Court File No.: S/M/__/09

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF SAINT JOHN

BETWEEN:

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

- and -

IN THE MATTER OF THE APPLICATION OF BLUE NOTE CARIBOU MINES INC., a body corporate.

BRIEF ON LAW OF THE APPLICANT, BLUE NOTE CARIBOU MINES INC.

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INDEX

PART ONE - FACTS

1. The Applicant, Blue Note Caribou Mines Inc., ("BNC"), applies by way of Notice of Application for relief pursuant to section 11 of the *Companies' Creditors Arrangement Act*, RSC. 1985, c. C-36, ("CCAA").

2. BNC was incorporated under the laws of Canada and is registered to do business in the Province of New Brunswick under the New Brunswick *Business Corporations Act*. BNC's principal place of business is in the City of Bathurst, New Brunswick. BNC owns and operates two mines in the Bathurst area known as the Restigouche Mine and the Caribou Mine. The mines are comprised of mining leases, industrial surface leases, various mineral claims and freehold land.

3. BNC had employed approximately 287 individuals inclusive of independent contractors, however, given recent financial difficulties, it has reduced its labour force to 17, as of the end of January, 2009.

4. The mines have operated, from time to time, for a number of years producing zinc, led and copper.

5. The geology of the mines is such that it presents financial challenges to BNC with respect to, ore extraction. As well, metal prices affect the economic viability of the mine operation.

6. When the mines were originally acquired by BNC's parent company in early 2006, the Minister of Mines for the Province of New Brunswick exacted security to secure the performance of obligations to the Minister with respect to environmental protection of the areas in and around the mines. The amount of

the security was $10,400,000.00. This is currently being held by the Minister.

7. After the parent company acquired the mines work began to refurbish the mines and mill complex with a view to commencing commercial production. BNC was later incorporated to become the entity that would otherwise operate the mine. In mid-June, 2007, all of the assets relating to the mines were transferred by the parent company to BNC. BNC possesses substantial mineral reserves and resources at the mines.

8. Production at the mines has been suspended to defer capital spending. BNC anticipates an improvement in operating costs over time.

9. The assets of BNC are encumbered by various forms of security to secure the indebtedness to the various secured creditors with investments in the mines.

10. BNC and its financial advisors have determined that it is insolvent. The indebtedness of BNC exceeds $75,000,000.00. Informal restructuring of BNC began in the month of August, 2008, however, those efforts have not produced the desired result. Various creditors have taken action with a view to recovering the indebtedness. Although supported by its parent company in the fall of 2008, given the worsening financial condition, the parent company ceased providing advances, and the mining facility is currently on a care and maintenance program. Part of that program involves a dewatering process in the mines, which involves the consumption of electric power. BNC has received notification by the power supplier, New Brunswick Power Corporation that, unless repayment terms are met, the power supply to the mines will be terminated, effective February 25, 2009. BNC does not have the resources to obtain an alternate power supply and believes that if the power supply is terminated flooding will occur which will cause wide-spread environmental damage.

11. BNC employs a highly skilled set of employees who have made significant contributions to the mines and who rely heavily on the employment provided by BNC.

12. Due to the worsening financial situation and the demands of creditors, BNC requires intervention by this Court to allow it time to develop a plan to present to its creditors which may include selling assets.

13. As at December 31,2007,BNC's parent company and BNC have allocated a total of $140 million toward the Caribou mine since the date of aquisition. This is in addition to the amount of $10 million posted as a deposit for reclamation and environmental obligations with the province of New Brunswick.

PART TWO - ISSUE

14. Should the Court issue the Order requested by the Applicant?

PART THREE - LAW AND ARGUMENT

Purpose of the CCAA

15. The purpose of the CCAA was commented on by Justice Turnbull of the New Brunswick Court of Appeal in Juniper Lumber Co. (Re) [2000] N.B.J. No. 144, at para. 1:

> *"The principal purpose of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (the "CCAA"), "is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its*

creditors to the end that the company is able to continue in business ... When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure." See Arrangements Under the Companies' Creditors Arrangement Act by Goldman, Baird and Weinszok (1991), 1 C.B.R. (3d) 135 at p. 201 where the authors cite Thackray, J. approvingly quoting Gibbs, J.A. from the cases cited on that page. In New Brunswick, the Court of Queen's Bench is defined by the CCAA as the Court to play the "kind of supervisory role". The CCAA has a remedial purpose and, therefore, must be interpreted in a broad and liberal fashion. See pages 137-138 in the article previously cited. More often than not time is critical. And, in order to maintain a status quo while attempts are made to determine if a successful compromise or arrangement can be reached, the courts are granted certain powers in s. 11 to hold creditors at bay.

16. Justice Glennie of the New Brunswick Court of Queen's Bench in Simpson's Island Salmon Ltd. (Re) [2006] N.B.J. No. 345, 2006 NBQB *279*, at para. 20, after referencing Juniper Lumber Co., referred to Lehndorff General Partner Ltd. (Re) *[1993] O.J. No. 14* (Ont. C.J. - Gen. Div.), at paras. 5 and 6, where Farley, J. said:

"The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable a plan of compromise or arrangement to

be prepared, filed and considered by their creditors and the court. In the interim, a judge has a great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. ...

The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA. ..."

17. In Re Pacific National Lease Holding Corp., (1992), 72 B.C.L.R (2d) 368 (B.C.C.A), the British Columbia Court of Appeal approved of the following principles to consider in applications under the CCAA, at paragraph 20:

"1. The purpose of the C.C.A.A. is to allow an insolvent company a reasonable period of time to recognize 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 served not only the company's creditors but also a broad constituency which includes the shareholders and the employees.

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

4. *The function of the Court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.*

5. *The status quo does not mean preservation of the relative pre-debt status of each creditors. Since the companies under C.C.A.A. orders continue to operate and having regard to the broad constituency of interests the Acts 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."*

Powers of the Court

18. Pursuant to the CCAA Courts are invested with a statutory authority and an inherent residual jurisdiction resulting from the equitable nature of Superior Courts.(see Cansugar Inc. (re) 288 N.B.R. (2nd)(374) at paragraph 18.)

19. Subsection 11(3) of the CCAA gives the Court power on an initial application to make an order for a period of time not to exceed (30) thirty days staying all proceedings, restraining further proceedings and prohibiting commencement of any proceedings. Subsection 11(6) provides that on an initial application the

Applicant must satisfy the Court that circumstances exist that make the order appropriate.

20. The Court has inherent jurisdiction to give a priority for debtor-in-possession (DIP) financing. (see ScoZinc Ltd. (re) [2008] N.S.J. No. 591)

21. The Court has jurisdiction to grant DIP Financing on an ex parte basis on an application for an initial order and if will do so it is necessary to respond on an urgent and interim basis to a serious negative cash flow crisis, where a lack of short term financial assistance might result in the cessation of operations. Other creditors are protected from any prejudice which may be caused by the DIP financing by the existence of a come back clause. (see Algoma Steel Inc.[2001] O.J.No.1943).

22. The powers the Court has under the CCAA extend to granting a stay to provide for the sale of a companies assets en bloc or as a going concern through some sort of judicially supervised sale process. (see SLMsoft Inc. (Re) [2003] O.J. No 4920 at para 3)

23. The CCAA can be used to effect a sale, winding up or liquidation of a company such that its business would not be ongoing if the sale is part of the arrangement approved by the creditors and sanctioned by the Court (see Cliffs over Maple Bay Investments Ltd. v Fisgard Capital Corp 46 C.B.R.(5th)7 at para 32)

Should the initial application be granted?

24. It is submitted BNC has shown it is insolvent and the total of the claims against it exceed $5 million. BNC's insolvency has resulted in a crisis situation as the supply of electricity to its properties is in imminent danger of being terminated. The supply of electricity is critical as without electricity BNC will not be able to de-water the Mines which will cause severe environmental damage. In addition to the environmental damage it is estimated the cost of recommencing operations after the mines are flooded will be $40 million dollars.

25. In Simpson's Island Salmon Ltd. (Re) (supra) the Court held at paragraph 14 " the CCAA is intended to provide distressed businessman and their creditors with the means of reaching an accommodation of benefit to both, and to the public generally". Substantial sums have been invested in BNC's business operations and significant employment has been generated. It is submitted BNC should be afforded the protection granted under the CCAA to enable it to preserve the results of the money invested and attempt to continue the business as a viable economic entity.

26. The Applicant is requesting DIP financing. It is submitted the provision of DIP financing is justified in accordance with the tests as set out in Algoma Steel Inc.(supra)

PART FOUR - ORDER SOUGHT

27. The Applicant seeks an order from the Court substantially in the form of the draft

Order appended to the Notice of Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19 day of February, 2009.

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PART FIVE - LIST OF AUTHORITIES

Case Law

Statutes

1. Companies' Creditors Arrangement Act, RSC. 1985, c. C-36, ("CCAA").

Indexed as:

Algoma Steel Inc.

IN THE MATTER OF The Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 and The Business Corporations Act, R.S.O. 1990, c. B.16
AND IN THE MATTER of a Proposed Plan of Arrangement with Respect to Algoma Steel Inc.
Algoma Steel Inc., (applicant/responding party)

[2001] O.J. No. 1943

147 O.A.C. 291
25 C.B.R. (4th) 194
105 A.C.W.S. (3d) 585

Docket No. M27359

Ontario Court of Appeal
Toronto, Ontario

Osborne A.C.J.O., Doherty and MacPherson JJ.A.

Heard: May 18, 2001.
Judgment: May 25, 2001.

(10 paras.)

Creditors and debtors — Debtor's relief legislation — Companies' creditors arrangement legislation — Notice to creditors — Appeals.

Motion for leave to appeal an order authorizing Algoma to obtain additional financing from its existing bank lenders during the 30-day stay. The order gave priorities to the additional financing and to certain administration and directors' charges over the noteholders' existing security. The noteholders were companies that held first mortgage notes. The order was made on a motion without notice to the noteholders. Algoma experienced a serious negative cash flow. Algoma might have had to ceased operations without the additional financing to restructure its indebtedness. The order contained a comeback clause. The noteholders brought a motion to vary the order.

HELD: Motion dismissed. The motion for leave to appeal was premature. Initial orders made on a without notice basis were permitted by the CCAA. The noteholders availed themselves of the order's comeback clause. The issues raised by the noteholders could be determined by the judge in the CCAA proceedings.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, 1985, ss. 11(1), 11(3), 13.

Appeal from:

On appeal from the order of Justice James M. Farley dated April 23, 2001.

Counsel:

John B. Laskin and David Outerbridge, for the moving party, First Mortgage Noteholders.
Michael Barrack, Geoff Hall and Sarit Batner, for the responding party, Algoma Steel Inc.
John T. Porter, Alan Merskey and Mario Forte, for the DIP Lenders.
Ken Rosenberg, Lily Harmer and Marcus Knapp, for the United Steelworkers of America.

James H. Grout, for the Monitor, Andrew Hatnay, for the Superintendent of Financial Services.
Michael Weinczok, for the Directors of Algoma Steel Inc.

The following judgment was delivered by

1 THE COURT (endorsement):-- The First Mortgage Noteholders ("the Noteholders") seek leave to appeal, pursuant to s. 13 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("the CCAA"), from the order of Farley J. dated April 23, 2001. The Noteholders are a consortium of about a dozen companies and groups which holds first mortgage notes totalling about $550 million issued by the respondent Algoma Steel Inc. ("Algoma").

2 Farley J.'s order was an initial order made pursuant to s. 11(3) of the CCAA, on a motion by Algoma. It was made without notice to the Noteholders. The essence of Farley J.'s order was an authorization to Algoma to obtain additional financing ("the DIP Financing") from its existing bank lenders during the 30 day stay period permitted by s. 11(3) of the CCAA. The purpose of the order was to respond, on an urgent and interim basis, to a serious negative cash flow crisis at Algoma. Indeed, without short-term financial assistance designed to serve as a base for restructuring Algoma's current indebtedness, Algoma might well have had to cease operations. The order also gave priorities (which the parties call superpriorities) to the DIP Financing charge and to certain Administration and Directors Charges over the Noteholders' existing security.

3 In his endorsement, Farley J. said, inter alia:

> Algoma qualifies as a corporation with the threshold debt re seeking relief under the CCAA.
>
> ...
>
> The noteholders who are owed in excess of $1/2 billion were not represented today for the very simple reason that none of them were served. The reason for that as I understand it is that there is no set up at the present time of a Creditor's Committee or any equivalent. *I note that there is a comeback clause and I would particularly emphasize that if it is felt appropriate and needed, this clause should be used on a timely basis*.
>
> Order to issue as per my fiat.
>
> [Emphasis added.]

4 The comeback clause in the underlined passage is reflected in paragraph 48 of Farley J.'s order:

> 48. THIS COURT ORDERS that any interested person may apply to this court to vary or rescind this order or seek other relief upon seven (7) days' notice to the Applicant, the Monitor and to any other party likely to be affected by the order sought or upon such other notice, if any, as this court may order.

5 Once the Noteholders became aware of Farley J.'s order, they decided to challenge it. They did so in two ways: by seeking leave to appeal to this Court and by initiating a motion to vary before Farley J. The former proceeded before this Court, on a preliminary basis, on May 15 and, on the merits, on May 18. The latter was scheduled to be heard by Farley J. on May 23.

6 The Noteholders seek leave to appeal Farley J.'s order on three bases, which they frame as Proposed Questions for this Court:

> (1) Did the motions judge exceed his jurisdiction in making the initial order by altering existing priorities of and between secured creditors through the granting of superpriorities without the consent of the First Mortgage Noteholders?
>
> (2) Did the motions judge exceed his jurisdiction or otherwise err in law by granting

these superpriorities without any notice to the First Mortgage Noteholders or to the trustee under the trust indenture?

(3) Did the motions judge err in law by failing: (a) to treat the First Mortgage Noteholders in an equitable and even-handed manner relative to the Bank Lenders; and (b) to give due regard to the prejudice suffered by the First Mortgage Noteholders as a result of the initial order?

7 In our view, the motion for leave to appeal is premature. Initial orders, made on a without notice basis, are specifically authorized by s. 11(1) of the CCAA. Proceedings under the CCAA are often urgent, complex and dynamic. The Algoma proceedings fit that description. Farley J. was faced with complex facts and a difficult decision potentially implicating the closure of one of the largest companies in Ontario. Moreover, he had to make his decision in a very timely fashion. In these circumstances, he recognized that his initial order might not be acceptable to all interested parties, including some of Algoma's creditors. That is why he included a comeback clause in his order and specifically invited parties to resort to it in his endorsement.

8 The fact that the CCAA provides that an appeal of an initial order is only available with leave indicates that appeals in CCAA proceedings should be limited. An Appeal Court should be cautious about intervening in the CCAA process, especially at an early stage. On this point, we are attracted to the reasoning of MacFarlane J.A. (in chambers) in Re Pacific National Lease Holding Corp. (1992), 15 C.B.R. (3d) 265 at 272 (B.C.C.A.):

> [T]here may be an arguable case for the petitioners to present to a panel of this court on discrete questions of law. But I am of the view that this court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the C.C.A.A. The process of management which the Act has assigned to the trial court is an ongoing one. ...
>
> A colleague has suggested that a judge exercising a supervisory function under the C.C.A.A. is more like a judge hearing a trial, who makes orders in the course of that trial, than a chambers judge who makes interlocutory orders in proceedings for which he has no further responsibility.
>
> ... In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and of problems. In that context appellant proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A. I do not say that leave will never be granted in a C.C.A.A. proceeding. But the effect upon all parties concerned will be an important consideration in deciding whether leave ought to be granted.

