COURT FILE NUMBER	643 of 2016
COURT	QUEEN'S BENCH FOR SASKATCHEWAN IN BANKRUPTCY AND INSOLVENCY
JUDICIAL CENTRE	SASKATOON
APPLICANTS	101133330 SASKATCHEWAN LTD. and 101149825 SASKATCHEWAN LTD.

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 101133330 SASKATCHEWAN LTD. and 101149825 SASKATCHEWAN LTD.

BRIEF OF LAW FILED ON BEHALF OF THE APPLICANTS, 101133330 SASKATCHEWAN LTD. and 101149825 SASKATCHEWAN LTD.

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500-616 Main Street
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I. INTRODUCTION

1. The Stalking Horse Sale Process was undertaken at the behest of the largest secured creditor in these proceedings, Affinity, and has resulted in the Pinnacle Transaction now presented for approval on this application.[1]

2. While the Pinnacle Transaction meets the statutory requirements for Court approval set out in s. 36 of the *Companies' Creditors Arrangement Act* (the "***CCAA***") and represents an objectively better outcome than the Colliers Sales Process, the Net Proceeds are nevertheless insufficient to fund a successful plan of arrangement. Consequently, the practical reality is that Affinity and the priority creditors identified in the Tenth Report of the Monitor dated February 19, 2019 (the "**Tenth Report**") are the only parties with any economic interest in the Purchased Assets.

3. The Applicants are therefore requesting the Pinnacle Transaction be approved and that the Monitor be authorized and directed to deal with the Net Proceeds as outlined in the Eleventh Report of the Monitor dated April 22, 2019 and draft order filed herein, all

[1] This brief will utilize the defined terms established in the affidavits and previous Orders of the Court.

of which will require a further extension of the stay of proceedings.

II. ISSUES

4. The relief sought on this application gives rise to the following issues:

A. whether circumstances exist to warrant an extension of the stay of proceedings;

B. whether the Pinnacle Transaction should be approved, which requires a consideration of:

(i) the criteria for approving an asset sale out of the ordinary course of business; and

(ii) whether the same is satisfied on the evidence before the Court;

C. whether the Monitor should be authorized and directed to make the distributions proposed in the Eleventh Report.

III. DISCUSSION

A. The Stay Extension

5. As per *CCAA*, ss. 11.02(2) and (3), respectively, this Honourable Court may extend the stay of proceedings under the Initial Order for such period of time as is deemed appropriate if the Applicants can satisfy the Court that circumstances exist that make the order appropriate, and the Applicants are continuing to act in good faith and with due diligence.

6. As explained in the most recent Orr Affidavit, the proposed extension to May 31, 2019 was arrived at in consultation with the Monitor, and is, in the parties' view, necessary to ensure there is adequate time to close the Pinnacle Transaction, deal with any issues arising in the course of the same, and consider what must be done to conclude the *CCAA* proceedings.

7. There have been no allegations that the Applicants are not acting in good faith and with due diligence, which is confirmed by the Monitor in its Eleventh Report, and as of the filing of this brief of law, the Applicants are unaware of any opposition to this motion or allegations that any of the stakeholders would be prejudiced by the relief sought herein. The Applicants will respond to any such allegations that may be forthcoming at the hearing of this matter; however, based on the facts of which the Applicants are aware and evidence filed in support of this application, the statutory requirements to grant an extension of the stay have been met.

B. The Pinnacle Transaction

(i) Section 36 of the CCAA

8. A debtor company subject to a *CCAA* order may not sell or otherwise dispose of its assets outside the ordinary course of business without Court authorization,[2] which authorization can only be obtained as the result of an application on notice to the secured creditors likely to be affected by the proposed sale or disposition.[3]

9. The non-exhaustive list of factors considered on such an application are set out in ss. 36(3) of the *CCAA*, which reads as follows:

> 36…
> (3) In deciding whether to grant the authorization, the court is to consider, among other things,
>
> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

[2] *CCAA*, ss 36(1).
[3] *Ibid.* ss 36(2).

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

10. Where the debtor company is an employer, ss. 36(7) provides that the Court must also be "*satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and 5(a)* [of the CCAA] *if the court had sanctioned the compromise or arrangement.*" Interestingly enough, the present version of the *CCAA* does not contain a ss. 6(4)(a). There is only a standalone ss. 6(4) with no additional subsections. Some commentators attribute this inconsistency to certain 2007 amendments to the *CCAA* having altered the numbering of ss. 6(3)-(6) without making a corresponding amendment to ss. 36(7).[4] In the absence of further direction from Parliament, the Applicants must consider the legislation as drafted. For the sake of economy, ss. 6(4) and 6(5)(a) are reproduced in the context of the discussion below.

(ii) Consideration of the Factors

CCAA, ss. 36(2) – Service

11. The secured creditors likely to be affected by the Pinnacle Transaction are:

(a) Affinity, which holds an $11.5 million first mortgage registered against the Campus (the "**Affinity Mortgage**") and an Assignment of Leases and Rents in respect of the Orr Centre lease agreements (the "**Assignment of Leases and Rents**");[5]

(b) Firm Capital, which holds a $3.5 million second mortgage registered against the Campus;[6] and

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[4] Dr Janis P Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2d ed (Toronto: Thomson Reuters Canada Limited, 2013) at pg 264. **[TAB 1]**
[5] Affidavit of John Orr sworn May 12, 2016 at para 70.
[6] *Ibid.* at para 72.

