

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

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

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

APPLICANTS' MEMORANDUM OF FACT AND LAW

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

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

Attention: Court Registry

INTRODUCTION

1. Norcon Marine Services Ltd. (the Company¹) applies for an order pursuant to the provisions of the *Companies' Creditors Arrangement Act*¹ ("CCAA"). Specifically, the Company seeks an Initial Order pursuant to section 11.02(1) of the *Act*.
2. The Company has had the benefit of a stay of proceedings upon the filing of a Notice of Intention to Make a Proposal ("NOI") under Part III, Division I, of the *Bankruptcy and Insolvency Act*², ("BIA"). The NOI was filed on November 25, 2019, and Deloitte Restructuring Inc. was appointed Proposal Trustee.
3. An issue has arisen whereby Business Development Bank of Canada ("BDC") has taken the position that it is not stayed by the NOI. Given this, and the need to expeditiously and as inexpensively as possible ensure that the Company's creditors, including BDC, remain subject to a stay, the Company is seeking an Initial Order under the *CCAA*.
4. In the event that BDC acknowledges that it is subject to the NOI stay, the Company is also filing an Application for an extension of that stay. That Application is addressed in a memorandum which is being filed on that Application, which Application may or may not be necessary.
5. In this memorandum the Company sets out the factual matrix giving rise to the present Application, sets out the relief being sought, identifies the issues to be considered by the Court, and sets out the arguments in favour of granting the order applied for.

SUMMARY OF FACTS

6. The Company is incorporated in Newfoundland and Labrador, and carries on business in the province.
7. The Company is engaged in marine transportation and has historically owned and operated passenger-freight vessels on routes located across the south shore of Newfoundland and

¹ R.S.C. 1985, c. C-36, as am.

² R.S.C. 1985, c. B-3, as am.

Labrador. The Company also owns and operates cargo ships servicing the offshore and aquaculture industry. At this time the Company owns four vessels.

8. The Company is also engaged in the business of providing crewing and vessel management services to clients primarily in the aquaculture industry.
9. The Company guaranteed to BDC the debts of Burry's Shipyard Inc. ("BSI"). BSI is now bankrupt and in receivership, following unsuccessful attempts to restructure BSI earlier this year. BDC now seeks \$834,000 from the Company in respect of that guarantee.
10. The Company had also loaned money to BSI. As a result of BSI's bankruptcy the Company has incurred a bad debt expense of approximately \$1,800,000.
11. During the current fiscal year, the Company has experienced a reduction in revenue and profitability as a result of the loss of Government of Newfoundland and Labrador ferry contracts, the termination of another long term contract, and disruptions within the aquaculture industry.
12. As a result, the Company has incurred an approximately \$443,000 liability to the Canada Revenue Agency relating to unpaid HST and payroll obligations. The Company has also increased utilization of its line of credit with the Bank of Nova Scotia, and its outstanding trade payables have increased when compared to prior years.
13. The Company's primary current assets consist of the four vessels, and real property located in Glovertown, Newfoundland and Labrador.
14. The Company is actively seeking new contracts for its vessels and services, but it does not expect to enter into such new contracts until early Spring, 2020.
15. One of the Company's vessels is under arrest pursuant to a Warrant issued in the Federal Court of Canada.
16. On October 28, 2019, BDC issued a demand against the Company pursuant to section 244 of the *BIA*. The Company took issue with the initial service of that demand, and BDC reissued and served the demand on November 19, 2019.

NATURE OF THIS APPLICATION

17. In this Application the Company seeks the following relief:
- (a) An Order abridging the notice periods pursuant to Section 11 of the *CCAA* and the *Rules of the Supreme Court, 1986*, Rule 2.01(1);
 - (b) An Order pursuant to Section 11 of the *CCAA* directing that service on the service list appended to the draft order filed herein is sufficient for the purposes of this Application;
 - (c) An Order pursuant to Section 11.02 of the *CCAA*:
 - (i) staying, for a period not to exceed 10 days, or until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the Company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
 - (ii) restraining, for a period not to exceed 10 days, or until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the Company; and
 - (i) prohibiting, for a period not to exceed 10 days, or until otherwise ordered by the court, the commencement of any action, suit or proceeding against the Company.
18. As noted, the purpose of seeking the Initial Order under the *CCAA* is to ensure that the stay remains in place and that BDC is subject to that stay. In addition, the stay under the NOI expires on December 25, 2019, and if BDC acknowledges that it is subject to that stay an extension would need to be sought in respect of same.