9 Like MacFarlane J.A., we do not say that leave to appeal should never be granted in the midst of CCAA proceedings. However, it is premature to grant such leave at this juncture in the Algoma proceedings. Farley J.'s order was only an initial order brought on an urgent basis to deal with seemingly desperate circumstances. Moreover, the order specifically opened the proceedings to all interested parties and invited dissatisfied parties to bring their concerns to the Court on a timely basis. The Noteholders availed themselves of this opportunity by initiating a motion to vary which was scheduled to be heard on the very day the initial order expired. In our view, this is precisely how a dynamic CCAA proceedings should unfold. Accordingly, it would be unwise to interrupt this normal and desirable process by granting leave to appeal at this juncture. The issues that the Noteholders want to raise can be considered by Farley J., importantly in the context of the entire proceedings with which he is familiar. Moreover, if at a later point in time this Court grants leave to appeal, it will then have the benefit of the considered reasons of the Motions Judge flowing from a complete record and from full argument by all interested parties.

10 For these reasons, the motion for leave to appeal is dismissed, without prejudice to the right of the Noteholders, or any other interested party, to make a similar motion at a later juncture in the proceedings, and to do so on an expedited basis. Only the United Steelworkers of America requested their costs of the motion. They are entitled to their costs which we would fix at $1000.

OSBORNE A.C.J.O.
DOHERTY J.A.
MacPHERSON J.A.

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Case Name:

Cansugar Inc. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF the application of Cansugar Inc., a body corporate
Between
Cansugar Inc., applicant, and
Her Majesty the Queen in Right of the Province of New Brunswick, as represented by the Minister of Business New Brunswick, respondent

[2005] N.B.J. No. 227

2005 NBQB 199

288 N.B.R. (2d) 374
6 B.L.R. (4th) 133
140 A.C.W.S. (3d) 391
2005 CarswellNB 308

No. S/M/96/03

New Brunswick Court of Queen's Bench
Trial Division - Judicial District of Saint John

P.S. Glennie J.

Heard: April 4 and 7, 2005.
Oral judgment: April 11, 2005.

(48 paras.)

Insolvency law — Practice — Proceedings in bankruptcy — Jurisdiction of courts — The court had the authority to extend the time for the bankrupt to exercise it option to purchase provincial lands.

Application by Cansugar Inc. for an order extending the time period within which it could exercise an option to purchase certain provincial lands — The option to purchase had been granted to Cansugar by the province — Cansugar had encroached on the provincial lands with one of its buildings — When Cansugar had attempted to sell its assets to a third party while in bankruptcy protection, this issue resurfaced — The Minister and Cansugar had entered into negotiation to provide a mechanism to resolve the encroachment problem which resulted in the option to purchase agreement — Cansugar failed to exercise its option to purchase within the requisite time — The province argued that the Court could not revive an expired contract and had no statutory authority to delve into private contractual matters dealing with public lands — HELD: Application allowed — The Court had an inherent jurisdiction coupled with express power to extend the option time period — If an extension of the time period was not granted, the success of Cansugar's Plan of Arrangement would be prejudiced — The province specifically gave the Court the authority to extend the time period by virtue of a provision in the option agreement that mentioned the time period could be extended by court order — The province specifically linked the option agreement to the plan of arrangement — Prejudice to Cansugar and its affected creditors was greater than any prejudice to the province.

Statutes, Regulations and Rules Cited:

Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended s. 11, s. 11(1), s. 11(4),

s. 11(6)

Constitution Act, 1867 s. 92(5), s. 92(13)

Counsel:

R. Gary Faloon, Q.C. on behalf of Cansugar Inc.

Richard A. Williams and Nathalie H. LeBlanc on behalf of the Minister of Business New Brunswick

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DECISION

1 **P.S. GLENNIE J.** (orally):— On April 7, 2005, I allowed the Application of Cansugar Inc. ("Cansugar") for an Order extending the time period within which it may exercise an option contained in an option to purchase granted to it by the Province of New Brunswick as represented by the Minister of Business New Brunswick (the "Minister") on July 9, 2004. The option related to certain land in the McAllister Industrial Park, Saint John. These are the reasons for my ruling.

Background

2 On December 8, 2003, Cansugar was granted protection by an order of this Court (the "Initial Order") pursuant to the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended (the "CCAA").

3 In December, 2004, a Plan of Arrangement which provided for the sale of the Cansugar facility in the McAllister Industrial Park, Saint John, was approved by the creditors to whom the Plan of Arrangement applied and was submitted to this Court for approval by way of a Sanction Order. Hearings in this regard have been held from time to time but a Sanction Order has not, as yet, been issued by this Court.

4 Cansugar has entered into an Asset Purchase Agreement with First Excelsior Holdings Limited ("First Excelsior") for the sale of its assets in the McAllister Industrial Park. The transaction is scheduled to close on April 22, 2005. The purchaser of Cansugar's assets has until April 11, 2005 to complete its due diligence pursuant to the Asset Purchase Agreement.

5 In the fall of 2003, Cansugar commenced a major expansion to its refinery and in the process encroached upon adjacent vacant land in the McAllister Industrial Park owned by the Minister. According to the Minister, the encroachment took place without his permission, knowledge or consent. The Cansugar facility is located on land identified as PID #55150932. The Minister's land is identified as PID #55163703.

6 It should be noted that there had been negotiations between Cansugar and an employee of Saint John Industrial Parks Ltd., agent for the Minister, with respect to the McAllister Industrial Park, to purchase the Minister's land between April and October of 2003, however those negotiations failed, apparently because Cansugar was not prepared at that time to accept the asking price for the Minister's land.

7 According to the Minister, the encroachments on the Province's land by Cansugar include the encroachment of a building 10 meters on one end and 17 meters on the other including the obstruction of a joint utility easement; encroachment of a fence by its full length of 26.84 meters and an encroachment of a railway spur.

8 When it became apparent to this Court that the encroachment problem might impair the ability of Cansugar to successfully complete the sale of its assets to a third party, the Minister through his legal counsel was asked by this Court and the Court Monitor to enter into negotiations with Cansugar to resolve the encroachment problem. It should be noted that the Minister, through his legal counsel, has been involved in all of the hearings held with respect to Cansugar's request for a Sanction Order for its Plan of Arrangement because the Minister is the guarantor of certain of

Cansugar's indebtedness to a Canadian Chartered Bank.

9 The Minister and Cansugar then entered into negotiations to provide a mechanism to resolve the encroachment problem in conjunction with the resolution of the debt restructuring objectives of Cansugar and as a result the Minister and Cansugar entered into an Option to Purchase Agreement dated as of July 9, 2004 (the "Option Agreement").

10 The Option Agreement gave Cansugar an irrevocable option to purchase two parcels of land from the Province identified as PID #55163703 and PID #55163711 for the purchase price of $106,000 plus HST.

11 The Option Agreement contains the following provisions:

> 2(a) The creation of any interest or estate in the Property and the exercise of this option by the company is contingent upon compliance to the satisfaction of the Vendor with the following conditions precedent by and at the expense of the Purchaser within 180 days of the signing of this agreement unless agreed otherwise by the parties in accordance with section 8 or unless ordered by the Court pursuant to the Court's authority under the Companies Creditors Arrangement Act, otherwise this agreement is null and void:
>
> (i) Acceptance by the creditors of Purchaser of a Plan of Arrangement for the restructuring of the finances of the Purchaser under the Companies Creditors Arrangement Act;
>
> (ii) Elimination of all safety hazards and pollution hazards which may create hazards to persons or the environment or which may impact on other lands owned by the Vendor or expose the Province of New Brunswick to third party liability and approval by all Governmental authorities and agencies of all remedial actions to eliminate the pollution and hazards;
>
> (iii) Relocation to a new reasonable location of the utility easement which has been obstructed by the construction of the building on the Property by the Purchaser;
>
> (iv) Reasonable compliance with the restrictive covenants contained in a conveyance from the Vendor to the Purchaser dated the 2nd day of December 2002 and registered in the Saint John Registry Office on the 6th day of December, 2002 as Number 15522445.
>
> (b) The parties specifically agree that no interest or estate, legal or equitable, in the Property is created or conferred on the Purchaser until there is compliance with these conditions precedent and acceptance by the Vendor of that compliance in accordance with section 2(c) herein.
>
> (c) Upon compliance with the conditions precedent the Vendor shall provide the Purchaser with a written confirmation of the satisfactory compliance with the conditions precedent ("Certificate of Compliance") after which time an interest in land in the Purchaser may in the normal course be created and the Purchaser shall be free to exercise this option. The parties further agree that the delivery of the Certificate of Compliance to the Purchaser is also a condition precedent to the creation of any interest in the land and the exercise of the easement.
>
> 3(a) If prior to the exercise of this option there is any outstanding work or deficiency which arises from any action from the Purchaser which is related to the compliance with the conditions precedent to the creation of the interest in land and the exercise of the option then the Vendor may at its sole discretion undertake to repair or correct any deficiency and add the cost of the repair or rectification to the amount due on the exercise of the option and if the Purchaser fails to pay the cost of any of these remedial actions then the Vendor may terminate this option in which case the Purchaser shall forfeit all deposits.
>
> (b) The Parties agree to keep each other fully informed of the progress of all actions taken in respect to compliance with the conditions precedent and to cooperate one

with the other in the spirit of good faith negotiations, to achieve compliance with the conditions precedent.

12 The Option Agreement also contains the following recital:

> "WHERAS the parties are desirous of resolving the outstanding issues between them in respect to the real property matters identified herein."

13 It is acknowledged by Counsel for the Minister that the Option Agreement was drafted primarily by legal counsel for the Minister.

14 Cansugar did not exercise it's option to purchase within the requisite time period and now seeks an order extending the date that it may exercise the option for a further period of one year.

15 The Minister argues that this Court lacks the statutory jurisdiction to make an order extending the time period to exercise the Option Agreement based on the fact that Section 2(a) of the Option Agreement has expired. In other words, the Court can not revive an expired contract.

16 The Minister also asserts that the Court has no specific statutory authority to delve into private contractual matters dealing with the Management and Sale of Public Lands belonging to the Province, as defined by Section 92(5) of the Constitution Act, 1867, or the field of Property and Civil Rights in the Province, as defined by Section 92(13) of the Constitution Act, 1867.

17 The Minister argues that using the Court's general jurisdiction provided under Section 11 of the CCAA to revive an expired contract dealing specifically with Public Land, without clear statutory authority in this regard, would be unconstitutional.

Analysis

18 Pursuant to the CCAA, Courts are vested with a statutory authority and an inherent residual jurisdiction resulting from the equitable nature of Superior Courts. See: Skeena Cellulose Inc., Re: 13 B.C.L.R. (4th) 236.

19 The CCAA deals with the Court's jurisdiction to make an order other than on an initial application at Section 11(4) which, along with Section 11(1), provides as follows:

> 11(1) Notwithstanding anything in the Bankruptcy and Insolvency Act or the Winding-up Act, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.
>
> ...
>
> (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.

20 Section 11(6) of the CCAA provides as follows:

> 11(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.

21 The purpose of Section 11 of the CCAA is to provide the Court with a discretionary power to restrain conduct or actions against a debtor company in order for the debtor company to continue with the operation of its business during the restructuring period. See: Richtree Inc., Re: 2005 CarswellOnt 255.

22 Courts have exercised their discretion under Section 11 of the CCAA against third parties in certain limited circumstances.

23 In Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 72 C.B.R. (N.S.) 1, the Court prohibited a third party from exercising its power under a contractual agreement which would effectively terminate the agreement.

24 In Re: Gauntlett Energy Corp., [2003] A.J. No. 1062, (2003), 2003 CarswellAlta 12009, Justice Kent based his reasoning on the reasons given by Justice Forsyth at paragraph 376 of the Norcen case, supra, who stated the following:

> ... I am of the opinion that s. 11 of the C.C.A.A. can validly be used to interfere with some other contractual relationships in circumstances which threaten a company's existence. I add, however, that in my judgment, such interference in the interest of fairness to all parties would be effective only for a relatively short period of time.

25 Courts have also interfered with parties' contractual rights to arbitrate their disputes, allowed debtor companies to unilaterally repudiate contracts and forced third parties to agree to the assignment of existing contracts. See: Smoky River Coal Ltd., Re [1999] A.J. No. 676 (Alta. C.A.); T. Eaton Co., Re (1999), 14 C.B.R. (4th) 288 (Ont. S.C.J. [Commercial List]); Playdium Entertainment Corp., Re (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J. [Commercial List]), additional reasons (2001), 31 C.B.R. (4th) 309 (Ont. S.C.J. [Commercial List]).

26 In Playdium Entertainment, supra, the Applicants sought an order to force a third party to consent to the assignment of an agreement. Justice Spence discusses the provisions of Section 11(4) of the CCAA as follows at para. 26:

> 26 Section 11(4) of the CCAA, in subsections (a), (b) and (c), provides only for orders of a negative injunctive effect until otherwise ordered by the court, in respect of proceedings against the company, i.e. in this case, Playdium. However, the order sought is in effect to require Famous Players to be bound by an assignment of their agreement to New Playdium. It is not readily apparent how such an order could be made under s. 11(4)(a), (b) or (c) of the CCAA and no other section of the Act has been mentioned as relevant.

27 Justice Spence approved an assignment by concluding as follows at para. 42:

> 42 Having regard to the overall purpose of the Act to facilitate the compromise of creditors' claims, and thereby allow businesses to continue, and the necessary inference that the s. 11(4) powers are intended to be used to further that purpose and giving to the Act the liberal interpretation the courts have said that the Act, as remedial legislation should receive for that purpose, the approval of the proposed assignment of the Terrytown Agreement can properly be considered to be within the jurisdiction of the court and a proper exercise of that jurisdiction.

28 In the case at bar, I am inclined to rely on the Court's inherent jurisdiction coupled with the express power granted to this Court to extend the option time period as provided for in Section 2(a) of the Option Agreement.

29 In Canadian Red Cross Society/Société Canadienne de la Croix-Rouge (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.), Justice Blair stated at page 315:

> The CCAA is designed to be a flexible instrument, and it is that very flexibility which gives

it its efficacy. As Farley J. said in Dylex Ltd., supra (p. 111), "the history of CCAA law has been an evolution of judicial interpretation". It is not infrequently that judges are told, by those opposing a particular initiative at a particular time, that if they make a particular order that is requested it will be the first time in Canadian jurisprudence (sometimes in global jurisprudence, depending upon the level of the rhetoric) that such an order has made! Nonetheless, the orders are made, if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation.

30 Recently, in Stelco Inc. (Bankruptcy) Re, [2005] O.J. No. 1171, 2005 CanLII 8671 (Ont. C.A.), the Ontario Court of Appeal concluded that Section 11 of the CCAA did not provide the authority for a court to interfere with the composition of the board of directors of a company by removing members of a corporate board.

31 R.A. Blair, J.A. writes at para. 41, 42 and 44:

> [41] The rule of statutory interpretation that has now been accepted by the Supreme Court of Canada, in such cases as R. v. Sharpe, [2001] 1 S.C.R. 45, at para. 33, and Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, at para. 21 is articulated in E.A. Driedger, The Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983) as follows:
>
> > Today, there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> See also Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed. (Toronto: Butterworths, 2002) at page 262.
>
> [44] What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. In the course of acting as referee, the court has great leeway, as Farley J. observed in Lehndorff, supra, at para. 5, "to make order[s] so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors". But the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. Moreover, the court is not entitled to usurp the role of the directors and management in conducting what are in substance the company's restructuring efforts.