(c) Pa, who holds a $2.1 million third mortgage against the Campus.[7]

12. As evidenced by the Applicants' Affidavits of Service, the Applicants' Notice of Application and supporting materials were served on all members of the Service List, which includes Affinity, Firm Capital, and Pa.

CCAA, ss. 36(3)(a)-(c) – Reasonableness of the Process and Monitor Approval/Opinion

13. The above-noted factors under this heading are, in the Applicants respectful submission, already established in light of the following:

(a) the Monitor believed that the Stalking Horse Sale Process' terms and timelines were reasonable and appropriate in the circumstances of these proceedings, and accordingly recommended that this Honourable Court approve the same in the Tenth Report;[8]

(b) the Stalking Horse Sale Process was also developed at the behest of (and in consultation with) the largest secured creditor in these proceedings, Affinity; and

(c) the Stalking Horse Sale Process was already approved by the Court in an Order dated February 22, 2019 (the "**Eighth Extension Order**") after a hearing conducted on notice to the members of the Service List with no opposition.

14. The Monitor's efforts to market the Purchased Assets in accordance with the Stalking Horse Sale Process are detailed in the Eleventh Report and Confidential Supplement (collectively, the "**Reports**"), the latter of which contains commercially sensitive information that cannot be discussed publicly at this time. Suffice it to say that the Reports establish that Monitor:

(a) conducted the process with fairness, integrity, and in accordance with the procedure and timelines set out in Schedule "B" to the Eighth Extension Order; and

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[7] *Ibid.* at para 75.
[8] paras 49-51 and 61.

(b) is of the opinion that the approval of the Pinnacle Transaction would be more beneficial to the creditors than a sale or disposition under a bankruptcy.

CCAA, ss. 36(3)(d)-(e) – Creditor Consultation and Effect of the Sale

15. Affinity was the primary creditor consulted with respect to the Stalking Horse Sale Process, which was reasonable in the circumstances given:

(a) the aggregate amount of Affinity's combined pre-filing debt and subsequent DIP advances compared to the collective debt owed to the Applicants' other creditors; and

(b) Affinity's active support of the Applicants' efforts throughout the proceedings, which were aimed at benefitting the stakeholders as a whole.

16. As set out in the Applicants' draft Order, the Applicants are proposing that the Net Proceeds of the Pinnacle Transaction (less the amount secured by the Administration Charge) be distributed to:

(a) the City of Regina to satisfy 33330's pre-filing property tax debt for the Campus;

(b) Canada Revenue Agency ("**CRA**") to satisfy 33330's unpaid employee source deduction arrears; and

(c) Affinity on account of the amounts outstanding under DIP Facility #6 and 33330's pre-filing debt secured by the Affinity Mortgage and Assignment of Leases and Rents.

17. Consequently, the approval of the Pinnacle Transaction will not benefit the subordinate secured creditors or unsecured creditors. This being said, the results of the two sales processes conducted in these proceedings suggest that those parties do not have an economic interest in the Purchased Assets in any event, such that Affinity's interest in having the Pinnacle Transaction approved should be preferred to that of the subordinate creditors.[9]

[9] See *Windsor Machine & Stamping Ltd, Re*, 179 ACWS (3d) 513 (WL) (Ont Sup Ct), where Morawetz J.

CCAA, ss. 36(3)(f) – Consideration

18. As alluded to above, the purchase price is sufficient to satisfy the amounts secured by the Administration Charge and DIP Charge created by the Initial Order and the statutory claims of the City of Regina and CRA, all of which were identified by the Monitor's independent security review of the Affinity security as having priority to the same.[10] An additional amount is anticipated to be available to apply to 33330's pre-filing indebtedness to Affinity.

19. Any previous estimations of the fair market value of the Purchased Assets aside, the bids received in the Colliers Sales Process were not sufficient to effect this result, and there is no evidence before the Court to suggest that further efforts to sell the Purchased Assets will yield a better offer than the Pinnacle Transaction. In the circumstances, the consideration to be received is, in the Applicants' submission, reasonable and fair.

CCAA, ss. 36(7) – Payments Pursuant to ss. 6(4) and (5)(a)

20. The above-noted provisions read as follows:

> 6…
> (4) If an order contains a provision authorized by section 11.09, no compromise or arrangement is to be sanctioned by the court if, at the time the court hears the application for sanction, Her Majesty in right of Canada or a province satisfies the court that the company is in default on any remittance of an amount referred to in subsection (3) that became due after the time of the application for an order under section 11.02.
>
> (5) The court may sanction a compromise or an arrangement only if
>
> (a) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of
>
> (i) amounts at least equal to the amounts that they would have been qualified to receive under

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conclude that the fact that a proposed transaction will not benefit a party with no economic interest in the property to be sold "*does not give rise to a valid reason to withhold court approval…*" of the proposed transaction (para 13). **[TAB 2]**

[10] Tenth Report at paras 52-54.

> paragraph 136(1)(d) of the *Bankruptcy and Insolvency Act* if the company had become bankrupt on the day on which proceedings commenced under this Act, and
>
> (ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period; and…

21. In order to comply with ss. 6(4) (and, in turn, the first requirement of ss. 36(7)), the Applicants must satisfy the Court that 33330 is not in default of payment "*in respect of source deductions that came due after the date of the initial application*" (i.e., after May 20, 2016 when the Initial Order was granted).[11] As confirmed by the Department of Justice's January 22, 2019 letter appended to the most recent Orr Affidavit as Exhibit "B," 33330's post-*CCAA* balance owing is $349.97, which is comprised of penalties and arrears interest that have accrued on the pre-filing amounts as opposed to source deductions falling due after May 20, 2016.