ISSUES ON THE APPLICATION

19. The issues arising include:
- (a) Under what circumstances may an Initial Order under the *CCAA* be issued where, as here, a proceeding under Part III of the *BIA* is extant;

(b) Has the Company met the burden imposed on those seeking an Initial Order?

ARGUMENT

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

20. This Application is somewhat unusual in that it seeks to “convert” a Part III BIA proposal proceeding into a CCAA proceeding. However, the situation is not without precedent or statutory basis. Indeed, this court issued such an Order in May of 2019.³ The order sought here is practically identical to that Order.

21. Section 11.6 of the CCAA reads:

Notwithstanding the *Bankruptcy and Insolvency Act*,

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

(b) an application under this Act by a bankrupt may only be made with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act* but no application may be made under this Act by a bankrupt whose bankruptcy has resulted from

(i) the operation of subsection 50.4(8) of the *Bankruptcy and Insolvency Act*, or

(ii) the refusal or deemed refusal by the creditors or the court, or the annulment, of a proposal under the *Bankruptcy and Insolvency Act*.

22. No proposal has been made by the Company so there is no impediment to the proceedings being “taken up and continued under” the CCAA.

23. The court’s attention is respectfully drawn to *Re Clothing for Modern Times Ltd*⁴:

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

³ *Re British Confectionary Company et al*, 2019 01G 2868 (Tab 1)

⁴ 2011 ONSC 7522 (Tab 2)

applicant company should place before the court evidence dealing with three issues:

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

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

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

24. It is submitted that the Company has shown that it has met the statutory condition in that no proposals have been made.
25. It is further submitted that the Report of the Proposed Monitor being filed herein contains “the information which section 10(2) of the *CCAA* requires accompany any initial application under the Act”, or a “reasonable surrogate” thereof.
26. This leaves the question as to whether “the proposed continuation would be consistent with the purposes of the *CCAA*”.

Has the Company met the burden imposed on those seeking an Initial Order?

27. Having dealt with two of the prerequisites described by the court in *Re Clothing for Modern Times Ltd.*, the Company is left with the task of meeting the burden of showing that “the proposed continuation would be consistent with the purposes of the *CCAA*”.
28. In *Re Clothing for Modern Times Ltd* the court summarized the views of the Supreme Court of Canada in *Re Ted Leroy Trucking [Century Services] Ltd*⁵ as follows:

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

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

⁵ 2010 SCC 60

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

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

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

29. In the case at bar all four of these purposes is extant.

30. The purposes of the CCAA were also canvassed by this Honourable Court in *Re Humber Valley Resort Corp*⁶, wherein the Court adopted the reasoning of the British Columbia Supreme Court in *Pacific National Lease Holding Corp.*:

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

(1) The purpose of the C.C.A.A. is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and the Court.

(2) The C.C.A.A. is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and the employees.

(3) During the stay period the Act is intended to prevent maneuvers (sic) for positioning amongst the creditors of the company.

(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

⁶ 2008 NLTD 160 (Tab 3)

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.

31. In the case at bar, we are at an early stage in the attempt to restructure the Company. Once the potential contracts for 2020 become clearer there is a real possibility of a restructuring that will find support with the Company's creditors.
32. In all the circumstances, it is respectfully submitted that this is an appropriate case in which to continue the stay under the provisions of the CCAA. There is no pressing need to place the fate of all the stakeholders in the hands of BDC.

FORM OF ORDER

33. The draft order submitted is in the form of the model CCAA Initial Order developed by the superior courts of the Atlantic Provinces, which to some extent follows precedents of the Toronto Commercial List. It is, as noted at paragraph 20, substantially the same as an Order issued by this Court in May 2019.
34. The Court will be aware of the recent changes to the CCAA effecting section 11.02⁷. The section in its entirety now reads:

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

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

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

⁷ S.C. 2019, c. 29, s. 137.

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

Stays, etc. — other than initial application

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

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

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

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

Burden of proof on application

(3) The court shall not make the order unless

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

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

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

35. The changes clearly limit the period of the Initial Order to 10 days, rather than 30 days as was the case before. To assist the Court on this application a copy of the recent Initial Order in *Re Clover Leaf Holdings Company et al*⁸ is appended to this memorandum.
36. It will be necessary for the Company to apply to the Court for an Amended and Restated Initial Order under section 11.02(2) of the CCAA within 10 days of the issuance of the Initial Order. At that time the Company will also apply for a Charging Order under section 11.52 of the CCAA seeking an administrative charge in the amount of \$100,000.