32 And at para. 51:

> [51] Court removal of directors is an exceptional remedy, and one that is rarely exercised in corporate law. This reluctance is rooted in the historical unwillingness of courts to interfere with the internal management of corporate affairs and in the court's well-established deference to decisions made by directors and officers in the exercise of their business judgment when managing the business and affairs of the corporation.
>
> These factors also bolster the view that where the CCAA is silent on the issue, the court should not read into the s. 11 discretion an extraordinary power - which the courts are disinclined to exercise in any event - except to the extent that that power may be introduced through the application of other legislation, and on the same principles that apply to the application of the provisions of the other legislation.

33 With respect to inherent jurisdiction, Justice Blair writes in Stelco at paras. 32 to 38:

> [32] The CCAA is remedial legislation and is to be given a liberal interpretation to facilitate its objectives: Babcock & Wilcox Canada Ltd. (Re), [2000] O.J. No. 786 (Sup. Ct.) at para.

11. See also, Re Chef Ready Foods Ltd. (1990), 4 C.B.R. (3d) 311 (B.C.C.A.), at p. 320; Re Lehndorff General Partners Ltd. (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.). Courts have adopted this approach in the past to rely on inherent jurisdiction, or alternatively on the broad jurisdiction under s. 11 of the CCAA, as the source of judicial power in a CCAA proceeding to "fill in the gaps" or to "put flesh on the bones" of that Act; see Re Dylex Ltd. (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div.) [Commercial List]), Royal Oak Mines Inc. (Re) (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]); and Westar Mining Ltd. (Re) (1992), 70 B.C.L.R. (2d) 6 (B.C.S.C.).

[33] It is not necessary, for purposes of this appeal, to determine whether inherent jurisdiction is excluded for all supervisory purposes under the CCAA, by reason of the existence of the statutory discretionary regime provided in that Act. In my opinion, however, the better view is that in carrying out his or her supervisory functions under the legislation, the judge is not exercising inherent jurisdiction but rather the statutory discretion provided by s. 11 of the CCAA and supplemented by other statutory powers that may be imported into exercise of the s. 11 discretion from other statutes through s. 20 of the CCAA.

Inherent Jurisdiction

[34] Inherent jurisdiction is a power derived "from the very nature of the court as a superior court of law", permitting the court "to maintain its authority and to prevent its process being obstructed and abused". It embodies the authority of the judiciary to control its own process and the lawyers and other officials connected with the court and its process, in order "to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner". See I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Problems 27-28. In Halsbury's Laws of England, 4th ed. (London: LexisNexis UK, 1973 -) vol. 37, at para. 14, the concept is described as follows:

> In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particularly to ensure the observation of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

[35] In spite of the expansive nature of this power, inherent jurisdiction does not operate where Parliament of the Legislature has acted. As Farley J. noted in Royal Oak Mines, supra, inherent jurisdiction is "not limitless; if the legislative body has not left a functional gap or vacuum, then inherent jurisdiction should not be brought into play" (para. 4). See also, Baxter Student Housing Ltd. v. College Housing Cooperative Ltd., [1976] 2 S.C.R. 475 (S.C.C.) at 480; Richtree Inc. (Re), [2005] O.J. No. 251 (Sup. Ct.).

[36] In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run; along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme, and that for the most part supplants the need to resort to inherent jurisdiction. In that regard, I agree with the comment of Newbury J.A. in Clear Creek Contracting Ltd. v. Skeena Cellulose Inc., [2003] B.C.J. No. 1335 (B.C.C.A.), (2003) 43 C.B.R. (4th) 187 at para. 46, that:

> ... the court is not exercising a power that arises from its nature as a superior court of law, but is exercising the discretion given to it by the CCAA. ... This is the discretion, given by s. 11, to stay proceedings against the debtor corporation and the discretion, given by s. 6, to approve a plan which appears to be reasonable and fair, to be in accord with the requirements and objects of the statute, and to make possible the

> continuation of the corporation as a viable entity. It is these considerations the courts have been concerned with in the cases discussed above, rather than the integrity of their own process.
>
> [37] As Jacob observes, in his article "The Inherent Jurisdiction of the Court", supra, at p. 25:
>
> > The inherent jurisdiction of the court is a concept which must be distinguished from the exercise of judicial discretion. These two concepts resemble each other, particularly in their operation, and they often appear to overlap, and are therefore sometimes confused the one with the other. There is nevertheless a vital jurisdical distinction between jurisdiction and discretion, which must always be observed.
>
> [38] I do not mean to suggest that inherent jurisdiction can never apply in a CCAA context. The court retains the ability to control its own process, should the need arise. There is a distinction, however - difficult as it may be to draw - between the court's process with respect to the restructuring, on the one hand, and the course of action involving the negotiations and corporate actions accompanying them, which are the company's process, on the other hand. The court simply supervises the latter process through its ability to stay, restrain or prohibit proceedings against the company during the plan negotiation period "on such terms as it may impose". Hence the better view is that a judge is generally exercising the court's statutory discretion under s. 11 of the Act when supervising a CCAA proceeding.

34 With respect to Section 11 discretion, Justice Blair opined that:

> [39] This appeal involves the scope of a supervisory judge's discretion under s. 11 of the CCAA, in the context of corporate governance decisions made during the course of the plan negotiating and approval process and, in particular, whether that discretion extends to the removal of directors in that environment. In my view, although the s. 11 discretion in spite of its considerable breadth and flexibility - does not permit the exercise of such a power in and of itself, there may be situations where a judge in a CCAA proceeding would be justified in ordering the removal of directors pursuant to the oppression remedy provisions found in s. 241 of the CBCA, and imported into the exercise of the s. 11 discretion through s. 20 of the CCAA.

35 In my view, to the extent that the jurisdiction to extend an option period is not specifically expressed in Section 11 of the CCAA, the granting of such an extension may be said to be an exercise by this Court of its inherent jurisdiction and in particular by virtue of the authority granted to this Court by Section 2(c) of the Option Agreement. In order to accomplish the goal of facilitating the restructuring of a debtor company, the Court must have a fund of discretionary powers arising from its inherent jurisdiction to make orders not only to do justice between the parties or other affected persons, but also to do what practicality demands: Re: Royal Oak Mines Inc. (1999), 7 C.B.R. (4th) 293 (Ont.Gen. Div.).

36 In Re Woodwards Ltd. (1993), 17 C.B.R. (3d) 236 at pp. 247-248, Justice Tysoe writes:

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

37 Counsel for the Minister states that there is little doubt that the Courts inherent jurisdiction extends in CCAA proceedings as to permit the Court, in appropriate circumstances, to make orders against third parties where their actions would potentially prejudice the success of a plan.

38 Counsel for the Minister argues however that use of inherent jurisdiction to create standing for a party who is clearly not mentioned on a contract or to enable the Court to breath life into an expired contract are not appropriate uses of the Court's inherent jurisdiction.

39 In my opinion, if an extension of the time period to exercise its option pursuant to the Option Agreement is not granted, the success of Cansugar's Plan of Arrangement would be prejudiced.

40 With respect to the expired contract argument advanced by Counsel for the Minister, there is no provision in the Option Agreement which provides that a Court Application for an extension of time must be made within the initial 80 day time period.

41 With respect to the Minister's assertion that this Court has no specific statutory authority to delve into private contractual matters dealing with the management and sale of public land belonging to the Province and that to revive an expired contract dealing specifically with public land and without clear statutory authority in this regard would be unconstitutional, I am of the respectful view that the Minister specifically gave this Court the authority to extend the time period within which the option could be exercised by Cansugar by virtue of Section 2(a) of the Option Agreement.

42 In the case at bar, the Option to Purchase, which was drafted primarily by legal Counsel acting on behalf of the Minister, is linked to Cansugar's court proceedings under the CCAA. There is a specific provision in Section 2(a) of the Option Agreement that the time period within which it can be exercised by Cansugar could be extended by order of the Court pursuant to the Courts authority under the CCAA. As well, one of the conditions precedent is the acceptance by Cansugar's creditors of a Plan of Arrangement under the CCAA. In this regard, since it was the intention of the Minister and Cansugar to link the Option Agreement to the CCAA and Cansugar's Plan of Arrangement bearing in mind that the Option was granted to Cansugar to resolve the encroachment problem at the request of the Court acting pursuant to the CCAA, the extension of time granted to Cansugar to exercise the option is contingent upon a Sanction Order being issued by the Court with respect to Cansugar's Plan of Arrangement. In other words, in the event a Sanction Order is not issued by this Court for Cansugar's Plan of Arrangement, the extension of time to March 31, 2006 is rescinded and is no longer available to Cansugar or a Receiver or a Trustee in Bankruptcy of Cansugar.

43 On weighing the interest of Cansugar and its creditors directly affected by Cansugar's Plan of Arrangement against any prejudice to the Minister in granting an extension, I am of the view that the prejudice to Cansugar and its affected creditors is greater than any prejudice to the Minister. Because of the encroachment problem, the Minister would appear to not be able to sell the land to another party. The Option Agreement was entered into by the Minister and Cansugar to resolve the "outstanding issues between them" in respect to the real property matters identified in the Option Agreement.

44 If the Minister had intended that any application to this Court for an extension of time would have to be made before the expiration of the initial 180 day option period, the Option Agreement would have said so.

45 With respect to the one year time period that I have allowed for the option to be exercised by Cansugar, I have taken into consideration the fact that some of the conditions precedent will take time to complete. I have also taken into consideration the Court Monitor's recommendation in this regard. He recommended a minimum one year extension. I have also taken into consideration the fact that the draftsperson of the Option Agreement has more than adequately protected the Minister with respect to the conditions precedent contained in Section 2(a)(ii)(iii) and (iv). These conditions precedent must be complied with "to the satisfaction" of the Minister before Cansugar can exercise its option to purchase. As well, there are the Minister's rights in Section 3(a) of the Option Agreement.

46 In its brief, Cansugar states that it was the expectation of Cansugar and the Minister that the option would be exercised upon the conclusion of the CCAA proceeding. I have granted a one year extension on the basis of Cansugar's representation that it will take time to complete the conditions precedent contained in Section 2 of the Option Agreement and in the Minister's recommendation in this regard. It is understood that Cansugar will continue to diligently satisfy the conditions precedent in a timely manner. The Province is at liberty to ask this Court to review the extension of time in the

event Cansugar is not diligently proceeding in a timely manner to fulfill the conditions precedent.

Conclusion and Disposition

47 In the result, the Application of Cansugar Inc. for an order extending the time period written which it may exercise the option to purchase contained in the Option Agreement granted to it by the Province of New Brunswick is allowed.

48 An order will issue extending the time period within which Cansugar Inc. may exercise the option to purchase to March 31, 2006 subject to a sanction order with respect to Cansugar's Plan of Arrangement being issued by this Court and contingent upon Cansugar proceeding diligently in a timely manner to fulfill the conditions precedent. A ruling on the assignment issue is deferred.

P.S. GLENNIE J.

cp/e/qlgxc/qlhcs

Case Name:

Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.

Between
Cliffs Over Maple Bay Investments Ltd., Respondent (Petitioner/Respondent), and
Fisgard Capital Corp. and Liberty Holdings Excel Corp., Appellants (Respondents/Applicants)

[2008] B.C.J. No. 1587

2008 BCCA 327

296 D.L.R. (4th) 577
46 C.B.R. (5th) 7
258 B.C.A.C. 187
[2008] 10 W.W.R. 575
83 B.C.L.R. (4th) 214
2008 CarswellBC 1758
168 A.C.W.S. (3d) 785

Docket: CA036261

British Columbia Court of Appeal
Vancouver, British Columbia

S.D. Frankel, D.F. Tysoe and D.M. Smith JJ.A.

Heard: August 12, 2008.
Oral judgment: August 15, 2008.

(44 paras.)

Bankruptcy and insolvency law — Proposals — Voting by creditors — Appeal by creditors from an order which extended a stay of proceedings and authorized $2.35 million in financing for the creditor company — Appeal allowed — The respondents sought to freeze the rights of all of its creditors while it undertook its restructuring plan without giving the creditors an opportunity to vote on the plan — The Companies' Creditors Arrangement Act was not intended to accommodate such a non-consensual stay of creditors' rights while a debtor company attempted to carry out a restructuring plan that did not involve an arrangement or compromise upon which the creditors could vote.

Appeal by Fisgard et al from an order which extended a stay of proceedings and authorized financing in the amount of $2.35 million. The proceeding was commenced by Cliffs under the Companies' Creditors Arrangement Act after Fisgard et al appointed a receiver on May 23, 2008. No notice was given to Fisgard et al or any other of Cliffs' creditors of the application giving rise to the May 26 stay order. In accordance with section 11(3) of the Act, the stay contained in the order was expressed to expire on June 25. Cliffs then made application for further relief. Cliffs requested an extension of the stay until October 20, 2008, and authorization for financing in the amount of $2.35 million. This financing was to be secured by a charge which would have priority over the security held by Fisgard et al and all other secured and unsecured creditors. Fisgard et al made a concurrent application to set aside the May 26 order and that an interim receiver be appointed pursuant to s. 47(1) of the Bankruptcy and Insolvency Act. The chambers judge granted Cliffs' application and dismissed the application by Fisgard et al. On this appeal, Fisgard et al contended that a stay of proceedings

should not have been granted under s. 11 of the Act.

HELD: Appeal allowed. Cliffs sought to freeze the rights of all of its creditors while it undertook its restructuring plan without giving the creditors an opportunity to vote on the plan. The Act was not intended to accommodate such a non-consensual stay of creditors' rights while a debtor company attempted to carry out a restructuring plan that did not involve an arrangement or compromise upon which the creditors could vote.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11, s. 11(6)

Counsel:

G.J. Tucker and A. Frydenlund: Counsel for the Appellants H.M.B. Ferris.

P.J. Roberts: Counsel for the Respondent.

M. Sennott: Counsel for Century Services Inc.

M.B. Paine: Counsel for the Monitor, The Bowra Group.

Reasons for Judgment

The judgment of the Court was delivered by

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

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

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

Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Monitor also reported that the realtor believes that if the development were to be completed, there would be sufficient sale proceeds to satisfy all obligations of the Debtor Company. The appellants took issue with the going concern valuation and submitted that the development should be re-appraised by an appraiser they consider to be trustworthy.

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

Decision of the Chambers Judge

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

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

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

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

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

Appraisal Evidence

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

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

Standard of Review

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

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

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

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

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

Analysis

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

25 I agree with the submission on behalf of the Debtor Company that the nature and state of its business are simply factors to be taken into account when considering under s. 11(6) whether it is appropriate to grant or continue a stay. If the more deferential standard of review is applicable to the granting and continuation of the stay of proceedings at the initial and comeback hearings, there would be insufficient basis to interfere with the decision of the chambers judge because he did give weight to these factors. However, there is another, more fundamental, factor that was not considered by the chambers judge.

26 In my opinion, the ability of the court to grant or continue a stay under s. 11 is not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring", a term with a broad meaning including such things as refinancings, capital injections

and asset sales and other downsizing. Rather, s. 11 is ancillary to the fundamental purpose of the ***CCAA***, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the ***CCAA***'s fundamental purpose.