22. In order to comply with ss. 5(a) (and, in turn, the second requirement of ss. 36(7)), the Applicants must satisfy the Court that 33330 will pay any relevant employees the amounts to which they would have been entitled pursuant to ss. 136(1)(d) of the *Bankruptcy and Insolvency Act* (the "***BIA***") had 33330 become bankrupt on May 20, 2016 instead of applying for relief pursuant to the *CCAA*, as well as any amounts owing to employees for services rendered after May 20, 2016.

23. The reference to ss. 136(1)(d) of the *BIA* itself engages s. 81.3 of the same by reference. The relevant portions of these provisions read:

> 136(1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:
>
> …
>
> (d) the amount of any wages, salaries, commissions, compensation

[11] Sara, Janis P, Geoffrey B Morawetz and LW Houlden, *The 2018-2019 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2018-2019) at N§50(1). **[TAB 3]**

or disbursements referred to in sections 81.3 and 81.4[12] that was not paid;

...

81.3(1) The claim of a clerk, servant, travelling sales-person, labourer or worker who is owed wages, salaries, commissions or compensation by a bankrupt for services rendered during the period beginning on the day that is six months before the date of the initial bankruptcy event and ending on the date of the bankruptcy is secured, as of the date of the bankruptcy, to the extent of $2,000 — less any amount paid for those services by the trustee or by a receiver — by security on the bankrupt's current assets on the date of the bankruptcy.

...

(4) A security under this section ranks above every other claim, right, charge or security against the bankrupt's current assets — regardless of when that other claim, right, charge or security arose — except rights under sections 81.1 and 81.2 and amounts referred to in subsection 67(3) that have been deemed to be held in trust.

...

(9) The following definitions apply in this section.

compensation includes vacation pay but does not include termination or severance pay.

[Emphasis added.]

24. As set out in the most recent Orr Affidavit:

(a) 33330's former employee, Merv Armstrong, is still owed $173.10 for vacation pay accrued during the six months preceding the Initial Order, which 33330 intends to pay; and

(b) 33330 has paid all of the wages and compensation owed to the employees engaged after the date of the Initial Order.

25. The additional requirements set out in ss. 36(7) of the *CCAA* are therefore satisfied based on the evidence before the Court.

C. The Proposed Distributions

26. The Court's jurisdiction to make distribution orders is founded in s. 11 of the *CCAA*, which reads:

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor

[12] ss. 81.4 applies in the event of a receivership.

> company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

27. The Monitor has obtained an independent security opinion considering the validity of Affinity's security against the Purchased Assets, and the potential priority claims to the proceeds of the same. As discussed in paragraphs 52-54 of the Tenth Report, the Monitor's independent counsel has opined that Affinity's security is valid, perfected, and enforceable against, among other things, the Purchased Assets, and subject only to the:

(a) City of Regina's claim for 33330's pre-filing property tax arrears;

(b) CRA's claim for 33330's pre-filing unremitted employee payroll source deductions;

(c) amounts secured by the Administration Charge created by the Initial Order; and

(d) amounts secured by the DIP Lender's Charge created by the Initial Order.

28. The Net Proceeds to be realized from the Pinnacle Transaction are sufficient to pay the above-noted amounts, but not 33330's estimated $11.3 million pre-filing debt to Affinity, who is nevertheless supporting the approval of the Pinnacle Transaction. Cases, such as *Northstar Aerospace Inc, Re*,[13] have authorized and directed the Monitor to distribute the proceeds of a distribution to priority creditors "*in accordance with their legal priorities*" in circumstances where the debtor company's restructuring efforts have failed to yield a better result, and the Applicants therefore respectfully request this Honourable Court grant the Order requested.

V. CONCLUSION

29. For all the reasons set forth above, the Companies respectfully request that this Honourable Court grant an Order in the form of the draft Order filed.

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[13] 2012 ONSC 4423 at paras 32-37 and 82-88, 2018 ACWS (3d) 490. **[TAB 4]**

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of April, 2019.

McDOUGALL GAULEY LLP

Per: _____

Solicitors for the applicants,
101133330 Saskatchewan Ltd. and
101149825 Saskatchewan Ltd.

VI. AUTHORITIES

1. Dr Janis P Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2d ed (Toronto: Thomson Reuters Canada Limited, 2013);

2. *Windsor Machine & Stamping Ltd, Re*, 179 ACWS (3d) 513 (WL) (Ont Sup Ct);

3. Sara, Janis P, Geoffrey B Morawetz and LW Houlden, *The 2018-2019 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2018-2019); and

4. *Northstar Aerospace Inc, Re*, 2012 ONSC 4423, 2018 ACWS (3d) 490.