⁸ Ontario Court of Justice, Commercial List, CV-19-631523-00CL (Tab 4)

SUMMARY

37. The order sought is necessary given the position being taken by BDC. To continue under the NOI with the specter of BDC appointing a receiver to act on its security would not only prejudice any restructuring efforts, but also prejudice those creditors continuing to supply goods and services to the Company post the date of the NOI.
38. No stakeholder will be prejudiced by the grant of the order. To the contrary, there is a potential benefit to all if the Company is allowed to continue under a CCAA stay.
39. The nature of the Company's principal assets, land and marine vessels, being not subject to dissipation during any stay, also substantiate the notion of "no prejudice".
40. Based upon all the foregoing, it is respectfully submitted that the order ought to be granted.

DATED AT the Dartmouth, in the Province of Nova Scotia, this 5th day of December, 2019.



Tim Hill, Q.C.
Counsel for the Applicants

TAB 1

2019 01G 2868
**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
 GENERAL DIVISION**

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

SUMMARY OF CURRENT DOCUMENT	
Court File No.	2019 01G 2868
Date of filing of document:	
Name of filing party or person:	Tim Hill, Q.C., (Counsel for the Applicants)
Application to which document being filed relates:	Initial Order pursuant to Section 11.02 of the <i>Companies' Creditors Arrangement Act</i> .
Statement of purpose in filing:	Application

Initial Order

Before the Honourable Justice *Mason* in chambers

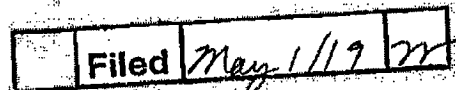
The Applicant proposes to make a compromise or arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended (the "CCAA") and it applied for an initial order and, now or in the future, other relief under the CCAA as may be sought on an interlocutory application.

The following parties received notice of this application: Those parties included on the Service List attached as Schedule "A" hereto.

The following parties, represented by the following counsel, made submissions:

Tim Hill, Q.C., of counsel for the Applicants, Geoffrey L. Spender, of counsel for the Bank of Montreal, and Joseph J. Thorne, of counsel for Atlantic Lottery Corporation;

On motion of the Applicants the following is ordered and declared:



Service

1. The service of the notice of application in chambers, and the supporting documents, as set out in the affidavit of service is hereby deemed adequate notice so that the motion is properly returnable today and further service thereof is hereby dispensed with.

Application

2. The Applicants are companies to which the CCAA applies.

Plan of Arrangement

3. The Applicant, in consultation with the Monitor, shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (the "Plan").

Possession of Property and Operations

4. The Applicant shall remain in possession and control of its current and future assets, undertakings, and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "Property"). Subject to further order of this Court, the Applicant shall continue to carry on business in a manner consistent with the preservation of its business (the "Business") and Property. The Applicant shall be authorized and empowered to continue to retain and employ consultants, agents, experts, accountants, counsel, and such other persons (collectively "Assistants") and the employees currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

5. The Applicant may pay the following expenses whether incurred prior to or after this Order:
 - a. all outstanding and future wages, salaries, employee and pension benefits, vacation pay, and expenses payable to employees who continue to provide service on or after the date of this Order ("Active Employees"), in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements; and
 - b. all existing and future employee health, dental, life insurance, short and long term disability and related benefits (collectively, the "Group Benefits") payable on or

after the date of this Order to Active Employees, in each case incurred in the ordinary course of business and consistent with existing policies and arrangements or such amended policies and arrangements as are necessary or desirable to deliver the existing Group Benefits;

c. with prior written approval of the Monitor, the fees and disbursements for any Assistants retained or employed by the Applicant in respect of these proceedings, at their reasonable standard rates and charges.

6. Except as otherwise provided to the contrary herein, the Applicant may pay all reasonable expenses incurred by the Applicant in carrying on the Business in the ordinary course during the currency of the proceedings under Part III, Division I of the *Bankruptcy and Insolvency Act* ("the BIA Period") which began on November 5, 2018, and after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

a. all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance including directors and officers insurance, maintenance, and security services; and

b. payment for goods or services actually supplied to the Applicant during the BIA Period and following the date of this Order.

