue. He indicates that the Ellis appraisal notes that land sales have been extremely slow, and sales have indicated the substantial drop in value. He also indicates that the Middlegate Mall was sold in a very heated market compared to the current market. In his opinion, an appraised value less than the original price of $20,700,000 is necessary.

48 He contends it is difficult to accept the current value of the property as higher than it was in 1997 and that the sale of the property would not yield sufficient funds to satisfy VanCity's third mortgage.

49 I think that the view that Mr. Zych takes of the market is supported by the material attached to the affidavit of David Bowra. Mr. Bowra is a chartered accountant with PricewaterhouseCoopers and was retained to assist the debenture holders, the first debenture holders, in their consideration of the proposed restructuring plan and in reviewing the equity positions in the various properties. He deposed that he reviewed the appraisals with Neil Acheson, a vice-president of his firm who has extensive experience in Canadian real estate development. He

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says that, given the market may be three to five years away from absorbing a project of this size and type and both appraisers agree that it would take two to three years to successfully redevelop the Middlegate property, even if one accepts the scenario of recovery of $20 million, it will be insufficient to pay the amounts under the mortgages of $19.9 million, costs, interest and incidental charges such as property taxes. Given that, he says, there will be insufficient money to pay out the mortgagees.

50 The applicants argue in connection with the Middlegate property and the plan generally that it is too early to tell if the plan will come to fruition or not.

51 The secured creditors opposed the stay of the Middlegate foreclosure for a number of reasons. They say that it is not appropriate to continue the order. They say that there is no reasonable chance of success given that it is unlikely there will be sufficient monies to satisfy the secured creditors and delay to them in commencing and continuing foreclosure proceedings is to their prejudice. They argue that the authorities require that the interests of all creditors be considered and, given the circumstances surrounding the valuation, it is not reasonable to conclude there is any reasonable prospect of a plan succeeding, at least not one concerning Middlegate.

52 I find, on the evidence, the Middlegate numbered company's position to be somewhat illogical. They argued that the value of the shopping centre is greater or equal to what they paid for it in 1997 when, by the weight of the evidence, it was a hot market. The evidence filed by the companies suggests that the market may now have just bottomed out. The evidence of Mr. Redekop and his appraiser indicates that the market has fallen since that time and indicates that the purchase was made in a hot market. It appears to me that when Mr. Bowra agreed on cross-examination that in time a greater amount may be recovered from this property, he was referring to a significant time to pass to be able to generate such value.

53 The evidence of negotiations for the sale of Middlegate does not provide any cogent evidence that the market value within a reasonable time might exceed the debt and taxes against the property. There is no evidence of a possible sale, other than an offer of February 5, 2001, from a numbered Saskatchewan company where an offer of $17 million has been countered by the Middlegate company at $22,600,000 on February 9th. I was shown the documents and was told there was no response for that counteroffer as of yet, and while I have reserved on this matter over the last week I have heard nothing further on that sale and assume that no reasonable counterproposal has been made.

54 The secured creditors also argue that there is another factor that I should consider that is material to whether I should continue the *C.C.A.A.* protection. The secured creditors argue that *C.C.A.A.* protection should not be continued in connection with the Middlegate numbered company because, in essence, there is no ongoing business that is the subject of these proceedings. In particular, they say that the company that is the subject of the Middlegate application is not a going concern with employees and unsecured creditors that are impacted by the possible demise of the company. They say it is different -- it is simply a holding company, holding a shopping centre managed by an agency firm.

55 The respondents argue that the *C.C.A.A.* is essentially and generally designed for corporations involving a host of secured, preferred, and trade creditors, employees and shareholders. The evidence indicates that even when R.P.I. was brought under the umbrella of *C.C.A.A.* protection, there was essentially only a landholding and land sale operation run by management companies with few employees. The respondents argue that this is a factor that tends to indicate that this case is not an appropriate case for *C.C.A.A.* protection.