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

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

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

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

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

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

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

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

32 Counsel for the Debtor Company has cited two decisions containing comments approving the use of the ***CCAA*** to effect a sale, winding up or liquidation of a company such that its business would not be ongoing following an arrangement with its creditors: namely, ***Re Lehndorff General Partner Ltd.*** (1992), 17 C.B.R. (3d) 24 at para. 7 (Ont. Ct. Jus. - Gen. Div.) and ***Re Anvil Range Mining Corp.*** (2001), 25 C.B.R. (4th) 1 at para. 11 (Ont. Sup. Ct. Jus.), aff'd (2002) 34 C.B.R. (4th) 157 at para. 32 (Ont. C.A.). I agree with these comments if it is intended that the sale, winding up or liquidation is part of the arrangement approved by the creditors and sanctioned by the court. I need not decide the point on this appeal, but I query whether the court should grant a stay under the ***CCAA*** to permit a sale, winding up or liquidation without requiring the matter to be voted upon by the creditors if the plan of arrangement intended to be made by the debtor company will simply propose that the net proceeds from the sale, winding up or liquidation be distributed to its creditors.

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

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

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

35 It was not suggested in the petition, nor in the Monitor's report before the chambers judge at the comeback hearing, that the Debtor Company intended to propose an arrangement or compromise to its creditors before embarking on its restructuring plan. In my opinion, in the absence of such an intention, it was not appropriate for a stay to have been granted or extended under s. 11 of the ***CCAA***. The chambers judge failed to take this important factor into account, and it is open for this Court to interfere with his exercise of discretion. To be fair to the chambers judge, I would point out that this factor was not drawn to his attention by counsel, and it was raised for the first time at the hearing of the appeal.

36 Although the ***CCAA*** can apply to companies whose sole business is a single land development as long as the requirements set out in the ***CCAA*** are met, it may be that, in view of the nature of its business and financing arrangements, such companies would have difficulty proposing an arrangement or compromise that was more advantageous than the remedies available to its creditors. The priorities of the security against the land development are often straightforward, and there may be little incentive for the creditors having senior priority to agree to an arrangement or compromise that involves money being paid to more junior creditors before the senior creditors are paid in full. If the developer is insolvent and not able to complete the development without further funding, the secured creditors may feel that they will be in a better position by exercising their remedies rather than by letting the developer remain in control of the failed development while

attempting to rescue it by means of obtaining refinancing, capital injection by a new partner or DIP financing.

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

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

Other Matters

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

40 The second additional person appearing at the hearing of the appeal was Century Services Inc., which is the lender arranged by the Debtor Company to provide the DIP financing authorized by the chambers judge. Century Services Inc. wished to make submissions with respect to the priority charge for its financing, the first tranche of which was apparently advanced last week. After counsel for the appellants advised us that there were evidentiary matters subsequent to the decision of the chambers judge bearing on this issue, we declined to hear submissions on behalf of Century Services Inc. We did not have affidavits dealing with this matter, and the Supreme Court is better suited to deal with issues that may turn on the evidence.

Disposition

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

42 S.D. FRANKEL J.A.:— I agree.

43 D.M. Smith J.A.:— I agree.

44 S.D. FRANKEL J.A.:-- The respondent's application to file a supplemental appeal book is dismissed. The appeal is allowed in the terms stated by Mr. Justice Tysoe.

D.F. TYSOE J.A.

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Indexed as:

Juniper Lumber (Re)

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 Juniper Lumber Co. Ltd. and Connell Transportation Co. Ltd. Between Juniper Lumber Co. Ltd. and Connell Transportation Co. Ltd., appellants, and The National Bank Of Canada, Glassville Logging Co. Ltd. and Wicklow Logging Co. Ltd., respondents

[2000] N.B.J. No. 144

[2000] A.N.-B. no 144
226 N.B.R. (2d) 115
96 A.C.W.S. (3d) 347

No. 68/2000/CA

New Brunswick Court of Appeal

Turnbull J.A.

Heard: April 6 and 12, 2000.
Judgment: April 12, 2000.

(13 paras.)

Bankruptcy — Interpretation of bankruptcy law — Practice — Orders — Variation or rescission of — Stay of proceedings — Pending appeal.

Motion by Juniper Lumber and Connell Transportation for an order abridging the time for service, extending a previous order staying further proceedings, and clarifying the terms of an order rescinding the original order. An initial order had been made upon the application of Juniper and Connell to stay the proceedings until a specified date, or such later date as the Court stipulated by further order. Creditors of the companies applied for an order rescinding the original order, which was granted on terms that allowed the companies leave to appeal the rescinding order, and provided that the rescission was stayed until the disposition of the appeal.

HELD: Motion allowed. The time for service of the motion was abridged. The rescinding order was intended to extend the stay termination date. The stay was extended until further order of the Court. The terms of the rescission order were varied to provide further instructions to the parties.

Statutes, Regulations and Rules Cited:

Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11, 11(2), 11(3), 11(4), 11(4)(a), 11.7(1), 11.7(3), 13, 14.

Counsel:

Thomas L. McGloan, Q.C., and Rodney J. Gillis, Q.C., for Juniper Lumber Co. Ltd. and Connell Transportation Co. Ltd..
D. Leslie Smith, Q.C., and Richard J. Scott, for National Bank of Canada and Bank of Montreal.
Eugene G. Mockler, Q.C., and Robert J. Peters, for Wicklow Logging Co. Ltd. and Glassville Logging Co. Ltd..

Charles D. Whelly, Q.C., for PricewaterhouseCoopers Inc..
Deno P. Pappas, Q.C., for CCFL Subordinated Debt (II) Limited Partnership.
Darrell J. Stephenson and Catherine Lahey, for GE Capital Canada Equipment Financing Inc..
James C. Crocco, for Carleton Enterprises Ltd. and Connell Farms Ltd..

DECISION ON MOTION

1 TURNBULL J.:— The principal purpose of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (the "CCAA"), "is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business ... When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure." See Arrangements Under the Companies' Creditors Arrangement Act by Goldman, Baird and Weinczok (1991), 1 C.B.R. (3d) 135 at p. 201 where the authors cite Thackray, J. approvingly quoting Gibbs, J.A. from the cases cited on that page. In New Brunswick, the Court of Queen's Bench is defined by the CCAA as the Court to play the "kind of supervisory role." The CCAA has a remedial purpose and, therefore, must be interpreted in a broad and liberal fashion. See pages 137-138 in the article previously cited. More often than not time is critical. And, in order to maintain a status quo while attempts are made to determine if a successful compromise or arrangement can be reached, the courts are granted certain powers in s. 11 to hold creditors at bay.

2 Juniper Lumber Co. Ltd. and Connell Transportation Co. Ltd. (the "Companies") bring a motion for an order:

1. Abridging the time for service;
2. Clarifying the Order of Justice John Turnbull, a Judge of the Court of Queen's Bench of New Brunswick in this matter made as of March 25, 2000 (the "Rescission Order");
3. Extending the Order of Justice J. Turnbull in this matter made on March 9, 2000 (the "Original Order"); and
4. Providing such further and other relief as this Court deems just.

3 On March 9, 2000, Justice J. Turnbull made an initial application order ex parte, Original Order, under the CCAA upon the application of the Companies dated March 8, 2000. In it, he ordered the stay, restraint, suspension and prohibition of further proceedings or acts by persons from March 8, 2000 "until and including April 6, 2000 or such later date as this Court may by further Order stipulate (the "Stay Termination Date")."

4 Subsequently, National Bank of Canada and Bank of Montreal, creditors of the Companies, made an application to Justice J. Turnbull for an order rescinding the Original Order. On March 28, 2000, Justice J. Turnbull granted the Rescinding Order with terms effective from March 25, 2000. Of relevance to the motion before me, the Rescinding Order:

(1) granted leave pursuant to s. 13 of the CCAA to the Companies to appeal the Rescinding Order (Notice of Appeal was filed with the Registrar on March 29, 2000 as File No. 68/2000/CA);

(2) provided that, "The rescission of the Original Order is hereby stayed, and the Original Order shall remain of full force and effect, unamended, pending the first to occur of the following:

(a) the final disposition of such appeal; or

(b) further Order of the Court of Appeal or a Judge thereof."

(3) provided "as terms of granting the stay of this Order" provisions which I will detail later.

5 On April 6, 2000, by Order dated "this 5th day of April, 2000," I ordered as follows:

1. The time for service of the Motion be and it is hereby abridged and service thereof upon any interested party is hereby dispensed with.
2. The hearing of this Motion is adjourned until April 12, 2000 at 10:00 a.m.
3. Subject to the Rescission Order, the Original Order, including without limiting the generality of the foregoing, the Stay Termination Date set out in paragraph 3 of the Original Order, is hereby extended until immediately following the final disposition of this Motion with respect the extension of the Original Order or such other date as may be ordered by this Court.

6 The remaining pertinent question that I am asked to resolve is whether the Rescinding Order is a further Order pursuant to the Original Order extending the Stay Termination Date from April 6, 2000 to the final disposition of the Companies' appeal or "a further Order of the Court of Appeal or a Judge thereof" as set out in the Rescinding Order.

7 The Original Order was an "initial application" (s. 11(2)). Accordingly, any terms that the Court deemed necessary with respect to a stay, restraint and prohibition could only be effective for a period not exceeding thirty days (s. 11(3)) i.e. April 6, 2000. The application for the Rescission Order was "other than an initial application" (s. 11(4)). Accordingly, the Court could make stay, restraint and prohibition orders for a period exceeding thirty days. In the case of a stay, it could order a stay for such period as the Court deemed necessary (s. 11(4)(a)).

8 In my opinion, Justice J. Turnbull intended the Rescinding Order to extend the Stay Termination Date in the Original Order as provided for in the Rescinding Order. In the context of the purpose of the CCAA quoted earlier, there is no rational basis on which a judge would make a rescinding order, grant leave to appeal that order and permit the legislated stay time limit to expire while ordering that "the Original Order shall remain of full force and effect, unamended ..." The time limits in the Original Order would expire by operation of law unless he "otherwise ordered" in the Rescinding Order. Without such an order there would be a substantial amendment to the Original Order and a significant change in the status quo. In my opinion, he extended the period of time for the stay and he had the authority in s. 11(4) of the CCAA to make such an order.

9 In any event, I further order, pursuant to s. 11(4) of the CCAA, that the period of the Stay Termination Date, prescribed in paragraph 3 of the Original Order be, and it is, further extended from my earlier Order, so that the Stay remains in force until further Order of the Court of Appeal or a Judge thereof. In connection with the actions taken by the Companies to facilitate a compromise and arrangement with its creditors since the Original Order, I have read the three Monitor's Reports to the Court dated March 19, 2000, April 4, 2000 and April 11, 2000. I have also read the three affidavits of Susan M. O'Keefe the Vice-Chairman and a Director of Juniper Lumber Co. Ltd. and the President of Connell Transportation Co. Ltd., the Companies, one dated March 22, 2000, one April 3, 2000, and one April 11, 2000. These affidavits support an extension of the Stay Termination Date. I have also read the affidavit of Mitchell Corey, the President of Glassville Logging Co. Ltd. and the Secretary-Treasurer of Wicklow Logging Co. Ltd., dated April 5, 2000 in opposition to such an extension. I am, satisfied that, since the Original Order, pursuant to s. 11(6) of the CCAA, (1) the circumstances exist that make such an extension appropriate and (2) the Companies have acted, and are acting, in good faith and with due diligence.

10 I now consider the Judge's "terms of granting the stay ..." that he imposed in paragraph 4 of the Rescinding Order. In defining the function of a Court of Appeal in the CCAA context, I agree with Macfarlane, J.A. in Pacific National Lease Holding Corp., Re (1992), 15 C.B.R. (3d) 265 (B.C.C.A.) at 272 where he said:

> ... But I am of the view that this court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the C.C.A.A. The process of

management which the Act has assigned to the trial court is an ongoing one. In this case a number of orders have been made. Some, including the one under appeal, have not been settled or entered. Other applications are pending. The process contemplated by the Act is continuing.

A colleague has suggested that a judge exercising a supervisory function under the C.C.A.A. is more like a judge hearing a trial, who makes orders in the course of that trial, than a chambers judge who makes interlocutory orders in proceedings for which he has no further responsibility.

Also, we know that in a case where a judgment has not been entered, it may be open to a judge to reconsider his or her judgment and alter its terms. In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A. I do not say that leave will never be granted in a C.C.A.A. proceeding. But the effect upon all parties concerned will be an important consideration in deciding whether leave ought to be granted.

11 Under the CCAA, the Court of Queen's Bench hears all initial applications and, in its supervisory role, appoints the Monitor (s. 11.7(1)) and receives the Monitor's reports (s. 11.7(3)). The CCAA does not authorize a judge of that Court to order the Monitor to report to the Court of Appeal of New Brunswick directly, or as a designate of the Court of Queen's Bench. Moreover, a judge of the Court of Queen's Bench has neither the authority to designate or delegate the Court of Appeal nor a Judge thereof as the entity to hear and determine motions either permitting a company to borrow funds or for determining any appropriate order pursuant to the CCAA. Under s. 13 and 14 of the CCAA, the jurisdiction of the Court of Appeal of New Brunswick, or a Judge thereof, is limited to hearing appeals and applications that are relevant to those appeals where leave has been granted from the judge appealed from or from the court or a judge of the court to which the appeal lies.

12 Therefore, the terms that the judge prescribed in the Rescinding Order are varied.

13 I order that paragraph 4 of the Rescission Order be varied so that it reads as follows:

4. Provided that as terms of granting the stay of this Order:

(a) nothing herein shall be taken as requiring National Bank of Canada or Bank of Montreal to advance or release any funds to the Companies, except funds deposited with Bank of Montreal, Woodstock, N.B., branch, after the date of the Original Order;

(b) with the concurrence of the Monitor, and the Companies applicable secured lenders, the Companies may borrow such funds on such terms and conditions as may be approved on motion to a Judge of the Court of Queen's Bench of New Brunswick;

(c) the Companies, and all other appropriate applicants under the CCAA, shall be at liberty to bring a motion before a Judge of the Court of Queen's Bench of New Brunswick for any appropriate Order pursuant to the CCAA;

(d) the Notice of Appeal by the Companies shall be filed with the Court of Appeal forthwith;

(e) National Bank of Canada shall provide a report monthly to a Judge of the Court of Queen's Bench of New Brunswick and counsel stating the balances then in the accounts referred to in the affidavit of Claire Viens previously filed herein;

(f) the Monitor shall continue to report to the Court of Queen's Bench of New Brunswick by filing its report with a Judge of that Court, such reports to include a statement as to retainers paid and fees paid and incurred for the professional services of the Monitor, the Monitor's counsel and counsel to the Companies; and

(g) the Companies shall file with a Judge of the Court of Queen's Bench of New Brunswick and deliver to counsel appearing on this motion copies of all monthly financial statements prepared for each of the Companies for the period from March 1999 through February 2000.

TURNBULL J.

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Pacific National Lease Holding Corp. (Re)

IN THE MATTER OF the Companies Creditors Arrangement Act R.S.C. 1985, C. C-36, and IN THE MATTER OF the Company Act, R.S.B.C. 1979, C. 59, and IN THE MATTER OF the Pacific National Lease Holding Corporation, Pacific National Financial Corporation, Pacific National Leasing Corp., Pacific National Vehicle Leasing Corp., Southborough Holdings Inc. and Pac Nat Equities Corp.

[1992] B.C.J. No. 2309

19 B.C.A.C. 134
72 B.C.L.R. (2d) 368
15 C.B.R. (3d) 265
36 A.C.W.S. (3d) 389

Vancouver Registry: CA016047

British Columbia Court of Appeal
(In Chambers)

MacFarlane J.A.