7. The Applicant shall remit or pay, in accordance with legal requirements or on terms as may be agreed to between the Applicant and the applicable authority:

a. any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of: i) employment insurance, ii) Canada Pension Plan, iii) Quebec Pension Plan, and iv) income taxes;

b. all goods and services or other applicable sales taxes (collectively, "Sales Taxes") required to be remitted by the Applicant in connection with the sale of goods and services by the Applicant, but only where such Sales Taxes are accrued or collected during the BIA Period or after the date of this Order, or where such Sales

Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order; and

c. any amount payable to the Crown in right of Canada or of any Province or any regulatory or administrative body or any other authority, in all cases in respect of municipal realty, municipal business, or other taxes, assessments or levies of any nature or kind which are: i) entitled at law to be paid in priority to claims of secured creditors; ii) attributable to or in respect of the ongoing Business carried on by the Applicant; and iii) payable in respect of the period commencing on or after the date of this Order or during the *BIA* Period.

8. Until such time as the Applicant disclaims a real property lease in accordance with the CCAA, the Applicant shall pay all amounts constituting rent or payable as rent under real property leases, including, for greater certainty, common area maintenance charges, utilities and realty taxes, and any other amounts payable to the landlord under the lease, or as otherwise may be negotiated between the Applicant and the landlord from time to time ("Rent"), for the period commencing during the *BIA* Period and from and including the date of this Order, in accordance with its existing lease agreements. On the date of the first of such payments, any arrears relating to the period commencing from and including the date of this Order shall also be paid.

9. Except as specifically permitted herein or by further order of this Court, the Applicant is hereby directed, until further order of this Court: i) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicant to any of its creditors as of November 5, 2018, without prior written consent of the Monitor; ii) to grant no security interests, trusts, liens, charges, or encumbrances upon or in respect of any of its Property; and iii) to not grant credit or incur liabilities except in the ordinary course of the Business or with the prior written approval of the Monitor.

Restructuring

10. The Applicant shall, subject to such requirements as are imposed by the Monitor and under any agreements for debtor in possession financing which may be granted, have the right to:

a. permanently or temporarily cease, downsize or shut down any of its business or operations,

- b. pursue all avenues of refinancing of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any refinancing; and
- c. in accordance with its ordinary course of business, dispose of redundant or non-material assets not exceeding \$10,000 in value.

No Proceedings Against the Applicant or the Property

11. Until and including the 29th day of May, 2019, or such other date as this Court may order (the "Stay Period"), no claim, grievance, application, action, suit, right or remedy, or proceeding or enforcement process in any court, tribunal, or arbitration association (each, a "Proceeding") shall be commenced, continued, or enforced against or in respect of any of the Applicant or the Monitor, or affecting the Business or the Property, except with the written consent of the Applicant and the Monitor, or as provided for in the Order of this Court dated January 21, 2019, issued in proceeding number 2018 01G 22375, or with leave of this Court, and any and all other Proceedings currently under way against or in respect of the Applicant or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court.

No Exercise of Rights or Remedies

12. During the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person") against or in respect of the Applicant or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Applicant and the Monitor, or leave of this Court, provided that nothing in this Order shall i) empower the Applicant to carry on any business which the Applicant is not lawfully entitled to carry on; ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by section 11.1 of the CCAA; iii) exempt the Applicant from compliance with statutory or regulatory provisions relating to health, safety, or the environment; iv) prevent the filing of any registration to preserve or perfect a security interest; or v) prevent the registration of a claim for lien and the related filing of an action to preserve the right of a lien holder, provided that the Applicant shall not be required to file a defence during the stay period.

No Interference with Rights

13. During the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate, or cease to perform any right, renewal right, contract, agreement, licence, or permit in favour of or held by the Applicant, including but not limited to renewal rights in respect of existing insurance policies on the same terms, except with the written consent of the Applicant and the Monitor, or leave of this Court.

Continuation of Services

14. During the Stay Period, all Persons having oral or written agreements with the Applicant or statutory or regulatory mandates for the supply of goods or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility, or other services to the Business or the Applicant, are hereby restrained until further order of this Court from discontinuing, altering, interfering with, or terminating the supply of such goods or services as may be required by the Applicant, and the Applicant shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses, and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Applicant in accordance with normal payment practices of the Applicant or such other practices as may be agreed upon by the supplier or service provider and each of the Applicant and the Monitor, or as may be ordered by this Court. W

Non-Derogation of Rights

15. Notwithstanding anything else contained herein, no Person shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property, or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicant.