CONTACT INFORMATION AND ADDRESS FOR SERVICE

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Tab 1

other interested parties; and whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.[294]

The court may order that the property be sold to the purchaser free and clear of charges, liens and restrictions of any kind. The interests of the secured creditors are protected by the requirement that the proceeds of the sale or disposition be subject to the same charges, liens or restrictions as the original property.[295]

The court may grant the authorization for a sale only if the court is satisfied that the company can and will make the payments that would have been required if the court had sanctioned a plan of compromise or arrangement, specifically, certain remittances due to the Crown and payments to employees of the arrears that would qualify for treatment as a preferred claim as set out in s. 136 of the *BIA* if the debtor were bankrupt and compensation to employees for services rendered after proceedings commenced.[296]

In *AbitibiBowater*, in a motion for the issuance of various orders authorizing the sale of non-core properties, Justice Gascon, then of the Québec Superior Court, granted vesting orders on the basis that the orders did not compromise potential environmental liabilities toward certain Provinces.[297] The case arose prior to the 2009 amendments. The issue of liability would, at best, be decided at the time of the sanction order and if not, at a later date.[298] In previous motions, vesting orders had been issued pertaining to properties located in Québec, in view of the absence of contestation by the Province of Québec.[299] The current motion was limited to properties owned by the debtor in Ontario, British Columbia and New Brunswick.[300] The motion sought vesting orders authorizing the transfer of

294 Section 36(3), *CCAA*.

295 Section 36(6), *CCAA*.

296 Section 36(7), *CCAA*. This provision requiring the payment of claims of the Crown and certain employee claims is viewed by at least one practitioner as a statutory mistake that does not reflect the intention of the legislator when the modification was made. The provision was modified in stages — the provision regarding the sale of assets was introduced in 2007, at which time ss. 6(4) and 6(5) of the *CCAA* referred to claims of employee arrears and amounts accruing due after the proceedings commenced, and claims of pension plans for certain amounts due for normal costs of defined benefit plans, employer contributions of defined contribution plans and contributions withheld from the employees and not remitted to a plan. In the modifications to s. 36 made through the 2007 amending legislation, a protection for the employees' and pension plan claims was introduced, referring to the ss. 6(4) and 6(5) of the *CCAA*; however, a provision was added between ss. 6(3) and 6(4) of the *CCAA*, resulting in a renumbering of ss. 6(4) and 6(5) of the *CCAA* to ss. 6(5) and 6(6) of the *CCAA*, and the consequent change in the numbering was not, in his view, properly made in the reference made in s. 36(7) *CCAA*. He observes that the aim of the legislator is made clear in this regard, when comparing the text of s. 36(7) *CCAA* with the equivalent provision, s. 65.13(8) *BIA*.

297 *Re AbitibiBowater inc.*, 2010 CarswellQue 9633, 2010 CarswellQue 9634, 2010 CarswellQue 9635, 2010 CarswellQue 9636, 2010 CarswellQue 9637 (Que. S.C.).

298 *Ibid.* at para. 14.

299 *Ibid.* at para. 6.

300 *Ibid.* at para. 7.

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301 *Ibid.* at para. 8.

302 *Ibid.* at para. 9.

303 *Ibid.* at para. 10.

304 *Ibid.* at para. 11.

305 *Ibid.* at paras. 21, 23.

306 *Re Grant Forest Products Inc.*, 2

307 *Ibid.* at para. 1.

308 *Ibid.* at para. 2.

309 *Ibid.* at para. 5.

310 *Ibid.* at para. 21.

311 *Ibid.* at para. 29.

Tab 2

2009 CarswellOnt 4505
Ontario Superior Court of Justice [Commercial List]

Windsor Machine & Stamping Ltd., Re .

2009 CarswellOnt 4505, 179 A.C.W.S. (3d) 513

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

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF WINDSOR MACHINE & STAMPING LIMITED, LIPEL INVESTMENTS LTD., WMSL HOLDINGS LTD., 442260 ONTARIO LTD., WINMACH CANADA LTD., PRODUCTION MACHINE SERVICES LTD., 538185 ONTARIO LTD., SOUTHERN WIRE PRODUCTS LIMITED, PELLUS MANUFACTURING LTD., TILBURY ASSEMBLY LTD., ST. CLAIR FORMS INC., CENTROY ASSEMBLY LTD., PIONEER POLYMERS INC., G&R COLD FORGING INC., WINDSOR MACHINE DE MEXICO, WINMACH INC., WINDSOR MACHINE PRODUCTS, INC. WAYNE MANUFACTURING INC. AND 383301 ONTARIO LIMITED (Applicants)

Morawetz J.

Heard: March 11, 2009
Judgment: March 11, 2009
Docket: CV-08-7672-00CL

Counsel: Tony Reyes, Evan Cobb for Monitor, RSM Richter Inc.
Raong Phalavong for Saginaw Pattern
Andrew Hatnay, Andrea McKinnon, D. Youkaris for U.A.W., Local 251
Joseph Marin for Windsor Machine & Stamping Ltd.
D. Dowdall, J. Dietrich for Bank of Montreal
J. Archibald for Magna
John D. Leslie for Ford Motor Company
P. Shea for Johnson Controls Inc.
Jackie Moher for Ryder Finance Corporation

Subject: Insolvency; Contracts; Property

Related Abridgment Classifications

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

Real property
III Sale of land
III.1 Agreement of purchase and sale
III.1.e Miscellaneous

Real property
III Sale of land
III.6 Judicial sale
III.6.f Vesting order

Headnote

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

Real property --- Sale of land — Agreement of purchase and sale — Miscellaneous

Real property --- Sale of land — Judicial sale — Vesting order

Table of Authorities

Statutes considered:

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

***Morawetz J.*:**

1 On March 11, 2009, the motion of RSM Richter Inc. was heard and granted with reasons to follow. These are those reasons.

2 RSM Richter Inc., in its capacity as Monitor, brought this motion for:

(a) an Approval and Distribution Order;

(b) a Vesting Order relating to the sale of personal property assets from WMSL to the Canadian Purchaser;

(c) a Vesting Order relating to the sale of real property from Lipel Investments Ltd. to the Canadian Purchaser;

(d) a Vesting Order relating to the sale of real property from 383301 to the Canadian Purchaser;

(e) an Order approving the fees and disbursements of the Monitor and its counsel.