Heard: October 22, 1992
Judgment: October 28, 1992

(13 pp.)

Debtor and creditor — Insolvency — Creditors arrangements — Stay of all proceedings against insolvent debtor — Statutory severance payments — Creation of trust fund to secure making of severance payments.

Application for leave to appeal an order made under the Companies' Creditors Arrangement Act. The petitioner applied to establish a trust fund to indemnify its directors and officers with respect to statutory severance payments. In the alternative, it wished to use available funds to meet those payments. There was no evidence that the operations of the petitioner would be impaired if the payments were not made. Its applications were refused. It argued that the trial judge erred in ordering the debtor not to abide by relevant mandatory statutory provisions.

HELD: Application dismissed. The Act preserved the status quo and protected all creditors while a re-organization was being attempted. The steps sought to be taken by the petitioner in this case would amount to an unacceptable alteration of that status quo. In exercising its powers under this statute, the court sought to serve creditors which included shareholders and employees. If in doing so, a decision of the court conflicted with provincial legislation, the pursuit of the purposes of the Act must prevail.

STATUTES, REGULATIONS AND RULES CITED:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36. Employment Standards Act, S.B.C. 1979, c. 10.

Counsel for the Petitioners (Appellants): H.C. Ritchie Clark and D.D. Nugent.
Counsel for Sun Life Trust Co.: W.E.J. Skelly.
Counsel for the Mutual Life Assurance Co. of Canada: M.P. Carroll.
Counsel for the Commcorp Financial Services Inc. and National Trust: W.C. Kaplan.

National Bank of Canada: H.W. Veenstra.

MACFARLANE J.A. (refusing leave to appeal):— This is an application for leave to appeal an order of Mr. Justice Brenner pronounced the 17th day of August, 1992, pursuant to the Companies Creditors Arrangement Act R.S.C. 1985, c. C-36 (the "C.C.A.A.").

1 The petitioners had become insolvent prior to July 22, 1992, when they made an application under the C.C.A.A. for a stay of all proceedings so that they might attempt a reorganization of their affairs as contemplated by the C.C.A.A..

2 Mr. Justice Brenner made an ex parte order on July 23, 1992. The effect of the order was to stay all proceedings against the petitioners.

3 The order permitted the petitioners to maintain in trust a sum not exceeding $1,500,000.00, to satisfy the potential liabilities of directors and officers of the petitioner companies with respect to the payment of wages under provincial legislation and remittances in connection therewith pursuant to federal legislation. The petitioners had previously established that fund to protect its directors and officers from potential personal liability under the Employment Standards Act S.B.C. 1979, c. 10 for failing to make the payments mandated by that statute.

4 On July 31, 1992, Mr. Justice Brenner heard a number of applications brought by various interested parties seeking to set aside the ex parte stay order or, if the stay order was not set aside, to vary its terms. Mr. Justice Brenner amended and replaced the stay order with an order on terms proposed by the parties. That order has not yet been entered and has gone through a number of amendments. The order provided that on an interim basis, pending the hearing and determination of an application on the merits of the issues, the petitioners should not, without further order of the Court, make any payment to any employee or employees of the petitioners in respect of unpaid wages, severance, termination, lay-off, vacation pay or other benefits arising or otherwise payable as a result of the termination of an employee or employees.

5 The merits were argued in August and on August 17 Mr. Justice Brenner delivered the reasons for judgment and made the order which is the subject of this application.

6 The operative portions of the order read as follows:

> THIS COURT ORDERS that the application by the Petitioners to make statutory severance payments or to maintain a trust fund to indemnify its directors and officers with respect to statutory severance payments is dismissed;
>
> THIS COURT FURTHER ORDERS that any proceedings that may be brought by employees of the Petitioners to compel payment of statutory severance payments are stayed.

7 The appeal concerns the order made under the first paragraph of the order, not against the stay granted in the second paragraph.

8 The reasons for judgment of Mr. Justice Brenner are careful and detailed and are contained in 17 pages. The reasons contain a review of the essential facts, including the circumstances which gave rise to the financial difficulties of the petitioners, the competing arguments with respect to the need and the ability to make severance payments to employees whose services had been terminated, a consideration of the purposes of the C.C.A.A., the principle derived from the judgment of Mr. Justice Macdonald in Westar Mining Ltd., unreported reasons for judgment, August 11, 1992 (which dealt with a similar issue), and the application of that principle to the facts of this case.

9 The essential facts are that the petitioners are a group of inter-related companies that have carried on a leasing business for some years. Just prior to the commencement of the C.C.A.A. proceedings the petitioners had over $246,000,000.00 in lease portfolios under administration. They

had a workforce of approximately 230 which, by the time Mr. Justice Brenner gave his reasons on August 17, 1992, had been reduced to 60. The provisions of the Employment Standards Act had not, by August 17, 1992, given rise to any actual liability with respect to the severance of the employees who had left the company. The potential liability was not known but the company said that it could be as much as $1,500,000.

10 Mr. Skelly informed me, upon the hearing of the application, that the latest information indicated a liability for severance pay in an amount of approximately $850,000.00 and for vacation pay in an amount of approximately $150,000.00 for a total potential liability of $1,000,000.00. I understand from counsel that once the Funders are repaid there may be as much as $61,000,000.00 available to meet other liabilities.

11 Mr. Clark, for the petitioners, was not prepared to concede that the potential liability had been reduced, and submits that a trust fund of about $1,300,000.00 is required.

12 The petitioners were in the business of purchasing equipment or vehicles and entering into leases with third parties. The initial purchases were financed with security on such leases granted in favour of National Bank of Canada and by way of a trust deed in favour of Canada Trust Company and Royal Trust Company. Additional financial advances were obtained from the other respondents, who are 27 other financial institutions, referred to in the material as the "Funders". The Funders advanced monies and took security, in part by way of assignment of the lease revenue stream. The monies advanced by the Funders exceeded the amount which the petitioners had paid for the equipment or vehicles. The difference, together with other revenue, was the petitioners' profit.

13 The arrangements with the Funders provided that the petitioners would continue the ongoing administration of the leases, including collection of the monthly lease payments, which would be forwarded to the Funders.

14 The petitioners got into financial difficulties, which they revealed to the Funders. The Funders and the petitioners were not able to agree to a plan to deal with this crisis. As a result the petitioners sought protection under the C.C.A.A..

15 The appellants seek an order of this Court setting aside the order made August 17, 1992, and authorizing the petitioners to comply with the statutes governing their operations (and in particular the Employment Standards Act) and permitting them to continue to maintain the Trust Funds with respect to possible claims against directors and officers arising out of the various federal and provincial statutes.

[para16] The petitioners assert that Mr. Justice Brenner erred:-

1. In ordering the appellants not to abide by the relevant mandatory statutory provisions including those under the Employment Standards Act, requiring the appellants to pay all the statutory payments in full, and thereby order the appellants to breach a mandatory statute regarding statutory payments.

2. In ruling that he had the inherent jurisdiction under the Companies Creditors Arrangement Act or otherwise to order the appellants to breach the Employment Standards Act regarding statutory payments and thereby order the petitioners to commit offences under such statute.

3. In failing to properly apply the relevant legal principles applicable to a decision regarding the payment of statutory payments including such payments to former employees.

4. In ruling that the payment of unpaid wages and holiday and vacation pay accruing to the appellants' employees was to be treated in the same manner as severance pay.

5. In suspending the provisions of the July 23, 1992 order authorizing the Trust Fund.

6. In failing to provide any protection to the directors and officers of the appellants by way of the Trust Fund when ordering the petitioners to breach the Employment Standards Act, thereby exposing the directors and officers of the petitioners to liabilities under that statute and to prosecution for offences thereunder.

17 I understand the submission of the respondents to be that the real issue is whether a judge, acting pursuant to the powers given by the C.C.A.A., may make an order the purpose of which is to hold all creditors at bay pending an attempted reorganization of the affairs of a company, and which is intended to prevent a creditor obtaining a preference which it would not have if the attempted re-organization fails, and bankruptcy occurs.

18 I think that the answer is given in Chef Ready Foods Ltd. v. Hong Kong Bank of Canada (1990), B.C.L.R. (2d) 84. In that case Mr. Justice Gibbs, at pp. 88-89, said:

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

19 In the same case, at p. 92, Mr. Justice Gibbs considered whether security given under the Bank Act gave preference to the Bank over other creditors, despite the provisions of the C.C.A.A.. He said:

> It is apparent from these excerpts and from the wording of the statute, that in contrast with ss. 178 and 179 of the Bank Act which are preoccupied with the competing rights and duties of the borrower and the lender, the C.C.A.A. serves the interests of a broad constituency of investors, creditors and employees. If a bank's right in respect of s. 178 security are accorded a unique status which renders those rights immune from the provisions of the C.C.A.A., the protection afforded that constituency for any company which has granted s. 178 security will be largely illusory. It will be illusory because almost inevitably the realization by the bank on its security will destroy the company as a going concern. Here, for example, if the bank signifies and collects the accounts receivable, Chef Ready will be deprived of working capital. Collapse and liquidation must necessarily follow. The lesson will be that where s. 178 security is present a single creditor can frustrate the public policy objectives of the C.C.A.A. There will be two classes of debtor companies: those for whom there are prospects for recovery under the C.C.A.A.; those for whom the C.C.A.A. may be irrelevant dependent upon the whim of the s. 178 security holder. Given the economic circumstances which prevailed when the C.C.A.A. was enacted, it is difficult to imagine that the legislators of the day intended that result to follow.

20 Mr. Justice Brenner, after reviewing that and other authorities, said:

> (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.

Counsel do not suggest that statement of principles is incorrect.

21 Mr. Justice Brenner then referred to the judgment of Mr. Justice Macdonald in Westar, and concluded:

> In my view, to allow the Petitioners to make statutory severance payments or to authorize a fund out of the company's operating revenues for that purpose would be an unacceptable alteration of the status quo in effect when the order was granted.

22 He said earlier that he did not understand Mr. Justice Macdonald to be saying in Westar that in no case should a court ever authorize severance payments when a company is operating under the C.C.A.A.

23 He held, in effect, that it was a proper exercise of the discretion given to a judge under the C.C.A.A. to order that no preference be given to any creditor while a reorganization was being attempted under the C.C.A.A.

24 It appears to me that an order which treats creditors alike is in accord with the purpose of the C.C.A.A. Without the provisions of that statute the petitioner companies might soon be in bankruptcy, and the priority which the employees now have would be lost. The process provided by the C.C.A.A. is an interim one. Generally, it suspends but does not determine the ultimate rights of any creditor. In the end it may result in the rights of employees being protected, but in the meantime it preserves the status quo and protects all creditors while a re-organization is being attempted.

25 So far as the directors and officers are concerned, they were personally liable for potential claims under the Employment Standards Act before July 22. Nothing has changed. No authority has been cited to show that the directors and officers have a preferred right over other potential creditors.

26 This case is not so much about the rights of employees as creditors, but the right of the court under the C.C.A.A. to serve not the special interests of the directors and officers of the company but the broader constituency referred to in Chef Ready Foods Ltd. Such a decision may inevitably conflict with provincial legislation, but the broad purposes of the C.C.A.A. must be served.

27 In this case Mr. Justice Brenner reviewed the evidence and made certain findings of fact. He concluded that it would be an unacceptable alteration of the status quo for the petitioners to make statutory severance payments or to authorize a fund out of the companies' operating revenues for that purpose. He also found that there was no evidence before him that the petitioners' operation will be impaired if terminated employees do not receive severance pay and instead become creditors of the company. He said that there was no evidence that the directors and officers will resign and be unavailable to assist the company in its organization plans.

28 Despite what I have said, there may be an arguable case for the petitioners to present to a panel of this Court on discreet questions of law. But I am of the view that this Court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the

C.C.A.A. The process of management which the Act has assigned to the trial Court is an ongoing one. In this case a number of orders have been made. Some, including the one under appeal, have not been settled or entered. Other applications are pending. The process contemplated by the Act is continuing.

29 A colleague has suggested that a judge exercising a supervisory function under the C.C.A.A. is more like a judge hearing a trial, who makes orders in the course of that trial, than a chambers judge who makes interlocutory or proceedings for which he has no further responsibility.

30 Also, we know that in a case where a judgment has not been entered, it may be open to a judge to reconsider his or her judgment, and alter its terms. In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A. I do not say that leave will never be granted in a C.C.A.A. proceeding. But the effect upon all parties concerned will be an important consideration in deciding whether leave ought to be granted.

31 In all the circumstances I would refuse leave to appeal.

MACFARLANE J.A.

Case Name:

ScoZinc Ltd. (Re)

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 ScoZinc Limited

[2008] N.S.J. No. 591

2008 NSSC 398

Docket: Hfx No. 305549

Registry: Halifax

Nova Scotia Supreme Court
Halifax, Nova Scotia

D.R. Beveridge J.

Heard: December 22, 2008.
Judgment: December 22, 2008.
Released: January 7, 2009.

(27 paras.)

Bankruptcy and insolvency law — Companies' Creditors Arrangement Act (CCAA) matters — Compromises and arrangements — With secured creditors — Claims — Priority — Costs of administration — A 30-day stay was granted in this Companies' Creditors Arrangement Act matter, and an order issued granting a supercharge for administrative expenses and debtor-in-possession financing — There was cogent evidence that the benefit of the first DIP order sought clearly outweighed any potential prejudice to secured creditors whose security was being eroded — The court declined to make the second such order sought, as it was not so much of an emergency as the first, and the two secured creditors had not yet provided their consent — Companies' Creditors Arrangement Act, s. 11.

Application under s. 11 of the Companies' Creditors Arrangement Act seeking to have the court exercise its inherent jurisdiction to grant a first priority (supercharge) for administrative expenses and debtor-in-possession financing. Although the applicant mining company, ScoZinc Ltd., had $31.6 million in assets, it had liabilities of $37 million. It had two secured creditors, owing Acadian Mining Corp. $23.5 million, and Royal Roads Corp. some $2.5 million. The company sought a stay for 30 days, and two orders for DIP financing. The first, requesting a priority for administrative charges, set a cap of $400,000, with DIP financing to be provided by two individuals in a total amount of $250,000 to rank only behind the administrative charges. The second order was respect to financing to be obtained from TCE Capital Corp. in the total principal amount of $1 million. The two secured creditors consented to the creation of a first priority in relation to the administrative charge request and first DIP order.

HELD: Stay granted for 30 days. The first order was granted, for the administrative charges and the first DIP financing. The second DIP order was not granted. It was obvious ScoZinc was a debtor company within the meaning of the CCAA, and there were claims well in excess of $5 million. The court was satisfied on the materials provided that it was far from being a company that was doomed to failure. Based on the prospect of rebounding commodity prices alone, the court was satisfied that it ought to grant the stay as requested. Other options were described that were equally attractive. The consequences of not granting the stay were far too unattractive, not only for the current employees but for the broader public interest, including the potential that the province's taxpayers

might be called upon to fund the clean-up of environmental contamination. There was cogent evidence that the benefit of the first DIP order clearly outweighed any potential prejudice to secured creditors whose security was being eroded. As for the second, this was not so much of an emergency as the first. The two secured creditors provided their consent to the initial DIP financing of $250,000 had not yet signed off on providing their consent in relation to the $1 million credit facility that had apparently been negotiated. It was a fundamental principle that where the rights of others could conceivably be impacted, notice should be provided to them so they would have the opportunity to see the materials, present argument, be informed of what the court was being asked to do, and to provide submissions.