56 I think that the following passage suggests that the existence or possible continuation of an ongoing busi-

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ness is at least a factor to consider when determining whether it is appropriate to make an order. This was as much as what was said by Mr. Justice Tysoe in *United Used Auto & Truck Parts Ltd., Re* (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]) at 150, where he said the following in the context of what was more clearly an ongoing operation with potentially affected creditors and employees:

> In the present case, the Petitioners have substantial land holdings and an operating business. (They employed 75 people.) It is their intention to reorganize their affairs in order to save the auto wrecking business. They have a legitimate concern that an en bloc sale of the land in the foreclosure proceedings could bring an end to the operating business. In my view, it is not an act of bad faith to seek the protection of the CCAA in order to save the operating business. **The arguments of the secured lenders in this regard would have been more persuasive if the only business of the Petitioners was land holdings, but the Petitioners do have an active business which must be considered.**
>
> [emphasis added]

57 Finally, VanCity argues that it is the one most at risk concerning the Middlegate property. During the stay they are not receiving interest payments. They say there is no equity. The VanCity mortgage provides for an increase in interest upon default, which they claim is an enforceable provision.

58 The secured creditors argue that there is no need, given the relief that the company is seeking, to continue under the protection of the *C.C.A.A.* The creditors argue that the relief that the Middlegate numbered company seeks can be provided by the court in the foreclosure proceeding during the course of a redemption period. If the court finds the circumstances are appropriate, the redemption period might be extended on a number of occasions. The petitioner responds that foreclosure proceedings cast the company and the property in a poor light, but I have difficulty seeing how that is really much different from the *C.C.A.A.* protection proceedings.

59 In a moment I intend to consider the continuation of the *ex parte* order that is sought by the other two companies. I think that the Middlegate company can be isolated. The applicants are essentially looking for the generation of cash, hopefully by sale or joint venture from the Middlegate property, to pay towards the debt to R.P.I.

60 I think that in considering the fairness to all the parties, including the debtors and the creditors, I have discretion to make an order that the stay be lifted in order to allow the secured creditors to pursue their rights of foreclosure. I think that is the appropriate order in all the circumstances. The evidence persuades me that in all of the circumstances it is very unlikely that there is sufficient equity to satisfy the charge holders. Although I see some prejudice to the creditors in being delayed in realizing on their security, given that they are not receiving interest and given that the market conditions could turn against them, particularly in the case of VanCity, I think that it is appropriate to allow them to proceed to foreclose in the usual way.

61 I do that for a number of reasons. Firstly, I am satisfied that the protection the company wishes to obtain is equally available in practical terms in a foreclosure proceeding, and the foreclosure proceeding allows the secured creditors to begin to enforce their security. The options of seeking a joint venture partner or selling are just as available in a foreclosure as they are under the protection of a *C.C.A.A.* proceeding.

62 The other arguments to which I have referred also have merit. Logic suggests that the value of the project in the existing market conditions is unlikely to exceed the original 1997 price. To not allow the secured creditors to attempt to enforce their security would be to allow the company to speculate with the risk of prejudice weighing too heavily against the secured creditors, particularly VanCity.

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63 It is also a factor that this type of company is not the classic ongoing business to which *C.C.A.A.* protection is often afforded. I do not say that protection might not, in appropriate circumstances, be extended to companies with few unsecured creditors and no real ongoing business, but I think that the relative absence of these things are factors to consider in determining whether to continue an order involving a company or to allow the secured creditors to foreclose.

64 Accordingly, I would exercise my discretion and exempt the Middlegate numbered company from the *C.C.A.A.* proceedings and not continue to stay the order in that respect.

65 I will now consider whether or not I will set aside or continue the order in connection with the other two companies. These other two companies argue that the order should be extended. Mr. Fitzpatrick argued that the burden on him was to show that the companies had acted in good faith and were proceeding diligently, and that there is a germ of a plan, the elements of which were described by the Monitor that I have set out. The petitioners argue that that is sufficient in the circumstances for an order that the stay continue.

66 The petitioners stated in their brief that, "a stay will only be ordered where there is a reasonable chance the insolvent company can continue to operate its business as a going concern." The petitioners also referred to the *Lehndorff* passage and stressed this argument in their submissions that, "... it is otherwise too early for the court to determine whether the debtor company will succeed."

67 They argue that the elements of the plan described above exist and that the affairs of the company should be regularized in the next two months to permit this. They rely on possible funds coming from the sale or joint venture development of the Middlegate property.

68 They argue that the third mortgage is secured by a pledge of 500,000 shares of Wall Financial Corporation, currently trading at about $3.05 a share. The company says that the cash outlay, given the restriction on the payment of interest expenses on Middlegate, will, according to the Monitor's report, mean that they will only expend about $270,000 over the next two months. This is the period of time for which they seek the stay to continue. They argue that the proposal, if completed, will benefit the shareholders, second debenture holders, and unsecured creditors. Mr. Redekop says that if there is a receivership of the company, he expects that the cost will substantially exceed the costs under *C.C.A.A.* proceedings because the proceedings under the *C.C.A.A.* are uni- fied.