Proceedings Against Directors and Officers

16. During the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current, or future directors

or officers of the Applicant with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicant whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicant, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicant or this Court, these proceedings are dismissed by final order of this Court, or with leave of this Court.

Appointment of Monitor

17. Deloitte Restructuring Inc. is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the Business and financial affairs of the Applicant, the Property, and the Applicant's conduct of the Business with the powers and obligations set out in the CCAA or set forth herein and the Applicant and its shareholders, officers, directors, employees and Assistants shall advise the Monitor of all material steps taken by the Applicant pursuant to this Order, cooperate fully with the Monitor in the exercise of its powers and discharge of its obligations, and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

18. The Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

- a. monitor the Applicant's receipts and disbursements;
- b. report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, the activities of the Applicant, and such other matters as may be relevant to the proceedings herein;
- c. advise the Applicant in its development of the Plan and any amendments to the Plan, and, to the extent deemed appropriate by the Monitor, assist in its negotiations with creditors, customers, vendors, and other interested Persons;
- d. assist the Applicant, to the extent deemed appropriate by the Monitor, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

e. have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents and to the Business of the Applicant, to the extent that is necessary to adequately assess the Applicant's Business and financial affairs or to perform its duties arising under this Order;

f. be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order, including any affiliate of, or person related to the Monitor;

g. develop a claims process to ascertain the quantum of the claims of all creditors; and

h. be at liberty to perform such other duties as are required by this Order or by this Court from time to time.

19. The Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

20. Nothing herein contained shall limit the protections afforded the Monitor at law including those protections set out in the CCAA.

21. The Monitor shall provide any creditor of the Applicant or a potential Debtor In Possession lender ("DIP Lender") with information provided by the Applicant in response to reasonable requests for information made in writing by such creditor or a DIP Lender addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicant is confidential, the Monitor shall not provide such information to creditors or a DIP Lender unless otherwise directed by this Court or on such terms as the Monitor and the Applicant may agree.

22. The Monitor, counsel to the Monitor, and counsel to the Applicant shall be paid their reasonable fees and disbursements, in each case not to exceed their standard rates and charges, by the Applicant as part of the costs of these proceedings. The Applicant is hereby authorized and

directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Applicant on a bi-weekly basis.

23. The Monitor and its legal counsel shall pass their accounts from time to time before a judge of this court or a referee appointed by a judge.

Service and Notice

24. The Monitor shall: i) without delay, publish in a notice containing the information prescribed under the CCAA, ii) within five days after the date of this Order, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Applicant of more than \$1,000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with section 23(1)(a) of the CCAA and the regulations made thereunder.

25. The Applicant and the Monitor may give notice of this Order, any other materials and orders in these proceedings, and any notices, and provide correspondence, by forwarding originals or true copies by prepaid ordinary mail, courier, personal delivery, or electronic transmission to the Applicant's creditors or other interested parties at their respective addresses as last shown on the records of the Applicant and any such notice by courier, personal delivery, or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

26. The Applicant and the Monitor, and any party who has filed a demand of notice may serve any court materials in these proceedings by e-mailing a PDF or other electronic copy of such materials to counsel's e-mail addresses as recorded on the service list from time to time, and the Monitor may post a copy of any or all such materials on its website at <https://www.insolvencies.deloitte.ca/en-ca/Pages/British-Bazaar-and-British-Confectionery.aspx?searchpage=Search-Insolvencies.aspx>.

Confidential Addendum

27. The Confidential Addendum to the Report of the Proposed Monitor shall remain sealed until the earliest of a compromise or arrangement being sanctioned by this Court pursuant to section 6 of the CCAA, the stay of proceedings herein expiring, or further Order of this Court.

General

28. The Applicant or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

29. Nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, construction lien trustee, or a trustee in bankruptcy of the Applicant, the Business or the Property.

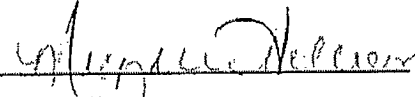
30. The aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction outside Newfoundland and Labrador, is requested to give effect to this Order and to assist the Applicant, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, and regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicant and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicant and the Monitor and their respective agents in carrying out the terms of this Order.