Statutes, Regulations and Rules Cited:

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

Counsel:

John D. Stringer, Q.C. and Ben Durnford, for the Applicant.

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1 D.R. BEVERIDGE J.:— For reasons that are obvious it is important that I consider and decide this matter today. I will give oral reasons from the bench and reserve the right to make changes in matter of style or form that do not affect the substance of these reasons.

2 This is an application brought by ScoZinc Limited under s. 11 of the *Companies' Creditors Arrangement Act:* R.S.C. 1985, c. C-36. The company also seeks to have this Court exercise its inherent jurisdiction to give a first priority, sometimes referred to as a supercharge, for administrative expenses and debtor-in-possession financing.

3 The facts are straight forward. They are set out in a detailed affidavit by the President and Chief Executive Officer of ScoZinc, Mr. William Felderhof. Mr. Felderhof also gave *viva voce* evidence to clarify for the Court a number of factual issues.

4 ScoZinc has been operating Scotia Mine in Gays River. It started operating that mine and the processing facility in May 2007. The financial statements as of the end of November 2008 show that the operation saw a tremendous growth in sales and production throughout 2008 despite some operational difficulties from flooding which required cut back in production, use of lower grade ore and additional expenditures to compensate or accommodate flooding.

5 What has caused the company to seek protection under the *CCAA* has been the dramatic decline in commodity prices for its two products it now mines and produces at its Scotia Mine, that is zinc and lead.

6 On January 1, 2008, zinc and lead prices were $1.08 and $1.23 per pound U.S. respectively. On October 1, 2008, these prices were down to $0.75 and $0.82 per pound respectively. What has changed dramatically is that by December 1, 2008, they declined a further 33% to U.S. $0.50 and lead by 49% to U.S. $0.42 per pound.

7 Cost of production, as I understand it, is $0.49 per pound based on a certain quantity of ore being produced.

8 ScoZinc is a wholly owned subsidiary of Acadian Mining. It has assets, as of November 30, 2008, of some $31.6 million. On the other hand, it has liabilities both current and long term of some $37 million. It has two secured creditors. Acadian Mining Corporation is owed approximately $23.5 million. ScoZinc also has a secured creditor in the form of Royal Roads Corp. which is a corporation which has close ties and some interlocking shareholding and directorships. ScoZinc's indebtedness to Royal Roads is $2.5 million. Both of these secured creditors are aware of these applications which are brought here today. The only other significant creditor that has what could be called a security interest is Komatsu who is owed just in excess of $3 million in long term capital leases. In addition, the affidavit material supplemented by Mr. Felderhof's evidence indicates trade payables of $5.4

million.

9 The evidence demonstrates that ScoZinc is unable to meet its next payroll payment which is due December 24, 2008. It has dramatically scaled back its workforce to a complement of only 70 which is roughly half of what it employed in October 2008. Despite these cost-cutting measures, it is obvious the company is insolvent.

10 The materials also demonstrate that ScoZinc is not a typical run-of-the-mill debtor. It operates a complicated facility that has significant environmental obligations. Although no creditors have yet given any formal notice of action to enforce payment of their various obligations, it is obvious that there are a large number of creditors who could take action not the least of which would be Komatsu who have an outstanding current liability in excess of $100,000.

11 If action were taken by the unsecured creditors it may take some time for those effects to be felt. Not so with respect to Komatsu which could in effect shut down any further production.

12 Under the statute I must be satisfied of a number of matters before relief can be granted. First of all, it is obvious that ScoZinc is a debtor company within the meaning of the *CCAA.* Secondly, there are claims well in excess of $5 million. The *CCAA* gives to the Court the power with or without notice to stay all proceedings that have been taken or might be taken in respect of a company. The ability to grant an order is one that requires the Court to be satisfied that circumstances exist that make it appropriate.

13 There has been ample case law throughout the country that has considered what would constitute circumstances that make such an order appropriate. In *Re Canadian Airlines Corp.,* [2000] A.J. No. 1692, the court wrote:

> [19] Finally, in making orders under the CCAA, the court must never lose sight of the objectives of the legislation. These were concisely summarized by the chambers judge and adopted by the British Columbia Court of Appeal in Re Pacific National Lease Holding Corp. (1992), 15 C.B.R. (3d) 265 (B.C.C.A. [In Chambers]):
>
> (1) The purpose of the CCAA is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and court.
>
> (2) The CCAA is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and employees.
>
> (3) During the stay period, the Act is intended to prevent manoeuvres for positioning amongst the creditors of the company.
>
> (4) The function of the court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.
>
> (5) The status quo does not mean preservation of the relative pre-stay debt status of each creditor. Since the companies under CCAA orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, the preservation of the status quo is not intended to create a rigid freeze of relative pre-stay positions.
>
> (6) The court has a broad discretion to apply these principles to the facts of the particular case.

14 The case law has described a number of tests, mostly in the negative. For example, a stay should be refused if there is no reasonable possibility of the company continuing to operate for the benefit of itself and its creditors. In other words, it is a company doomed to failure.

15 Wachowich, C.J.Q.B. in *Re Hunters Trailer and Marine Limited,* [2001] A.J. No. 857 quoted with approval the comments by Finlayson J.A. and Krever J.A. He wrote:

> [17] Finlayson J.A. (Krever J.A. concurring) in Elan Corporation v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101 at 120 (Ont. C.A.) agreed with the statement made by Gibbs J.A. in Hongkong Bank of Canada that the Act was designed to serve a "broad constituency of investors, creditors and employees" and instructed that:
>
> > Because of that "broad constituency", the Court must, when considering applications brought under the Act, have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest. That interest is generally, but not always, served by permitting an attempt at reorganization: see S.E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act," [(1947) 25 Can. Bar Rev. 587] at p. 593.

16 I am satisfied based on the materials provided to me that ScoZinc is far from being a company that is doomed to failure. There are a number of options described in Mr. Felderhof's affidavit that certainly set out a number of reasonable opportunities for ScoZinc and its related corporate entity, Acadian Mining, to explore. Not the least of which is the prospect of a rebounding of commodity prices for lead and zinc. No one has a crystal ball nor is one required. Mr. Felderhof described that even if commodity prices climbed back to where they were in the fall of 2008, the company, although not making a handsome return on its investment, would certainly no longer be insolvent. Based on that prospect alone I am satisfied that the Court should grant the stay as has been requested.

17 The other options that are described are equally attractive. There are other mining properties close by which could provide the necessary ore to be processed at the Scotia Mine facility. The consequences of not granting the stay are simply far too unattractive not only for the current employees but for the broader public interest including the interest of the tax payers of Nova Scotia which may be called upon to fund the clean-up of an environmental contamination that can be avoided if ScoZinc is given a reasonable opportunity to explore other options and put into place the necessary safeguards. Creditors will also benefit not only from the reasonable prospect of a restructuring and return to solvency, but simply one of safeguarding the assets that are presently on site. In the event the worst happens and liquidation has to occur at least the best value can be achieved in an orderly fashion.

18 So I will grant the stay that as been requested for an initial period of 30 days.

19 The company has also requested two orders for debtor-in-possession (DIP) financing. The company recognizes that ordinarily DIP financing is a relief that is applied for subsequent to the initial order and on notice to the creditors. Nonetheless, they have pointed out a number of decisions from other jurisdictions that have granted DIP financing on an *ex parte* basis along with the application for the initial order. (See *Re Algoma Steel Inc.* (2001), 25 C.B.R. (4th) 194 (Ont. C.A.); *Re Hunters Trailer & Marine Ltd., (supra)*.

20 Initially the company sought DIP financing first for the administrative charges or expenses that would be incurred by the company in the use of a monitor, and other professionals reasonably required by the monitor, in the fulfilment of the monitor's obligations. This request for priority for administrative charges set a cap of $400,000. In addition, DIP financing is to be provided by two individuals, Terence Coughlan and Mr. William Felderhof in a total amount of $250,000, to rank only behind the administration charges.

21 Today the company has also requested a second DIP order with respect to financing to be obtained from TCE Capital Corporation in the total principal amount of $1 million.

22 Counsel for the company points out that the two secured creditors, Acadian Mining and Royal Roads, consent to the Court creating a first priority or super charge in relation to the administrative charge request and the first DIP order and no secured creditor is realistically harmed by the granting of either the first or the second DIP order. He reasonably points out that Acadian Mining holds a debenture in the amount of essentially $23.5 million and Royal Roads of $2.3 million.

23 The appropriate principles to be applied in exercising the inherent jurisdiction of the Court were extensively reviewed by MacAdam J. in *Re Federal Gypsum Company*, [2007] N.S.J. No. 558,

2007 NSSC 347. He adopted with approval a number of statements of principle from *Re Manderley Corp.* (2005), 10 C.B.R. (5th) 48 at para. 18 where Campbell J. wrote:

> [18] The operative legal principles are set out in the following quotations from Houlden & Morawetz' Bankruptcy & Insolvency Analysis (Carswell, 2004), section N16 -- Stay of Proceedings -- CCAA -- at page 18:
>
> > Although the C.C.A.A. makes no provision for DIP financing, it seems to be well established that, under its inherent powers, the court may give a priority for such financing and for professional fees incurred in connection with the working out of a C.C.A.A. plan.
> >
> > For the court to authorize DIP financing, there must be cogent evidence that the benefit of the financing clearly outweighs the prejudice to the lenders whose security is being subordinated to the financing: ...
> >
> > The court can create a priority for the fees and expenses of a court-appointed monitor ranking ahead of secured creditors so long as they are reasonably incurred in connection with the restructuring of the debtor corporation and there is a reasonable prospect of a successful restructuring: ...

24 To like effect are the comments by Wachowich C.J.Q.B. in *Hunters Trailer & Marine Ltd. (Re), (supra).*

> [32] Having reviewed the jurisprudence on this issue, I am satisfied that the Court has the inherent or equitable jurisdiction to grant a super-priority for DIP financing and administrative charges, including the fees and disbursements of the professional advisors who guide a debtor company through the CCAA process. Hunters brought its initial CCAA application ex parte because it was insolvent and there was a threat of seizure by some of its major floor planners. If super-priority cannot be granted without the consent of secured creditors, the protection of the CCAA effectively would be denied a debtor company in many cases.
>
> [33] I am aware, however, that administrative costs and DIP financing can erode the security of creditors. LoVecchio J. in Re Smoky River Coal Ltd. (2000), 19 C.B.R. (4th) 281 at 290 (Alta. Q.B.), raised a caution flag in this regard, stating at p. 290:
>
> > While the CCAA requires a large and liberal interpretation in order to be effective, the need for caution arises when the Court exercises its inherent jurisdiction under this statute. Although the CCAA serves a vital and important role in a reorganization, the general statutory scheme of priorities of creditors must not be overlooked. As the Court is altering this scheme, the exercise of the power of the Court to create classes of creditors with a super-priority status should not be taken lightly. Especially in light of the fact that this action could prejudice the recovery of creditors who would, but for the Order, enjoy a priority if a receivership or bankruptcy ultimately ensues.
>
> [34] It is preferable that priority for administrative costs and DIP financing be dealt with on notice to all interested parties. However, if the circumstances warrant, priority may be granted on the initial application, but on a limited basis only until the matter is considered on notice to those affected by the order. That is precisely what occurred in this case. Hunters brought an application on November 8th for an extension of the stay of proceedings. This application was made on notice to the secured creditors. If they had wanted to challenge the initial Order before that date, they could have done so on two days' notice.

25 I am satisfied that there is cogent evidence that the benefit of the first DIP order clearly outweighs any potential prejudice to secured creditors whose security is being eroded. I will grant the order that has been requested for the administrative charges and for the first DIP financing.

26 In relation to the requested second DIP order, I am not, today, going to grant this order. Both

of the requests for DIP orders are without notice to the other creditors. The first one is of some urgency. The second one is not so much of an emergency today. The two secured creditors who have provided their consent to the initial DIP financing of $250,000 have not yet signed off on providing their consent in relation to the $1 million credit facility that apparently has been negotiated with TCE Capital Corporation.

27 Although the *CCAA* specifically gives the Court jurisdiction to act *ex parte* by abridging or waiving notice to individuals or corporations who may be affected by its order, DIP financing, in my opinion, is considerably different. Here, the company seeks to have the Court exercise its inherent jurisdiction. It is a fundamental principle that where the rights of others could conceivably be impacted, notice should be provided to them so they will have the opportunity to see the materials, present argument, be informed of what the Court is being asked to do, and to provide submissions. And for that reason, I have declined to make the second DIP order today, but certainly have indicated to the company my willingness on short notice to deal with this application with notice being given to the secured creditors and all unsecured creditors whose indebtedness exceed $100,000.

D.R. BEVERIDGE J.

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Case Name:

Simpson's Island Salmon Ltd. (Re)

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 the applicants, Simpson's Island Salmon Ltd., and Tidal Run Aqua Inc.

[2006] N.B.J. No. 345

2006 NBQB 279

302 N.B.R. (2d) 10
24 C.B.R. (5th) 17
150 A.C.W.S. (3d) 285
2006 CarswellNB 453

No. S/M/69/05

New Brunswick Court of Queen's Bench
Trial Division - Judicial District of Saint John

P.S. Glennie J.

Heard: June 14, 2006.
Oral judgment: June 16, 2006.

(66 paras.)

Insolvency law — Legislation — Companies' Creditors Arrangement Act — Companies entitled to extension of stay of proceedings against them granted pursuant to the Act given that they acted in good faith, extension was appropriate under the circumstances and viable plans were forthcoming within a few weeks — Companies' Creditors Arrangement Act, s. 11(6).

Determination of issues regarding a Companies' Creditors Arrangement Act (CCAA) proceeding — Simpson's Island and Tidal Run operated companies engaged in aquaculture farming and harvesting — Simpson's balance sheet indicated that its liabilities exceeded its assets — Its major creditor, Heritage Salmon, was owed $4.1 million — The court issued Court issued an Initial Order under the CCAA staying all proceedings against Simpson's and Tidal — The Monitor's report indicated that the companies would realize between $4.2 and $4.4 million from a future salmon harvest — Simpson's and Tidal applied for an extension of CCAA protection — Heritage claimed that the companies were using CCAA proceedings to fund future litigation against it --HELD: Application allowed — The Applicants were properly within the purview of the CCAA and were taking all actions in good faith solely with a view of restructuring and proposing a Plan of Arrangement to their creditors in a timely way — Extension of the stay was appropriate given that the value of the salmon increased the longer the delay period to market since the salmon grew in size and in all likelihood would be worth more when brought to market — Viable plans of compromise or arrangement were forthcoming within a few weeks from both Simpson's and Tidal.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, s. 11(6)

Counsel:

Rodney J. Gillis, Q.C. and John C. Gillis on behalf of the Applicants

Raymond P. Gorman, Q.C. on behalf of the Monitor

R. Gary Faloon, Q.C. on behalf of Farm Credit Corporation and The Bank of Nova Scotia

Catherine A. Lahey and Stephen J. Hutchison on behalf of Heritage Salmon Limited

Mel K. Norton on behalf of 047759 N.B. Ltd.

John B.D. Logan on behalf of the Minister of Business New Brunswick

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DECISION

1 **P.S. GLENNIE J.** (orally):— Simpson's Island Ltd. and Tidal Aqua Inc. seek an extension of the Stay Termination Date issued pursuant to the ***Companies' Creditors Arrangement Act*** ("***CCAA***").