69 The germ of the plan is that the company will pay a million dollars out of the available cash within 30 days and will pay the trustee on behalf of the debenture holders a distress amount, which is the estimate of the amount that the first debenture holders might recover anyway in a liquidation or bankruptcy, adjusted downward for the earlier cash payment and the value of the publicly traded securities they will receive. The second debenture holder, it will be proposed, would receive Class B non-voting common shares and some cash payment. The unsecured creditors would also receive some Class B non-voting participating shares.

70 The first debenture holders oppose the *C.C.A.A.* order continuing in connection with R.P.I. and the other numbered company. They argue there would be no additional costs from the appointment of a receiver as there would be one receiver. They argue that a receivership or the plan that the petitioners want to advance is essentially a liquidation as there will be no assets or real operating business at the end of it other than the hope of future projects. Mr. Palleson says that there has been an erosion in the confidence of his client in the management of these companies.

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71 The debenture holders say the cash position of R.P.I. has eroded by a million dollars since the end of December. This was explained by the Monitor. The Monitor demonstrated that, after deducting the share of cash belonging to the joint venture, the consolidated cash on hand was $1.94 million as of December 31st, the cash position as of January 31st was $1.44 million, and that the balance of the cash flow, the petitioners say, will still be less than $300,000 that should be expended over the next two months. (I received a further addendum to the Monitor's second report, which I read this morning.)

72 One of the factors that may be considered at this stage, in determining it is appropriate to continue an order, is whether the company has demonstrated the possibility of a reasonable plan. I think that often it is too early in the scheme of things to tell, but here the original order concerning the numbered Middlegate company was made almost three months ago.

73 Mr. Bowra is a person experienced in dealing with plans under the *C.C.A.A.* He said that R.P.I.'s intention to rely on joint venture partners and new public share offerings to survive as a going concern is simply not realistic. He was cross-examined, and his opinion which he based on these factors was not, in my view, seriously or successfully challenged. I found his evidence compelling. He said that the *C.C.A.A.* protection would be of little utility for several reasons: it has no prospect of restructuring its affairs to be profitable in the near future given current market conditions and the financial position of the properties; it has no current projects under development that appear to be profitable, and one potential development property is overburdened by debt and unlikely to provide any equity to RPI in the short term; and, the current real estate market is soft and there is no sign of improvement in the year ahead.

74 I agree with Mr. Bowra's assessment that this proposal is better described as a wing and a prayer. Mr. Fitzpatrick suggested that Skeena Cellulose presented an even more dire situation that came to fruition, but Mr. Bowra, who was involved in that proceeding, indicated that there was significant government support, including a guarantee and a payout of a secured charge and substantial long-term financing. Those elements are obviously not present here.

75 I think it is also a factor that there are no employees to speak of, there are few unsecured creditors because there is really no going concern business, and the company's projects are built and managed by management companies. Mr. Fitzpatrick says I should look at the prospectus and ascertain that R.P.I. is a going concern, but I do not think that really rebuts this point. I point out this passage in *Royal Bank v. Fracmaster Ltd.* (1999), 11 C.B.R. (4th) 230 (Alta. C.A.) at 238, that has some pertinence:

> Although there are infrequent situations in which a liquidation of a company's assets has been concluded under the CCAA, the proposed transaction must be in the best interest of the creditors generally: ***Lehndorff General Partner Ltd., Re*** (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List], at 31. There must be an ongoing business entity that will survive the asset sale. See, for example, ***Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re***, (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]); ***Solv-Ex Corporation and Solv-Ex Canada Limited***, (November 19, 1997) Doc. Calgary 9701-10022 (Alta. Q.B.).

76 Although on the one hand, the possible benefit to the companies, all of the creditors, and the shareholders of R.P.I. are factors that must be given heavy consideration, as I do, I do not think it is appropriate for the stay under the *C.C.A.A.* to continue.

77 I reach that conclusion for these reasons. I think that given all the evidence before me, there is no reason-

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able prospect of success for this plan. I base that on a number of factors, including the apparent lack of equity in the Middlegate property and apparent absence of sufficient equity in the various projects to satisfy in full the debt to the first debenture holders. There are no monies for the second debenture holders. In the circumstances, I think that the companies are proposing a plan where they are seeking to liquidate their assets and hopefully interest the first debenture holders and others in taking shares in the development of presently unacquired and essentially unknown projects. I think that this plan, if not described as a wing and a prayer, might be accurately described as a gamble, particularly from the perspective of the first debenture holders. It appears extremely unlikely that they would approve it.