31. Each of the Applicant and the Monitor may apply to any court, tribunal, or regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and the Monitor may act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

32. Any interested party, including the Applicant and the Monitor, may apply to this Court to vary or amend this Order on such notice required under the *Rules of the Supreme Court, 1986* or as this Court may order.

33. This Order and all of its provisions are effective as of 12.01 a.m. Newfoundland Daylight Time on the 1st day of May, 2019

Dated the day of May, 2019, at St. John's, Newfoundland and Labrador.


Court Officer
Trial Co-Ordinator

Schedule "A"

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ATTN: Catherine Kappos-Guerreiro, Group Leader - Credit & Collections, (905) 362-4467
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Atlantic Canada Opportunities Agency
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M

TAB 2

Most Negative Treatment: Check subsequent history and related treatments.
2011 ONSC 7522
Ontario Superior Court of Justice [Commercial List]
Clothing for Modern Times Ltd., Re

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

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

D.M. Brown J.

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

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

Subject: Insolvency

Related Abridgment Classifications

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

Headnote

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

Table of Authorities

Cases considered by D.M. Brown J.:

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

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

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

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

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

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

Statutes considered:

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

Pt. III — referred to

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

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

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

s. 10(2) — considered

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

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

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

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

D.M. Brown J.:

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

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

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

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

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

II. Key background events

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

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

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

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

III. Continuation under the CCAA

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

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

11.6 Notwithstanding the *Bankruptcy and Insolvency Act*,

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

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

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

Let me deal with each in turn

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

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

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

- 11 In *Ted Leroy Trucking Ltd., Re*,¹ the Supreme Court of Canada articulated the purpose of the *CCAA* in several ways:
- (i) To permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets;²
 - (ii) To provide a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made;³
 - (iii) To avoid the social and economic losses resulting from liquidation of an insolvent company;⁴
 - (iv) To create conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all.⁵

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

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

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

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

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

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

10. (2) An initial application must be accompanied by

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

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

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

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

E. Conclusion

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

IV. Sale Process

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

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

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

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

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

V. Administration Charges

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

23 No interested person opposes the charges sought.

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

VI. Order granted

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

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

Motion granted.

Footnotes

¹ 2010 SCC 60 (S.C.C.).

² *Century Services*, para. 15.

³ *Ibid.*, para. 59.

⁴ *Ibid.*, para. 70.

⁵ *Ibid.*, para. 77.

⁶ *Ibid.*, para. 15.

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

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

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

9 *Ibid.*, para. 40.

10 *Century Services*, para. 70.

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

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

TAB 3

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

Humber Valley Resort Corp., Re

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

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

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

R.M. Hall J.

Heard: October 6, 2008
Judgment: October 10, 2008
Docket: 200801F3743

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

Subject: Insolvency; Civil Practice and Procedure

Related Abridgment Classifications

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

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

Headnote

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

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

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

Table of Authorities

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

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

Statutes considered:

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

Generally — referred to

s. 11 — referred to

s. 11(4) — considered

s. 11(6) — considered

Labour Standards Act, R.S.N. 1990, c. L-2

Generally — referred to

Mechanics' Lien Act, R.S.N. 1990, c. M-3

Generally — referred to

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

R.M. Hall J.:

Introduction

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

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

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

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

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

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

Other than initial application court orders

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

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

Burden of proof on application

(6) The court shall not make an order under subsection (3) or (4) unless

- (a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
- (b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

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

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

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

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

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

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

reasonable and done in good faith.

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

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

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

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

Ruling on Extension of Stay Termination Date

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

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

Decision on Authorization of Additional DIP Financing and Securitization

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

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

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

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

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

Maxium Financial Services Inc. ("Maxium")

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

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

Marine Contractors Inc. and Home Construction Ltd.

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

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

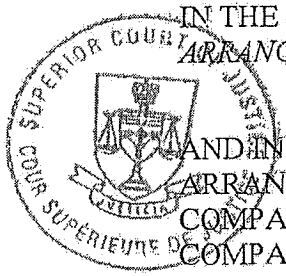
24 The above named corporations are in a similar position to Home Construction Limited and Marine Contractors Inc. They have filed mechanics' lien claims but have not as yet commenced any actions. They too will be seeking leave to commence their actions and have the Stay lifted against them on the same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

Application granted.