2 As well, the parties have advanced submissions with respect to four questions which were posed by this Court at an earlier hearing, namely:

> *1. Does this CCAA proceeding constitute a viable restructuring and, if so, should it be permitted to proceed?*
>
> *2. Does this CCAA proceeding constitute a liquidation and, if so, should it be permitted to proceed?*
>
> *3. Is the purpose of this CCAA proceeding simply to fund litigation against Heritage Salmon Ltd. and, if so, should it be permitted to proceed?*
>
> *4. If this CCAA proceeding is not an appropriate use of the CCAA, is the appropriate alternative remedy the appointment of a Receiver?*

Overview

3 Simpson's Island Salmon Ltd. ("Simpson's Island") and Tidal Run Aqua Inc. ("Tidal Run") are privately held New Brunswick corporations located at Deer Island, Charlotte County.

4 Simpson's Island has two main operations - aquaculture farming (growing caged salmon) and aquaculture harvesting (harvesting and delivering the harvested salmon to processing sites).

5 Tidal Run has two main operations, namely aquaculture farming and aquaculture delivery (delivering smolt and feed to cages, using equipment and vehicles).

6 Together Simpson's Island and Tidal Run employ 17 people directly and at times up to 30 contribute to the local and regional economy.

7 Each company holds an aquaculture site license granted by the Province of New Brunswick to grow Atlantic salmon at their sites near Deer Island. Simpson's Island has been operating in the aquaculture business since 1989 and Tidal Run since 2001. Simpson's Island owns all of the outstanding shares of Tidal Run. The Richardson family owns all of the outstanding shares of Simpson's Island.

8 The major assets of Simpson's Island include an aquacultural site license; a vessel; nets and cages; and approximately 200,000 salmon due to be harvested in spring or early summer 2006. The vessel - known as the "*Atlantic Bay*" is 80 feet long and 24 feet wide. The Atlantic Bay is used to harvest adult salmon from cages for delivery to fish processing facilities.

9 The major assets of Tidal Run include an aquaculture site license; a vessel; along with nets and cages. The assets of Tidal Run do not include harvestable Atlantic salmon as these fish were previously harvested in June, 2005. The vessel, known as the "*Fundy Navigator*" is 90 feet long and 32 feet wide. The Fundy Navigator is used to transport vehicles and equipment including trucks

carrying smolt and feed for delivery to various salmon cages.

10 On December 5, 2005, this Court issued an Initial Order under the provisions of the ***CCAA*** staying all proceedings against Simpson's Island and Tidal Run.

11 The Simpson's Island balance sheet as at December 5, 2005 indicated total assets of $4.6 million against total liabilities of $5.4 million. The major debt owed was to one creditor, Heritage Salmon Ltd. ("Heritage"), in the amount of $4.1 million.

12 As well as being a creditor, Heritage is also a supplier of feed to Simpson's Island; the processor and marketer of its salmon as well as a competitor of Simpson's Island in the market place.

13 Based on projected cash flows in the first report of the Monitor, estimated total net cash for the Companies to the May 2006 harvest would be between $4.2 and $4.4 million depending on the market value per pound of the fish.

Purpose of the CCAA

14 The ***CCAA*** is intended to provide distressed businesses and their creditors with a means of reaching an accommodation of benefit to both, and to the public generally. Writing for the British Columbia Court of Appeal, Justice Gibbs described the ***CCAA*** in Chef Ready Foods Ltd. v. Hong Kong Bank of Canada, [1990] B.C.J. No. 2384[1990] CanLII 529 as follows at p. 8:

> *... The CCAA was enacted by Parliament in 1933 when the nation and the world were in the grip of an economic depression. When a company became insolvent liquidation followed because that was the only consequence of the only insolvency legislation which then existed - the* Bankruptcy Act *and the* Winding-up Act. *Almost invariably liquidation destroyed the shareholders' investment, yielded little by way of, recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the CCAA, to create a regime whereby the principals of the company and the creditors could be brought together, under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business.*

15 Chief Justice McEachern discussed its purpose in the case of Northland Properties Limited et al. v. Excelsior Life Insurance Company of Canada et al., [1989] B.C.J. No. 63, 1989 CarswellBC 334 (B.C.C.A.) at para. 27:

> *... there can be no doubt about the purpose of the C.C.A.A. It is to enable compromises to be made for the common benefit of the creditors and of the company, particularly to keep a company in financial difficulties alive and out of the hands of liquidators.*

16 In Re: Stelco Inc., [2005] O.J. No. 1171 (Ontario Court of Appeal), Justice Blair comments on the purpose of the CCAA at para. 36:

> *In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditor, shareholders, employees and other stakeholders.*

17 In Re: Juniper Lumber, [2000] N.B.J. No. 144 (N.B.C.A.), Justice Wallace Turnbull, at para1, describes the purpose of the CCAA as follows:

> *The principal purpose of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (the "CCAA"), "is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business ... When a company has recourse to the C.C.A.A., the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt*

is doomed to failure.

Does this **CCAA** proceeding constitute a viable restructuring, and if so, should it be permitted to proceed.

18 Heritage takes the position that the Applicants are improperly utilizing the protections afforded by the ***CCAA***. In my opinion, the Applicants are properly within the purview of the ***CCAA*** and are taking all actions solely with a view of restructuring and proposing a Plan of Arrangement to their creditors in a timely way once it is possible to do so. In the particular circumstances of this industry and this case, the assets are needed to be valued by harvesting. In this case, the value of the salmon increases the longer the delay period to market since the salmon grow in size and in all likelihood will be worth more when brought to market. This is not the normal case of raw inventory such as motor vehicles or appliances which would in all likelihood decrease in value and are usually sold at distressed prices in an insolvency situation.

19 The need for flexibility in ***CCAA*** proceedings was referred to by Justice Topolniski in 843504 Alberta Ltd. (Re), [2003] A.J. No. 1549 wherein he stated:

> *I accept that the need for flexibility in CCAA proceedings may, in the appropriate circumstances, warrant a sale of a significant portion of a debtors assets or undertaking before a plan of arrangement is put to the creditors.* (Re PSI Net Ltd. *(2001), 28 C.B.R. (4th) 95, [2001] O.J. No. 3829 (Ont. S.C.),* Canadian Red Cross and Consumer's Packaging)."

20 Similar statements were made in Lehndorff General Partner Ltd. (Re), [1993] O.J. No. 14 at page 4:

> *The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. [The] purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their business in the ordinary course or otherwise deal with their assets so as to enable a plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has great discretion under the CCAA to make orders so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors.*
>
> *The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA. It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed. The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and all of the creditors:* Chef Ready Foods Ltd. v. Hongkong Bank of Canada *(1990), 4 C.B.R. (3d) 311 at pp. 315-318.*

21 In my opinion, upon reviewing the submissions of counsel and all of the circumstances in this case, I conclude that this ***CCAA*** proceeding constitutes a viable restructuring and should be permitted to proceed.

Is the purpose of the within **CCAA** proceeding simply to fund litigation and, if so, should it be permitted to proceed?

22 Heritage Salmon has expressed concern as to whether the purpose of the ***CCAA*** in this matter is to fund litigation against it. At the April 26th hearing, this Court was assured by counsel for Simpson's Island and Tidal Run that outstanding litigation by the Companies against Heritage Salmon Ltd. was being billed separately by their legal counsel.

23 On direction of this Court, the Monitor has extensively reviewed the accounts of counsel for Simpson's Island and Tidal Run and has concluded that time billings have been tracked separately.

24 Initially, it was believed that it would not be possible to put together a Plan of Arrangement until the litigation was concluded. However, based on recent affidavits and discussions with the Companies, the Monitor has now confined that the resolution of the litigation is not a condition precedent to a plan of arrangement.

25 The Monitor has not found any evidence that the purpose of the ***CCAA*** in this case was to fund litigation. This is further reinforced by the fact that a plan of arrangement is being prepared without resolution of the outstanding dispute between Heritage Salmon Ltd. and Simpson's Island and Tidal Run.

26 I find on the evidence that the purpose of the ***CCAA*** proceedings is not to fund the litigation against Heritage Salmon Ltd. and 1311735 Ontario Limited.

Does the **CCAA** proceeding in this case constitute a liquidation and, if so, should it be permitted to proceed?

27 In assessing the applicability of the ***CCAA*** in this case, it is important to examine the nature of the assets at issue. The major assets of Simpson's Island and Tidal Run are the aquaculture site licenses; the boats and equipment; and the fish inventory. This matter is unique because the major asset of the companies being sold is the inventory of Atlantic salmon which need to be harvested on a two year cycle.

28 It is important to note that just because an asset is being sold does not mean that a liquidation is taking place. It should not be forgotten that the sale of the fish inventory is what the companies in this case do in the normal course of their business operations. It is their product and, in effect, their business.

29 The value of Simpson's Island and Tidal Run as a whole, as operating entities under a restructuring, have significantly more value for the stakeholders involved than in a liquidation scenario. As stated by Farley J. in ***Lehndorff,*** *supra*, the ***CCAA*** seeks to facilitate ongoing operations where the assets have greater value as part of an integrated system than individually.

30 As pointed out by counsel for the Monitor, if the companies can sell their fish inventory then they have a good chance of obtaining additional investment and/or financing as the foundation for putting together a viable proposal which will benefit all stakeholders.

31 Counsel for the Monitor is satisfied that the companies have been working toward a potential plan of arrangement. Most recently, this is evidenced by the Affidavit of Donald Richardson, the President of Simpson's Island, dated May 8, 2006 which states at para. 12:

> *12. I have had discussions with the present DIP lender concerning potential financing of the Applicants on a go-forward basis. I am informed by the DIP lender, and verily believe, that they have approached a chartered bank in relation to financing the Applicants' potential plan of arrangement.*

32 According to counsel for the Monitor, the delay in putting together a plan of arrangement is that any plan depends upon financing, and the ability to attract investment depends on the price of the fish in this case. These points are critical in determining what funds are available for any plan of arrangement. The Companies' difficulties in dealing with the sale of the fish has had the effect of stalling its abilities to put together a plan of arrangement in the opinion of counsel for the Monitor.

He adds that in many ways, this is simply a "*timing issue*."

33 According to the Monitor and its counsel, it would appear that there is a distinct and realistic possibility that the Companies will put forth a plan that will involve the significant payment of the outstanding indebtedness to secured creditors while continuing to operate as a going concern. This is subject to the ability of the Companies to arrange appropriate financing.

34 In my opinion, this is what the structure and process of the ***CCAA*** is all about and is designed to achieve.

35 The Monitor does not believe that this is simply a liquidation, but rather that there is a realistic and good faith attempt underway by the Companies to put a plan together which would allow them to stay in business. It is the fish inventory of Simpson's Island which is being sold as it would in the normal course of business. The Monitor says it has no knowledge of the capital assets of the Companies being offered for sale.

36 The Monitor is satisfied that the Companies are acting, and have acted, in good faith and with due diligence in seeking to put a plan together and it is therefore a viable restructuring.

37 I am satisfied on the evidence that the purpose of these ***CCAA*** proceedings is to provide a viable restructuring and that there is a good faith effort by Simpson's Island and Tidal Run to put forth a plan of arrangement.

38 On the issue of bona fides, I find each of Simpson's Island and Tidal Run to be acting in good faith and with due diligence taking all of the circumstances of this case into consideration.

39 As mentioned, it must be remembered in this case that a unique relationship exits between Simpson's Island, Tidal Run and Heritage. Heritage is not only the major creditor but it is also a supplier of feed for the salmon; the processor and marketer of salmon; the user of Tidal Run's barge and also a major competitor to Simpson's Island. This Court must continue to take this unique relationship factor into consideration when balancing the interests of Simpson's Island, Tidal Run, Heritage Salmon and the other creditors of Simpson's Island and Tidal Run into consideration.

40 Taking all these factors and circumstances into consideration, I conclude the purpose of these proceedings is to provide a viable restructuring and there is a good faith effort by the companies to put forth a plan of arrangement and that the process ought to continue.

The Request for an Extension of the Stay

41 In applications requesting that a stay of proceedings to the ***CCAA*** be extended, the onus is on the applicant to satisfy the test in s. 11(6) of the ***CCAA*** that:

1. Circumstances exist that make the extension order appropriate;
2. The applicant has acted and continues to act in good faith; and
3. The applicant has acted and continues to act with due diligence.

42 As was stated in ***843504 Alberta Ltd. (Re)***, *supra* at para. 13:

> *The CCAA is intended to provide a structured, court supervised environment for the negotiation of compromises between a debtor and its creditors for the benefit of not only those parties, but also other stakeholders such as employees and shareholders. At the end of the day, the objective is to enable the debtor to continue in business so that all stakeholders benefit* (United Auto and Truck Parts Ltd. v. Aziz *(2000), 135 B.C.A.C. 96, [2000] B.C.J. No. 409, 2000 BCCA 146 at paras. 10 and 11). The CCAA is to be interpreted in a broad and liberal fashion to facilitate that objective. That broad and liberal fashion to facilitate that objective. That broad and liberal interpretation, however, must not permit the enhancement of one stakeholders position at the expense of others - there should be no confiscation of legal rights. This requires a balancing of interests, rights and prejudices to "see if rights are compromised ... and have the pain of the compromise equitably shared."* (Sammi Atlas Inc. (Re), *[1998] O.J. No. 1089 (Ont. Gen. Div.) citing* Re Campeau Corp.,

[1992] O.J. No. 237, 10 C.B.R. (3d) 104 (Ont. Gen. Div.) at 109).

43 Counsel for Heritage Salmon says it is too late for vague references. However, in my opinion, the statements contained in the Affidavit of Donald Richardson, as well as the most recent report of the Monitor and counsel for the Monitor, contain more than vague references. The Monitor has met with the officers of Simpson's Island and Tidal Run and their legal and financial advisors as well as a potential lender. Simpson's Island's Plan of Arrangement has been drafted and is awaiting market value figures from Heritage with respect to the sale of the balance of the 2004 crop of salmon. Simpson's plan is expected to be filed by the end of the first week of July and voted upon by July 15th. Tidal Run's Plan of Compromise is expected to be circulated by July 15th and voted upon during the first week of August 2006.

44 The Court appointed Monitor, Paul Goodman, of Goodman Rosen advised this Court that by the end of July he anticipates that he will have the gross amount of approximately $3.2 million in his escrow account.

45 It is anticipated that the Plan of Arrangement for Simpson's Island will be available for review by the creditors of Simpson's Island by the end of the first week of July. Simpson's Island and the Monitor are waiting to learn the weight and market value of the salmon to be processed by Heritage commencing on June 18th will be. Accordingly, we are approximately three weeks away for a draft of a plan of compromise or arrangement to be circulated by Simpson's Island. It is anticipated that the Plan of Arrangement for Simpson's Island will be voted on around mid-July. The plan of arrangement for Tidal Run is projected to be ready for circulation at the mid-July mark when the creditors' meeting for Simpson's Island is scheduled to take place. The voting on the Tidal Run Plan will take place in early August. In its written submission, Heritage states:

> *"It is submitted that the lack of evidence presented by the Applicants throughout the within CCAA proceeding clearly confirms that the Applicants are not using the CCAA for an appropriate purpose such as attempting to reorganize and restructure their affairs and formulating a proper plan of compromise or arrangement."*

46 Heritage states further:

> *"It is abundantly clear the Applicants are no closer now to formulating a formal plan of compromise or arrangement than at the commencement of the entire CCAA stay process. They have presented no evidence that they are even attempting to restructure or reorganize their affairs, much less put forward a plan of compromise or arrangement."*

47 The evidence before this Court clearly demonstrates that this assertion by Heritage is not accurate.

48 Simpson's Island is on the verge of filing its Plan of Arrangement to be voted upon in mid-July. An application for a claims barred process is to be made to this Court in the near future.