78 I also think that the plan is essentially a liquidation plan, but it is one that contains a significant risk to the first debenture holders. It is significant that it is several months from the first order in December 2000, but the plan is still so tentatively formulated. That is a factor that I can give some consideration to, given the passage of time.

79 I also think that I am entitled to give some consideration to the nature of the enterprise. I think that the more that the operation approaches a going concern, with employees potentially losing jobs and ongoing creditors losing customers, the more appropriate it may be to make orders for protection. Conversely, when those elements are absent, as is the case here, it seems less appropriate.

80 Therefore, balancing all of the interests of all relevant parties, as best I can on the evidence before me, I exercise my discretion not to continue the orders under the *C.C.A.A.* because to do so would not be appropriate. Accordingly, the petitions are dismissed.

Petitions dismissed.

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TAB 5

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Sammi Atlas Inc., Re
In The Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36
In The Matter of the Courts of Justice Act, R.S.O. 1990, c.C.43
In The Matter of a Plan of Compromise or Arrangement of Sammi Atlas Inc.
Ontario Court of Justice, General Division [Commercial List]
Farley J.
Heard: February 27, 1998
Judgment: February 27, 1998
Docket: 97-BK-000219, B230/97

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Counsel: Norman J. Emblem, for the applicant, Sammi Atlas Inc.

James Grout, for Agro Partners, Inc.

Thomas Matz, for the Bank of Nova Scotia.

Jay Carfagnini and Ben Zarnett, for Investors' Committee.

Geoffrey Morawetz, for the Trade Creditors' committee.

Clifton Prophet, for Duk Lee.

Subject: Insolvency; Corporate and Commercial

Corporations --- Arrangements and compromises -- Under Companies' Creditors Arrangement Act -- Arrangements -- Approval by court -- Miscellaneous issues

Corporation brought motion for approval and sanctioning of plan of compromise and arrangement under Companies' Creditors Arrangement Act -- There must be strict compliance with all statutory requirements and adherence to previous orders of court -- All materials filed and procedures carried out must be examined to determine whether anything has been done or purported to be done which is not authorized by Act -- Plan must be fair and reasonable -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Corporations --- Arrangements and compromises -- Under Companies' Creditors Arrangement Act -- Arrangements -- Approval by court -- "Fair and reasonable"

Corporation and majority of creditors approved plan of compromise and arrangement under Companies' Creditors Arrangements Act providing for distribution to creditors on sliding scale based on aggregate of all claims held by each claimant -- Corporation brought motion for approval and sanctioning of plan -- Creditor by way of

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assignment brought motion for direction that plan be amended -- Motion for approval and sanctioning was granted, and motion for amendment was dismissed -- Court should be reluctant to interfere with business decisions of creditors reached as a body -- No exceptional circumstances supported motion to amend plan after it was voted on -- No jurisdiction existed under Act to grant substantive change sought by creditor -- Creditor and all unsecured creditors were treated fairly and reasonably -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Cases considered by Farley J.:

Algoma Steel Corp. v. Royal Bank (1992), 11 C.B.R. (3d) 11, 8 O.R. (3d) 449, 93 D.L.R. (4th) 98, 55 O.A.C. 303 (Ont. C.A.) -- applied

Campeau Corp., Re (1992), 10 C.B.R. (3d) 104 (Ont. Gen. Div.) -- applied

Central Guaranty Trustco Ltd., Re (1993), 21 C.B.R. (3d) 139 (Ont. Gen. Div. [Commercial List]) -- applied

Northland Properties Ltd., Re (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.) -- applied

Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada, 34 B.C.L.R. (2d) 122, 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363 (B.C. C.A.) -- referred to

Olympia & York Developments Ltd. v. Royal Trust Co. (1993), 17 C.B.R. (3d) 1, (sub nom. Olympia & York Developments Ltd., Re) 12 O.R. (3d) 500 (Ont. Gen. Div.) -- applied

Statutes considered:

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

Generally -- referred to

MOTION for approval and sanctioning of plan of compromise and arrangement under Companies' Creditors Arrangement Act; MOTION by creditor for amendment of plan.