TAB 4

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.) FRIDAY, THE 22nd
)
JUSTICE HAINEY) DAY OF NOVEMBER, 2019



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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF CLOVER LEAF HOLDINGS
COMPANY, CONNORS BROS. CLOVER LEAF SEAFOODS
COMPANY, K.C.R. FISHERIES LTD., 6162410 CANADA
LIMITED, CONNORS BROS. HOLDINGS COMPANY AND
CONNORS BROS. SEAFOODS COMPANY

(collectively, the "Applicants" and each an "Applicant")

INITIAL ORDER

THIS APPLICATION, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCA") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Gary Ware sworn November 21, 2019 and the Exhibits thereto, and on being advised that Wells Fargo Capital Finance, LLC and Wells Fargo Capital Finance Corporation Canada in their capacities as administrative agents under that certain amended and restated credit agreement dated as of August 18, 2017 (as may have thereafter been amended, restated, supplemented or otherwise modified from time to time (in such capacity, the "ABL Agent") and Brookfield Principal Credit LLC in its capacity as administrative agent under that certain credit agreement, dated as of August 15, 2017 (as may have thereafter been amended, restated, supplemented or otherwise modified from time to time) (in such capacity, the "Term

Agent"), the secured creditors of the Applicants, were given notice, and on hearing the submissions of counsel for the Applicants, Alvarez & Marsal Canada Inc. ("A&M"), the ABL Agent and the Term Agent and on reading the consent of A&M to act as the Monitor,

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

APPLICATION

2. **THIS COURT ORDERS AND DECLARES** that the Applicants are companies to which the CCAA applies.

POSSESSION OF PROPERTY AND OPERATIONS

3. **THIS COURT ORDERS** that the Applicants shall remain in possession and control of their respective current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"). Subject to further Order of this Court, the Applicants shall continue to carry on business in a manner consistent with the preservation of their business (the "**Business**") and Property. The Applicants are authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

4. **THIS COURT ORDERS** that the Applicants shall be entitled to continue to utilize the central cash management system currently in place or, with the consent of the Monitor, replace it with another substantially similar central cash management system (the "**Cash Management System**") and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Applicants of funds transferred, paid, collected or otherwise dealt

with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Applicants, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

5. **THIS COURT ORDERS** that each of the Applicants' existing depository and disbursement banks (collectively, the "**Banks**") is authorized to debit the applicable Applicant's accounts in the ordinary course of business without the need for further order of this Court for: (i) all cheques drawn on the applicable Applicant's accounts which are cashed at such Bank's counters or exchanged for cashier's cheques by the payees thereof prior to the date of this Order; (ii) all cheques or other items deposited in one of the Applicant's accounts with such Bank prior to the date of this Order which have been dishonoured or returned unpaid for any reason, together with any fees and costs in connection therewith, to the same extent an Applicant was responsible for such items prior to the date of this Order; and (iii) all undisputed pre-filing amounts outstanding as of the date hereof, if any, owed to any Bank as service charges for the maintenance of the Cash Management System.

6. **THIS COURT ORDERS** that any of the Banks may rely on the representations of the applicable Applicant with respect to whether any cheques or other payment order drawn or issued by the applicable Applicant prior to the date of this Order should be honoured pursuant to this or any other order of this Court, and such Bank shall not have any liability to any party for relying on such representations by the applicable Applicant as provided for herein.

7. **THIS COURT ORDERS** that (i) those certain existing deposit agreements between the Banks shall continue to govern the post-filing cash management relationship between the Applicants and the Banks, and that all of the provisions of such agreements, including, without limitation, the termination and fee provisions, shall remain in full force and effect, (ii) either any of the Applicants, with the consent of the Monitor, or the Banks may, without further Order of this Court, implement changes to the Cash Management Systems and procedures in the ordinary course of business pursuant to the terms of those certain existing deposit agreements, including, without limitation, the opening and closing of bank accounts, and (iii) all control agreements in

existence prior to the date of the commencement of these proceedings shall apply, including, as applicable, with respect to any debtor-in-possession financing facilities to be approved this Court.

8. **THIS COURT ORDERS** that, except as specifically permitted herein, the Applicants are hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by any of the Applicants to any of their creditors as of this date unless critical to the preservation of the Business and consented to by the Monitor and consistent with the budget under the contemplated DIP ABL and term loan financing proposed to be obtained and/or guaranteed by the Applicants and certain of their affiliates; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of their Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

9. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, the Applicants shall be entitled but not required to pay all reasonable expenses incurred by any of the Applicants in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order.