3 The motion has the support of the Applicants, Bank of Montreal (the "Bank"), Magna, Ford and Johnson Controls. The Union was not opposed to the sale. An unsecured creditor, Saginaw Pattern, objected. Ryder Finance, an unaffected party did not oppose.

4 I am satisfied that the record supports the requested relief. During these CCAA proceedings, the Applicants explored a number of restructuring alternatives. The Monitor also ran a sale process to identify a potential buyer or buyers for the business. The Applicants were unable to implement a restructuring within the current corporate entities and were unable to identify an arm's length buyer of the business that would pay an amount greater than the forced liquidation value of the business. The sale process conducted by the Monitor did not result in any offers being submitted to purchase the Applicants' assets.

5 The Monitor is of the view that the Applicants could not carry on as currently structured. Both the Bank and EDC indicated that they would continue their support for the business and they have had negotiations with the Purchasers and the Applicants, with a view to financing the Purchasers and then working with the Applicants to complete a sale of the business to the Purchasers.

6 The Monitor is of the view that the proposed transactions result in an outcome that preserves the business. The Monitor supports the approval of the transactions described in the Seventh Report.

7 With respect to the Approval and Distribution Order and the three Vesting Orders, these transactions notionally result in the Bank's loans being repaid by the Purchasers (who are being financed by the Bank and EDC) and will permit the business to continue. A portion of the secured debt owing by WMSL to WMSL Holdings Ltd. will be paid by way of a promissory note from the Canadian Purchaser to WMSL Holdings Ltd. The Canadian Purchaser will not have the burden of the remaining secured debt owing to WMSL Holdings Inc., nor the burden of substantial unsecured debt.

8 The Monitor is of the view that the holdbacks described in the Approval and Distribution Order are desirable and appropriate in the circumstances so that goods and services supplied post-filing can be paid, and so that the Union, if it is successful in its claims, can be paid.

9 In addition to the three transactions for which the Vesting Orders are sought, a fourth transaction is covered by the Approval and Distribution Order. The fourth transaction is with respect to personal property owned by two U.S. companies. These companies operate in the State of Michigan. The Applicants did not seek formal recognition of the CCAA proceedings in the United States. The parties are of the view that the most cost efficient means of completing the transaction with respect to these assets would be for the Bank to take its remedies under the U.S. Uniform Commercial Code, ("UCC") and issue notices of sale under the UCC with respect to the personal property. The Monitor consented to this process and notices were issued by the Bank.

10 It is specifically noted, that notwithstanding anything in the Approval and Distribution Order, Vesting Orders or purchase agreements referenced therein, the purchase orders or releases issued by Magna Structural Systems Inc. and/or Magna Seating of America, Inc. (collectively, "Magna") or Ford Motor Company ("Ford") to WMSL or any other Applicant will be assigned and vested in and to the purchaser, upon the consent of Magna or Ford, as the case may be, to the assignment of such purchase orders and releases being provided to WMSL and the Purchaser on Closing and the Certificate having been filed.

11 Further, nothing in the Approval and Distribution Order or the Vesting Orders made in accordance with such Approval and Vesting Order shall, unless JCI consents, impact or terminate the IP licence or option to purchase assets granted to JCI pursuant to the Accommodation Agreement dated October 24, 2008 and approved by the Order dated October 29, 2008, and the vesting of assets pursuant to Approval and Distribution Order or the Vesting Orders shall, unless JCI otherwise consents, be subject to the IP licence and option in favour of JCI.

12 Finally, it is noted that employee matters are specifically addressed at Article 2.13 of the Agreement of Purchase and Sale.

13 Although the outcome of this process does not result in any distribution to unsecured creditors, this does not give rise to a valid reason to withhold court approval of these transactions. I am satisfied that the unsecured creditors have no economic interest in the assets.

14 As previously indicated, the record supports the requested relief in all respects. Orders have been signed and issued in the form requested.

End of Document

Tab 3

istrative costs in respect of administration of the fund: *Re é Canadienne de la Croix-Rouge* (2011), 2011 Carswell nt. S.C.J. [Commercial List]).

ice declined to approve a settlement negotiated betwee r of securities dealers. The plain language of the court t the settlement be "acceptable" to the litigation trustee *CAA* plan and the subsequent litigation trust agreement prehensive manner. There was never any doubt that the at the *CCAA* release had to be acceptable to the litigation declined to override the language of the plan. Justice uld be mindful of the guidance recently provided by the *n v. Hrynew*, 2014 CarswellAlta 2046, [2014] 3 S.C.R No. 71 (S.C.C.), where at paragraph 63 the Court held ıere is an organizing principle of good faith that underlie e specific doctrines governing contractual performance that parties generally must perform their contractual du capriciously or arbitrarily." Justice Morawetz stated that ract, and both sides should attempt to resolve the issue in the litigation trustee, having no economic interest in the ıtractual duties honestly and reasonably and not capri eld that the parties should attempt to resolve the issue in ɔrth in *Bhasin*, and directed the parties to negotiate with eturn to court to report on their progress. If the matter is ıe class action plaintiffs could renew their motion for the l be heard on the issue of whether the parties have been ınce with the principles set forth in *Bhasin*: *Labourers' n Canada (Trustees of) v. Sino-Forest Corp.*, 2015 Cars 2015 ONSC 4004, [2015] O.J. No. 5550 (Ont. S.C.J.).