49 The President of Simpson's Island comments as follows in his affidavit on the Plan of Arrangement for Simpson's Island that has been drafted and reviewed by the Monitor:

> *"The Applicants and their accountant have been and are in frequent contact with the Monitor to ensure compliance with the Initial Order and subsequent Orders of the Court. I have spent considerable time since the Initial Order discussing issues of reorganization and financing with potential financers, the Applicants' accountant, Applicants' counsel, the Monitor and other stakeholders in the industry.*
>
> *In conjunction with the Applicants' counsel, we have prepared a draft Plan of Arrangement, outlining, in a general way at this time, the reorganization and financing of the operations of SISL.*
>
> *The draft Plan was reviewed with the Monitor at a meeting in Saint John on June 5, 2006. Also, present at the meeting was the Applicants' accountant, Lori Toombs, who discussed with the Applicants' counsel and the Monitor draft projected figures for SISL's continued*

operation and placement of smolt in the water by the fall of 2006.

The related litigation, cause No. S/C/123/06, is not part of the Plan and the Plan is in no way contingent on, or funded by that litigation.

The Applicants intend to resolve the issue of outstanding debt to Heritage, and all other Creditors, at least for the purposes of voting on the Plan through a claims bar process to be approved by this Honourable Court. The Applicants intend to file a Motion requesting the Court approve such a process by late June 2006.

Once the value of the harvest is known, and the extent of debt determined, financing efforts can be finalized which will complete the Plan. The Plan will then be put to the Creditors for a vote expected by mid to late July 2006.

THE NEED FOR AN EXTENSION

An extension of the stay of termination date will permit the Applicants to complete the steps outlined above, necessary to put the Plan to the creditors by July 2006.

I believe that if the Stay Termination date is not extended, the Applicants' creditors may commence proceedings against the Applicants which would highly prejudicial to the operation of the Applicants and would impair their ability to complete a successful restructuring.

The management of the Applicants believes that they have acted, and will continue to act in good faith and due diligence and request an extension of the stay of termination date and other relief as set out in the Notice of Motion."

50 The Monitor comments on the Status of the Plan of Arrangement under the ***CCAA*** as follows in his most recent report:

"6.1 On June 5, 2006, the Monitor (Paul Goodman of GRI) and legal counsel (Ray Gorman) met in Saint John with Mr. Donald Richardson (Officer of the Applicants); Lori Toombs, C.A. (Applicants' Accountant); Rod Gillis, John Gillis, and Cathy Fawcett, (legal counsel to the Applicants) and a Potential Lender.

6.2 At the June 5, 2006 meeting, a frank discussion was held as to status of the CCAA Plan and various scenarios. Simpson's provided the Monitor with a draft Plan Of Arrangement and Financial Projections through to and including the fiscal year ended April 30, 2009.

6.3 The Monitor raised a number of questions regarding the materials presented and discussions included possible timings related to the filing of the Plan, Cash Flow associated with the sale of the 2004 salmon crop, and the future financing of operations.

6.4 Of significant importance in the finalizing of the CCAA along with the determination of the Heritage claim discussed in Section 5, is the amount of the final net proceeds available to Simpson's from the sale of the 2004 salmon crop, which amount will not be received until the end of July, 2006. This amount should be determined shortly after the last salmon are harvested on or about July 1, if the harvest concludes as planned and there are no further delays in the said harvest.

6.5 Having met with the Applicants and their advisors and having reviewed the Simpson's preliminary draft plan and Financial Projections, and having heard that significant progress is being made as to the future financing of operations, including the funding needed to address the claims of the pre-December 5, 2005 creditors, the Monitor concludes that the Applicants have acted, and continue to act, in good faith and with due diligence if given sufficient time by this Honourable Court, can and will file a Plan of Arrangement under CCAA that will have a significant chance of being successful.

6.9 It is the view of the Monitor that if the Extension Of Time to file the Plan Order is not

granted by June 16, 2006, and the process proceeds to a liquidation of assets by way of a Receivership, the costs of doing such will only diminish returns to creditors. The motion advises that the salmon will still have to be harvested and sold and it believes Simpson's is the best party to do so. The CCAA process can be revisited once the salmon are sold and funds collected, in the event a Plan of Arrangement has not been filed."

51 In his report, Mr. Goodman writes at Section 7:

*"7. **Recommendations***

...

7.2 THAT whereas a preliminary draft Plan of Arrangement has been presented by Simpson's to the Monitor, along with plausible financial projections and preliminary indications of available future financing, and given that there has been a delay in the harvest of the 2004 salmon crop through no fault of Simpson's, the Monitor would support an Extension Of Time for the Applicants to file their Plan Of Arrangement under CCAA.

7.3 AS the Applicants have requested an extension, the Monitor believes such extension should be no longer than to July 28, 2006, by which time the total proceeds of the sale of the 2004 salmon crop should be known and which proceeds should be substantially received by the Monitor's Escrow Account.

7.4 THE Monitor recommends that Simpson's forthwith commence the process to establish the quantum of the amounts owed to its creditors by sending a communication to the creditors along with a Proof of Claim and ask that such claim be directed to the Monitor within ten (10) days of the said communication being given. This process may allow the convening of a Creditors' Meeting to occur more quickly once a Plan Of Arrangement has been filed with the Court.

7.5 THE Monitor respectfully confirms that it supports an extension of time to file a Plan Of Arrangement, because such a request we believe is reasonable in the circumstances, the recommendation is supported by the opinion of the Monitor's counsel and by the actions of the Applicants in acting in good faith and with due diligence in preparing a plan and is consistent with the anticipated Cash Flow."

52 I am satisfied on the evidence before me that viable plans of compromise or arrangement are forthcoming in the near future from both Simpson's Island and Tidal Run.

53 Counsel for Heritage asserts that by Simpson's Island and the Monitor now stating that the related litigation is not part of the Plan and that the Plan is in no way contingent upon that litigation or as the monitor states "*there is a **CCAA** scenario that may provide an opportunity for a successful plan to be made without the quantification and security positions first being determined*", there has been a change of plan which can be construed to be evidence of bad faith.

54 An allegation of bad faith is a serious assertion. The Monitor has advised this Court that the new ***CCAA*** "*scenario*" came about as the result of the new Monitor meeting with the officers of Simpson's Island and their legal and financial advisors. I accept the Monitor's explanation. This is the right of any ***CCAA*** applicant in the process of drafting a plan of arrangement. I conclude that Heritage allegations of bad faith are without merit.

55 After the granting on April 26, 2006 of the Third Extension of the Stay Order until June 16, 2006, Heritage Salmon sought leave to appeal the decision of this Court to grant the third extension. Leave to appeal was denied in a decision reported at [2006] N.B.J. No. 223, 2006 CarswellNB 303. In denying the motion for leave to appeal, Madam Justice Larlee writes at para. 7:

Turning now to the substantive issues relevant to the disposition of the application, I am convinced that there was some evidence to conclude that there was a plan of compromise or arrangement. There is affidavit evidence that the debtors were working with the Monitor diligently and in good faith.

56 Today, I am satisfied on the evidence that there is even stronger evidence that plans of arrangement or compromise are being finalized. Simpson's Island and the Monitor are waiting for Heritage to process and market the final portion of the 2004 salmon crop and to confirm the amount of money to be realized from the sale. Once the figures are received from Heritage (estimated to be during the first week of July), the figures can then be plugged into the Plan and the Plan then distributed to all creditors. It would appear on the evidence that we are approximately 20-22 days away from the Plan being filed by Simpson's Island.

57 In its written submission, Heritage states:

> *"At the same time, the Monitor has suggested the Applicants will not be in a position to restructure their affairs and formulate a plan at all unless and until they are provided an opportunity to prosecute their claims for unliquidated damages against Heritage and Old Heritage. Accordingly, the Monitor has essentially confirmed that no plan is forthcoming in the reasonably foreseeable future. In such circumstances, it is submitted the Applicants are not making a proper use of the CCAA."*

58 As mentioned, this assertion by Heritage is not accurate. The Monitor has in fact confirmed that a Plan of Compromise or Arrangement is forthcoming in the near future, namely approximately three weeks for Simpson's Island and four weeks for Tidal Run.

59 As well, the Monitor has confirmed that there is a ***CCAA*** scenario that may provide an opportunity for a successful plan to be made without the quantification and security positions being first determined.

60 It should also be noted that the Harvesting, Processing and Marketing Agreement between Simpson's Island and Heritage Salmon was only recently executed after various court applications had to be made and the processing of the balance of the 2004 salmon crop will not begin until next Monday, June 18th.

61 There is no question on the evidence, and I so find, that the Applicants are closer today to proposals than they were at the beginning of these proceedings and at the hearing of the last application for an extension.

62 As mentioned, to obtain an extension, the applicant must establish three pre-conditions:

(a)	*that circumstances exist that make the order appropriate;*
(b)	*that the applicant has acted and continues to act in good faith; and*
(c)	*that the applicant has acted and continues to act with due diligence.*

63 In his report dated June 12, 2006, the Monitor concluded that Simpson's Island and Tidal Run have acted and continue to act in good faith and with due diligence and "*if given sufficient time by this Honourable Court, can and will file a Plan of Arrangement under CCAA that will have a significant chance of being successful.*"

64 As mentioned, the Plan of Arrangement for Simpson's Island is expected to be available for circulation to its creditors by July 7, 2006, to be voted on around mid-July. The Plan of Arrangement for Tidal Run is expected to be ready for circulation to creditors by July 15th and will be voted on during the first week of August. It is, in both cases a matter of weeks. I am satisfied that circumstances exist that make an extension order appropriate.

65 I am also satisfied that the Applicants have acted and are continuing to act in good faith and with due diligence.

66 In the result, an order will issue extending the Stay Termination Date and the date for filing a Plan of Arrangement to July 28, 2006 at 4 p.m.

Case Name:

SLMsoft Inc. (Re)

Between
Re: SLMsoft Inc. et al. - CCAA Application

[2003] O.J. No. 4920
4 C.B.R. (5th) 99
126 A.C.W.S. (3d) 386
2003 CarswellOnt 4186

Court File No. 03-CL-005013

Ontario Superior Court of Justice

Ground J.

Heard: October 22, 2003.
Judgment: October 29, 2003.

(5 paras.)

Bankruptcy — Interim receivers — Appointment — Circumstances when appointment refused — Companies' Creditors Arrangement Act — Practice — Stay of proceedings.

Application by SLMsoft and others to increase the provision of an administrative charge of $200,000 in an initial order and to extend a stay of CCAA proceedings. At issue was also whether an interim receiver should be appointed. The applicants' revenue had fallen short of what was anticipated when the charge was set and the DIP financing that had been advanced to date had been required to be applied toward essential payments such as salaries and rent. Professional services had been provided to complete and realize income from two major contracts.

HELD: Application allowed. The administrative charge in the initial order was increased to $600,000. The professional services were crucial in enabling the applicants to remain in operation. An interim receiver was not appropriate, given the impact on the retention of management and essential employees to complete the contracts. There was no realistic prospect of the applicants putting forward a viable plan of restructuring. The stay was extended to October 31, 2003 to allow for further information to be provided, including the anticipated completion dates of the contracts, projected operating costs, and financing arrangements.

Counsel:

Tony Reyes and Virginie Gauthier, for the applicants.
Larry J. Levine, for DIP lender.
Edward Park, for CCRA.
A. Kauffman, Richter and Partners, for Independent Monitor.
John MacDonald and Allan D. Coleman, for Insight Venture Associates.
Craig Hill, for Ernst & Young Inc., trustee of Ramport Securities.

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1 GROUND J.:— As indicated, I am prepared to issue an Order increasing the Administrative Charge under paragraph 33 of the Initial Order from $200,000 to $600,000. In my view, it is apparent that the revenues of the Applicants fell far short of what was anticipated when that figure was set and the DIP financing which has been advanced to date has had to be applied toward essential payments such as salaries and rent. The professional services have been crucial in enabling

the Applicant to remain in operation, within the CCAA proceedings, in hopes of completing and realizing income from the two major contracts which appear to me to be the only tangible assets of the Applicants. The professionals have forborne payment of their accounts in order to do so and should not, in my view, be penalized for having made that sacrifice.

2 I have also indicated that I am not prepared to terminate the CCAA proceedings and appoint an Interim Receiver today. I share many of the concerns raised by Mr. Reyes, Mr. Dowdall and Mr. Levine as to the impact of the appointment of an Interim Receiver on the escrow of the source codes, on the retention of management and essential employees required to manage the business and complete the major contracts and on the Rampart and the Insight litigation and as to the message to the marketplace and to existing and potential customers of the appointment of a receiver of any nature.

3 I am not, however, prepared to grant any lengthy extension of the stay or of the CCAA proceedings. There is, in my view, no realistic prospect of these Applicants ever being able to put forward a viable plan of restructuring. There is no assurance, as of today, that the balance of the DIP financing will be advanced and no evidence of any other source of funds for the Applicants. There is still no certainty as to when, if ever, the major contracts will be completed or any revenue received from those contracts and certainly nothing before the court from the customers by way of hard, firm information, undertaking or commitment as to when payments will be received. The potential for realizing funds in the short term from the sale of non-core assets seems to me to be remote and, in the case of the shares of Infocorp., non-existent. The flow of revenue to the Applicants from other sources such as maintenance fees, even on the most optimistic forecasts which seem always to be unreliable, would not nearly cover the operating costs of the Applicants. It seems to me that the only realistic scenario is the sale of the assets en bloc or as a going concern through some sort of judicially supervised sale process. However, the court is not in a position today to determine what that process should be or by whom it should be conducted and that cannot be determined until the court has certain additional information before it. I will extend the stay to October 31, 2003 to permit the parties an opportunity to provide such information to the court.

4 Accordingly, an Order will issue extending the Stay to October 31, 2003 on terms that:

1. the DIP lender advance to the Applicants the balance of the total authorized DIP amount by October 31, 2003 or advise the court what part of the balance will not be advanced;
2. the Applicants and the Monitor provide the court with an opinion as to the impact of the appointment of an Interim Receiver on the escrow of the source codes;
3. CCRA advise the court as to the amount of the post-filing withholding tax remittances in arrears and what part of such arrears relates to consultants, verify that the amount of the Applicants' GST credits has been validated and what that amount is and advise whether the GST credits can be applied against the withholding tax remittances in arrears;
4. Insight advise the court whether the commitment to advance $400,000 new DIP financing to the Applicants is conditional upon the termination of employment of Mr. Misir and persons related to him;
5. the Applicants and the Monitor file with the court a report as to the anticipated date of completion of the UAE and Ivory Coast contracts and on what basis that anticipated date was determined and a list of payments and dates of payments which will be received by the Applicants on completion of those contracts; and
6. the Applicants and the Monitor file with the court projected monthly operating costs of the Applicants for the next three months based on retaining essential senior management and essential employees required to complete the contracts and providing for a program of reasonable payment to professionals on account of both fees in arrears and fees estimated to be incurred during such three-month period.

5 Accordingly, on the motion brought by Mr. Reyes, an Order will issue extending the Stay to

October 31, 2003 on the terms indicated above; on the motion brought by Mr. Dowdall, an Order will issue increasing the amount of the Administrative Charge to $600,000 and the motions brought by Mr. MacDonald are adjourned to October 31, 2003.

GROUND J.

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