***Farley J.*:**

1 This endorsement deals with two of the motions before me today:

1) Applicant's motion for an order approving and sanctioning the Applicant's Plan of Compromise and Arrangement, as amended and approved by the Applicant's unsecured creditors on February 25, 1998; and

2) A motion by Argo Partners, Inc. ("Argo"), a creditor by way of assignment, for an order directing that the Plan be amended to provide that a person who, on the record date, held unsecured claims shall be entitled to elect treatment with respect to each unsecured claim held by it on a claim by claim basis (and not on an aggregate basis as provided for in the Plan).

2 As to the Applicant's sanction motion, the general principles to be applied in the exercise of the court's discretion are:

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1) there must be strict compliance with all statutory requirements and adherence to the previous orders of the court;

2) all materials filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the *Companies' Creditors Arrangement Act* ("CCAA"); and

3) the Plan must be fair and reasonable.

See *Northland Properties Ltd., Re* (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.); affirmed (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.) at p.201; *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.) at p.506.

3 I am satisfied on the material before me that the Applicant was held to be a corporation as to which the CCAA applies, that the Plan was filed with the court in accordance with the previous orders, that notices were appropriately given and published as to claims and meetings, that the meetings were held in accordance with the directions of the court and that the Plan was approved by the requisite majority (in fact it was approved 98.74% in number of the proven claims of creditors voting and by 96.79% dollar value, with Argo abstaining). Thus it would appear that items one and two are met.

4 What of item 3 - is the Plan fair and reasonable? A Plan under the CCAA is a compromise; it cannot be expected to be perfect. It should be approved if it is fair, reasonable and equitable. Equitable treatment is not necessarily equal treatment. Equal treatment may be contrary to equitable treatment. One must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) and see if rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to a confiscation of rights: see *Campeau Corp., Re* (1992), 10 C.B.R. (3d) 104 (Ont. Gen. Div.) at p.109. It is recognized that the CCAA contemplates that a minority of creditors is bound by the Plan which a majority have approved - subject only to the court determining that the Plan is fair and reasonable: see *Northland Properties Ltd.* at p.201; *Olympia & York Developments Ltd.* at p.509. In the present case no one appeared today to oppose the Plan being sanctioned: Argo merely wished that the Plan be amended to accommodate its particular concerns. Of course, to the extent that Argo would be benefited by such an amendment, the other creditors would in effect be disadvantaged since the pot in this case is based on a zero sum game.

5 Those voting on the Plan (and I note there was a very significant "quorum" present at the meeting) do so on a business basis. As Blair J. said at p.510 of *Olympia & York Developments Ltd.*:

> As the other courts have done, I observe that it is not my function to second guess the business people with respect to the "business" aspects of the Plan, descending into the negotiating arena and substituting my own view of what is a fair and reasonable compromise or arrangement for that of the business judgment of the participants. The parties themselves know best what is in their interests in those areas.

The court should be appropriately reluctant to interfere with the business decisions of creditors reached as a body. There was no suggestion that these creditors were unsophisticated or unable to look out for their own best interests. The vote in the present case is even higher than in *Central Guaranty Trustco Ltd., Re* (1993), 21 C.B.R. (3d) 139 (Ont. Gen. Div. [Commercial List]) where I observed at p.141:

> ... This on either basis is well beyond the specific majority requirement of CCAA. Clearly there is a

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> very heavy burden on parties seeking to upset a plan that the required majority have found that they could vote for; given the overwhelming majority this burden is no lighter. This vote by sophisticated lenders speaks volumes as to fairness and reasonableness.
>
> The Courts should not second guess business people who have gone along with the Plan....

6 Argo's motion is to amend the Plan - after it has been voted on. However I do not see any exceptional circumstances which would support such a motion being brought now. In *Algoma Steel Corp. v. Royal Bank* (1992), 11 C.B.R. (3d) 11 (Ont. C.A.) the Court of Appeal observed at p.15 that the court's jurisdiction to amend a plan should "be exercised sparingly and in exceptional circumstances only" even if the amendment were merely technical and did not prejudice the interests of the corporation or its creditors and then only where there is jurisdiction under the CCAA to make the amendment requested, I was advised that Argo had considered bringing the motion on earlier but had not done so in the face of "veto" opposition from the major creditors. I am puzzled by this since the creditor or any other appropriate party can always move in court before the Plan is voted on to amend the Plan; voting does not have anything to do with the court granting or dismissing the motion. The court can always determine a matter which may impinge directly and materially upon the fairness and reasonableness of a plan. I note in passing that it would be inappropriate to attempt to obtain a preview of the court's views as to sanctioning by brining on such a motion. See my views in *Central Guaranty Trustco Ltd., Re* at p.143:

> ... In *Algoma Steel Corp. v. Royal Bank* (1992), 8 O.R. (3d) 449, the Court of Appeal determined that there were exceptional circumstances (unrelated to the Plan) which allowed it to adjust *where no interest was adversely affected.* The same cannot be said here. FSTQ aside from s.11(c) of the CCAA also raised s.7. I am of the view that s.7 allows an amendment after an adjournment - *but not after a vote has been taken.* (emphasis in original)

What Argo wants is a substantive change; I do not see the jurisdiction to grant same under the CCAA.