ɜ Plan by the Court

/ the court, a difficulty arises in interpreting the plan, an ɔns to the court that made the order approving the plan: 1991), 8 C.B.R. (3d) 25, 82 Alta. L.R. (2d) 152 (Q.B.). *ociété Canadienne de la Croix-Rouge* (2002), 35 C.B.R. nt. S.C.J.), after a plan had been sanctioned by the court, governing the limitation period for certain claims. In s of a plan, the court should apply fairness and reasona- ıeral aim of minimizing prejudice to creditors. At the ance a contract sanctioned by the court, the principles ıcts must also be applied. By interpreting the plan in this law of Ontario and the federal laws of Canada were the ı period.

ɔproval, certain property of the debtor company may be e sales. In *United Properties Ltd. v. 642433 B.C. Ltd.* CarswellBC 863 (B.C. C.A.), the plan contained such a le of a parcel of real property, the purchaser paid the ı vesting order. The debtor company then moved before *CCAA* proceedings for determination of the question l with post-closing obligations. The judge held that he

had no jurisdiction to determine this question as it was not part and parcel of the *CCAA* proceedings. The decision was affirmed by the British Columbia Court of Appeal on the ground that the dispute did not raise any question about the interpretation of the plan or its administration.

N§50 — Payment of Crown Claims

Section 6 ensures that the treatment of certain claims is similar in both the *CCAA* and the *BIA* to prevent forum shopping to defeat interests that are protected for public policy reasons. Section 6(3) requires Crown approval for any plan that does not provide for the payment, within six months, of all amounts owed to the Crown in respect of source deductions under s. 224(1.2) of the *Income Tax Act*, any provision of the *Canada Pension Plan* or the *Employment Insurance Act* that refers to s. 224(1.2) and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or equivalent provincial legislation. No compromise or arrangement is to be sanctioned by the court if, at the time the court hears the application for sanction, the Crown satisfies the court that the company is in default on any remittances that became due after the time of the application for an order under s. 11.02: s. 6(4).

See discussion at N§101 "Claims under the *Excise Tax Act*".

(1) — Remittances Due after Application for Initial Order

Section 6(4) requires Crown approval for any plan of arrangement or compromise that does not require payment of all amounts owed to the Crown in respect of source deductions that came due after the date of the initial application.

N§51 — Plan Where Company Subject to Bankruptcy or Winding-up Legislation

The court may sanction a proposed plan where creditors have voted in the requisite amounts under s. 6(1), and it is binding on the trustee in the case of a company that has made an assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act* and binding on the liquidator and contributories of a company that is in the course of being wound up under the *Winding-up and Restructuring Act*: s. 6(1)(b).

N§52 — Court Order that Constating Instrument be Amended

If a court approves a plan of compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law, s. 6(2). The provision allows the court to approve a change in the capital or governance structure of the debtor company without having to convene concurrent proceedings under the relevant corporations legislation.

N§53 — Protection of Claims of Employees and Former Employees

Section 6(5) prohibits the court from sanctioning a plan of arrangement or compromise unless the plan requires the payment immediately after court approval of all amounts the employees or former employees would have qualified to receive under s. 136(1)(d) of the *BIA* had the company had become bankrupt. The court may sanction a compromise or an arrangement only if wages, salaries, commissions or compensation for services rendered after proceedings commence under the *CCAA* and before the court sanction, together with dis-

Tab 4

2012 ONSC 4423, 2012 CarswellOnt 9607, 218 A.C.W.S. (3d) 490, 91 C.B.R. (5th) 268

Most Negative Treatment: Distinguished
Most Recent Distinguished: Terrace Bay Pulp Inc., Re | 2013 ONSC 5111, 2013 CarswellOnt 11233, 231 A.C.W.S. (3d) 118 | (Ont. S.C.J. [Commercial List], Aug 9, 2013)

2012 ONSC 4423
Ontario Superior Court of Justice [Commercial List]

Northstar Aerospace Inc., Re

2012 CarswellOnt 9607, 2012 ONSC 4423, 218 A.C.W.S. (3d) 490, 91 C.B.R. (5th) 268

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C 36, as Amended

In the Matter of a Plan of Compromise or Arrangement of Northstar Aerospace, Inc., Northstar Aerospace (Canada) Inc., 2007775 Ontario Inc. and 3024308 Nova Scotia Company (Applicants)

Morawetz J.

Heard: July 24, 2012
Judgment: July 30, 2012
Docket: CV-12-9761-00CL

Counsel: A.J. Taylor, K. Esaw for Applicants
Craig J. Hill for Court-Appointed Monitor, Ernst & Young Inc.
D.S. Grieve for Heligear Canada
A. Dale for CAW-Canada
G. Moffat for Chief Restructuring Officer
J.L. Wall for Her Majesty The Queen in Right of Ontario as represented by the Ministry of the Environment
R. Brookes for Region of Waterloo
S. Weisz, L. Rogers J. Willis for Fifth Third Bank as Pre-filing Agent and DIP Lender
W.P. Meagher for Corporation of the City of Cambridge
R.M. Slattery for 180 Market Portfolio
M. Jilesen for General Electric Canada
C. Prophet for Boeing Capital Loan Corporation
S. Pickens (by phone) for Fifth Third Bank

Subject: Insolvency; Constitutional; Corporate and Commercial; International

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.e Proceedings subject to stay
XIX.2.e.iv Crown claims

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Proceedings subject to stay — Crown claims