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

10. **THIS COURT ORDERS** that until and including December 2, 2019, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Applicants or the Monitor or their respective employees and representatives acting in such capacities, or affecting the Business or the Property, except with the written consent of the Applicants and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of any of the Applicants or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

11. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the

Applicants or the Monitor or their respective employees and representatives acting in such capacities, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Applicants and the Monitor, or leave of this Court, provided that nothing in this Order shall: (i) empower the Applicants to carry on any business which the Applicants are not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH RIGHTS

12. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by any of the Applicants, except with the written consent of the applicable Applicant and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

13. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with any of the Applicants or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or any of the Applicants, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by any of the Applicants, and that each of the Applicants shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the applicable Applicant in accordance with normal payment practices of the applicable Applicant or such other practices as may be agreed upon by the supplier or service provider and each of the applicable Applicant and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

14. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicants. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

15. **THIS COURT ORDERS** that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of any of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of any of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations.

APPOINTMENT OF MONITOR

16. **THIS COURT ORDERS** that A&M is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Applicants with the powers and obligations set out in the CCAA or set forth herein and that the Applicants and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by any of the Applicants pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

17. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

- (a) monitor the Applicants' receipts and disbursements;

- (b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;
- (c) advise the Applicants in their preparation of cash flow statements and financial reporting, which information shall be reviewed with the Monitor and delivered to any proposed or future DIP lender(s), and each of their respective counsel and financial advisors, as required by such lender(s);
- (d) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Applicants, to the extent that is necessary to adequately assess the Applicants' business and financial affairs or to perform its duties arising under this Order;
- (e) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order; and
- (f) perform such other duties as are required by this Order or by this Court from time to time.

18. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

19. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *New Brunswick Clean Environment Act*, the *New Brunswick Clean Water Act*, the *New Brunswick Occupational Health and Safety Act*, the

Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

20. **THIS COURT ORDERS** that that the Monitor shall provide any creditor of any of the Applicants with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants may agree.

21. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

SERVICE AND NOTICE

22. **THIS COURT ORDERS** that the Monitor shall (i) without delay, publish in *The Globe and Mail* (National Edition) and the *Telegraph Journal* (New Brunswick) a notice containing the information prescribed under the CCAA, (ii) within five days after the date of this Order, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, or cause to be sent, in the prescribed manner, a notice to every known creditor who has a claim against any of the Applicants of more than \$1,000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

23. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "Protocol") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at <http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/>) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL – <http://www.alvarezandmarsal.com/CloverLeaf> (the "Website").

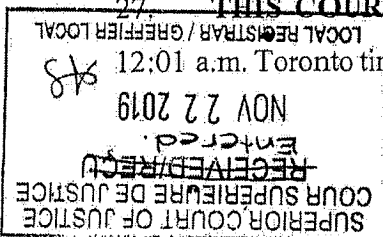
24. **THIS COURT ORDERS** that the Applicants and the Monitor and their respective counsel are at liberty to serve or distribute this Order, any other materials and orders as may be reasonably required in these proceedings, including any notices, or other correspondence, by forwarding true copies thereof by electronic message to the Applicants' creditors or other interested parties and their advisors. For greater certainty, any such distribution or service shall be deemed to be in satisfaction of a legal or judicial obligation, and notice requirements within the meaning of clause 3(c) of the *Electronic Commerce Protection Regulations*, Reg. 81000-2-175 (SOR/DORS).

GENERAL

25. **THIS COURT ORDERS** that each of the Applicants or the Monitor may from time to time apply to this Court to amend, vary or supplement this Order or for advice and directions in the discharge of its powers and duties under this Order or in the interpretation or application of this Order.

26. **THIS COURT ORDERS** that the balance of the relief sought by the Applicants in the Notice of Application dated November 22, 2019, be and is hereby reserved to be heard by The Honourable Mr. Justice Hailey on November 27, 2019 or such other date as determined by this Court.

27. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Toronto time on the date of this Order.



IN THE MATTER OF THE COMPANIES CREDITORS' ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED AND
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CLOVER LEAF HOLDINGS
COMPANY, CONNORS BROS. CLOVER LEAF SEAFOODS COMPANY, K.C.R. FISHERIES LTD., 6162410 CANADA
LIMITED, CONNORS BROS. HOLDINGS COMPANY and CONNORS BROS. SEAFOODS COMPANY

Court File No. CV-19-631523-000

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced in Toronto

INITIAL ORDER

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