7 In the subject Plan creditors are to be dealt with on a sliding scale for distribution purposes only: with this scale being on an aggregate basis of all claims held by one claimant:

> i) $7,500 or less to receive cash of 95% of the proven claim;
>
> ii) $7,501 - $100,000 to receive cash of 90% of the first $7,500 and 55% of balance; and;
>
> iii) in excess of $100,000 to receive shares on a formula basis (subject to creditor agreeing to limit claims to $100,000 so as to obtain cash as per the previous formula).

Such a sliding scale arrangement has been present in many proposals over the years. Argo has not been singled out for special treatment; others who acquired claims by assignment have also been affected. Argo has acquired 40 claims; all under $100,000 but in the aggregate well over $100,000. Argo submitted that it could have achieved the result that it wished if it had kept the individual claims it acquired separate by having them held by a different "person"; this is true under the Plan as worded. Conceivably if this type of separation in the face of an aggregation provision were perceived to be inappropriate by a CCAA applicant, then I suppose the language of such a plan could be "tightened" to eliminate what the applicant perceived as a loophole. I appreciate Argo's position that by buying up the small claims it was providing the original creditors with liquidity but this should not be a determinative factor. I would note that the sliding scale provided here does recognize (albeit imperfectly)

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that small claims may be equated with small creditors who would more likely wish cash as opposed to non-board lots of shares which would not be as liquidate as cash; the high percentage cash for those proven claims of $7,500 or under illustrates the desire not to have the "little person" hurt - at least any more than is necessary. The question will come down to balance - the plan must be efficient and attractive enough for it to be brought forward by an applicant with the realistic chance of its succeeding (and perhaps in that regard be "sponsored" by significant creditors) and while not being too generous so that the future of the applicant on an ongoing basis would be in jeopardy: at the same time it must gain enough support amongst the creditor body for it to gain the requisite majority. New creditors by assignment may provide not only liquidity but also a benefit in providing a block of support for a plan which may not have been forthcoming as a small creditor may not think it important to do so. Argo of course has not claimed it is a "little person" in the context of this CCAA proceeding.

8 In my view Argo is being treated fairly and reasonably as a creditor as are all the unsecured creditors. An aggregation clause is not inherently unfair and the sliding scale provisions would appear to me to be aimed at "protecting (or helping out) the little guy" which would appear to be a reasonable policy.

9 The Plan is sanctioned and approved; Argo's aggregation motion is dismissed.

Addendum:

10 I reviewed with the insolvency practitioners (legal counsel and accountants) the aspect that industrial and commercial concerns in a CCAA setting should be distinguished from "bricks and mortgage" corporations. In their reorganization it is important to maintain the goodwill attributable to employee experience and customer (and supplier) loyalty; this may very quickly erode with uncertainty. Therefore it would, to my mind be desirable to get down to brass tacks as quickly as possible and perhaps a reasonable target (subject to adjustment up or down according to the circumstances including complexity) would be for a six month period from application to Plan sanction.

Motion for approval granted; motion for amendment dismissed.

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

AND IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C 1985, c. B-3, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SMURFIT-STONE CONTAINER CANADA INC.

Court File No.: CV-09-7966-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at **Toronto**

BOOK OF AUTHORITIES OF MANUFACTURERS AND TRADERS TRUST COMPANY, IN ITS CAPACITY AS INDENTURE TRUSTEE

ThorntonGroutFinnigan LLP
Barristers and Solicitors
Suite 3200, P.O. Box 329
Canadian Pacific Tower
Toronto-Dominion Centre
Toronto, Ontario
M5K 1K7

Robert I. Thornton (LSUC# 24266B)
Tel: 416-304-0560
Seema Aggarwal (LSUC# 50674J)
Tel: 416-304-0603
Fax: 416-304-1313

Lawyers for the Manufacturers and Traders Trust Company, in its capacity as Indenture Trustee