Facility owned by N group of companies was subject to orders under Environmental Protection Act due to contamination caused by N group's prior use of industrial solvents at facility — Ministry of Environment (Ministry) issued March 15 Order requiring N group to undertake various activities related to monitoring, mitigation and remediation of environmental contamination at facility, which was presently non-operational — N Canada Inc. and certain Canadian subsidiaries (debtor companies) received protection of Companies' Creditors Arrangement Act (CCAA) — Initial Order was issued — Debtor companies brought motion for approval of agreement to purchase substantially all of N group's assets, not including facility, from N group; Ministry brought motion for declaration that March 15 Order was "regulatory order" pursuant to s. 11.1(2) of CCAA and was not subject to stay of proceedings in Initial Order; or, in alternative, sought order lifting stay — Debtor companies' motion granted on other grounds; Ministry's motion dismissed — Purpose of March 15 Order and Ministry's motion was to attempt to require debtor companies to continue to comply with March 15 Order and financial obligations associated therewith in perpetuity and in conflict with priorities enjoyed by other creditors — March 15 Order sought to enforce payment obligation and was therefore stayed by Initial Order — Ministry was entitled to claim against N group for costs of remedying environmental condition at facility — Ministry's request to lift stay denied on basis that Ministry was seeking to create super priority claim by way of March 15 Order — Such priority is not recognized at law.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous

Facility owned by N group of companies was subject to orders under Environmental Protection Act due to contamination caused by N group's prior use of industrial solvents at facility — Ministry of Environment (Ministry) issued orders requiring N group to fund and undertake various activities related to monitoring, mitigation and remediation of environmental contamination at facility, which was presently non-operational — N Canada Inc. and certain Canadian subsidiaries (debtor companies) received protection of Companies' Creditors Arrangement Act (CCAA) — Initial Order was issued — Debtor companies brought motion for approval of agreement by purchaser to purchase substantially all of N group's assets, not including facility, from N group vendors; Ministry brought motion for declaration — Debtor companies' motion granted; Ministry's motion dismissed on other grounds — Having considered factors in s. 36(3) of CCAA, transaction was in best interests of N group's stakeholders and should be approved — Debtor companies complied with terms of Sales Process Order — Record established that creditors were adequately consulted and effects of transaction were positive — Consideration to be received for assets was reasonable and fair in circumstances.

Table of Authorities

Cases considered by *Morawetz J.*:

AbitibiBowater Inc., Re (2010), 68 C.B.R. (5th) 1, 52 C.E.L.R. (3d) 17, 2010 QCCS 1261, 2010 CarswellQue 2812 (C.S. Que.) — referred to

General Chemical Canada Ltd., Re (2007), 228 O.A.C. 385, (sub nom. *Harbert Distressed Investment Fund, L.P. v. General Chemical Canada Ltd.)* 2007 C.E.B. & P.G.R. 8258, 35 C.B.R. (5th) 163, 61 C.C.P.B. 266, 31 C.E.L.R. (3d) 205, 2007 ONCA 600, 2007 CarswellOnt 5497 (Ont. C.A.) — considered

Nortel Networks Corp., Re (2009), 256 O.A.C. 131, 2009 CarswellOnt 7383, 2009 ONCA 833, 59 C.B.R. (5th) 23, 77 C.C.P.B. 161, (sub nom. *Sproule v. Nortel Networks Corp.)* 2010 C.L.L.C. 210-005, (sub nom. *Sproule v. Nortel Networks Corp., Re)* 99 O.R. (3d) 708 (Ont. C.A.) — referred to

Nortel Networks Corp., Re (2012), 88 C.B.R. (5th) 111, 2012 CarswellOnt 3153, 2012 ONSC 1213, 66 C.E.L.R. (3d) 310 (Ont. S.C.J. [Commercial List]) — considered

Northstar Aerospace Inc., Re (2012), 2012 ONSC 3974, 2012 CarswellOnt 8605 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982
Chapter 11 — referred to

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

s. 6(5)(a) — considered

s. 11.1 [en. 1997, c. 12, s. 124] — considered

s. 11.1(2) [en. 1997, c. 12, s. 124] — considered

s. 11.1(3) [en. 1997, c. 12, s. 124] — considered

s. 11.1(4) [en. 1997, c. 12, s. 124] — considered

s. 11.8(8) [en. 1997, c. 12, s. 124] — considered

s. 11.8(9) [en. 1997, c. 12, s. 124] — considered

s. 36(3) — considered

s. 36(7) — considered

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5
s. 91 ¶ 21 — considered

s. 92 ¶ 13 — considered

s. 92 ¶ 16 — considered

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 109 — considered

Environmental Protection Act, R.S.O. 1990, c. E.19
Generally — referred to

MOTION by debtor companies for approval of asset purchase agreement and other relief; MOTION by Ministry of Environment for declaration.

***Morawetz J.*:**

Overview

1 Northstar Aerospace, Inc. ("Northstar Inc."), Northstar Aerospace (Canada) Inc. ("Northstar Canada"), 2007775 Ontario Inc. and 3024308 Nova Scotia Company (collectively, the "CCAA Entities") brought this motion for:

> (a) approval of an agreement dated June 14, 2012 (the "Heligear Agreement") between Northstar Inc. and Northstar Canada (together, the "Canadian Vendors"), Northstar Aerospace (U.S.A.) Inc. ("Northstar USA") and other Northstar U.S. entities, (collectively, the U.S. Vendors", and together with the Canadian Vendors, the "Vendors") and Heligear Acquisition Co. (the "U.S. Purchaser") and Heligear Canada Acquisition Corporation (the "Canadian

for many months and are unable to meet various financial and other covenants with their secured lenders and do not have the liquidity to meet their ongoing prefiling obligations.

29 Since late 2011, Northstar has issued press releases discussing, among things, concerns about its ability to continue as a going concern.

30 After a comprehensive marketing process conducted with the assistance of Harris Williams Inc. ("Harris Williams"), on June 14, 2012, the Canadian Vendors and Heligear entered into the Heligear Agreement for the sale of substantially all of Northstar's assets (the "Heligear Transaction").

31 The assets to be purchased by Heligear do not include the Cambridge Facility and related assets. It is apparent that during the Sales Process, no bidder that expressed an interest in the assets of Northstar was willing to purchase or expressed any interest in purchasing the nonoperating Cambridge Facility, either on its own or together with the other assets of Northstar.

32 Two significant credit facilities have security over the property of the CCAA Entities.

33 In 2010, the CCAA Entities entered into a $66 million secured credit agreement (the "Credit Facility") between certain of the CCAA and Chapter 11 Entities and Fifth Third Bank ("Fifth Third") and other lenders (collectively, the "Lenders").

34 The Monitor has found the security related to the Credit Facility to be valid, perfected and enforceable.

35 In the Initial Order, the court approved a Debtor-in-Possession Facility (the "DIP Facility") under which Fifth Third, as the DIP Agent, and other lenders (together, the "DIP Lenders"), agreed to provide up to a principal amount of $3 million to finance the CCAA Entities' working capital requirements and other general corporate purposes and capital expenditures. A court-ordered charge over the CCAA Entities' property in favour of the DIP Lenders (the "DIP Lenders' Charge") was also granted and was given super priority status by court order dated June 27, 2012.

36 As of August 3, 2012, the proposed closing date for the proposed Heligear Transaction, the aggregate amount owing under the DIP Facility, the U.S. Dip Facilities (to which the CCAA Entities are guarantors) and the Credit Facility will be approximately $75 million. Net proceeds from the Heligear Transaction are expected to be less than $65 million after transaction costs, payment of outstanding post-filing obligations and prior ranking claims. As a result, if the Transaction is approved, Northstar's secured creditors are expected to realize a shortfall.

37 Notwithstanding this shortfall, the secured creditors support approval of the Heligear Transaction.

38 The DIP Lenders have advised Northstar that they will not fund the continued voluntary remediation efforts after closing of the proposed Heligear Transaction, which is scheduled for August 3, 2012.

Analysis

39 The MOE takes the position and has served a motion for a declaration that the March 15 Order is a "regulatory order" pursuant to s. 11.1(2) of the CCAA and is not subject to the stay of proceedings provided by the Initial Order; or, in the alternative, the MOE seeks an order lifting the stay.

40 The MOE also seeks an order that the Heligear Transaction not be approved.

41 Alternatively, if the Heligear Transaction is approved, the MOE seeks an order that no proceeds be distributed pending the release of the decision on this motion and the hearing of further submissions on the allocation of proceeds.

42 The issues on this motion, from the standpoint of the MOE, are:

(a) is the March 15 Order subject to the stay of proceedings granted in the Initial Order?

proceedings to enforce its rights as such.

76 The practical result at that point would be that Northstar would have no assets available and no ability to comply with the MOE Order.

77 The reality of the situation is that, regardless of whether the Heligear Transaction is approved, Northstar will not have the practical ability to comply with the MOE Order. In this respect, the sale of the Canadian Purchased Assets to the Canadian Purchaser has no real effect on the MOE or any other party with an interest in the Cambridge Facility.

78 The Heligear Transaction is supported by the Monitor, the CRO, Fifth Third Bank (both as DIP Agent and as Agent for the Lenders under Northstar's existing secured facility), Boeing, Boeing Capital and the CAW.

79 In addition to the factors set out in s. 36(3), discussed above, s. 36(7) of the CCAA sets out the following restrictions on the disposition of assets within CCAA proceedings:

> 36(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(*a*) and (5)(*a*) if the court had sanctioned the compromise or arrangement.

80 The CCAA Entities have advised that they intend to make the payments of the amounts described in subsections 6(4)(*a*) and (5)(*a*) of the CCAA on their normal due dates from the proceeds of the Heligear Transaction.

81 Counsel to the CAW made reference to issues of successor liability. These issues are not directly before the court today and do not factor into this endorsement.

Disposition

82 In conclusion, I am satisfied that the Heligear Transaction is in the best interests of Northstar's stakeholders, including its employees, suppliers and customers. The proceeds of the Transaction will be available for distribution to the CCAA Entities' creditors in accordance with their legal priorities. The Lenders have asserted a claim against the proceeds of the Heligear Transaction. Independent counsel to the Monitor has reviewed the Lenders' security and concluded that the security granted under the Credit Facility is valid, perfected and enforceable.

83 In the result, I am satisfied that the Heligear Transaction should be approved.

84 An order is also made declaring that the MOE is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed.

85 Further, MOE's request to lift the stay is denied on the basis that the MOE is seeking to create a super priority claim by way of the March 15 Order. Such a priority is not recognized at law and, consequently, it is appropriate that the MOE's enforcement of its rights as a creditor should be stayed.

86 An order is also granted vesting all of the Canadian Purchased Assets in the Canadian Purchaser free and clear of all restrictions.

87 Finally, the Monitor is authorized and directed, on closing of the Heligear Transaction, to make distributions to the DIP Agent for the DIP Lenders and to the Lenders in accordance with their legal priorities.

88 I thank counsel for their comprehensive submissions and argument in connection with this matter.

Debtor companies' motion granted; Ministry's motion dismissed.

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