

COURT FILE NUMBER
COURT
JUDICIAL CENTRE OF

2403 15089

COURT OF KING'S BENCH OF ALBERTA
EDMONTON

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
FREEDOM CANNABIS INC.

APPLICANT:

FREEDOM CANNABIS INC.

DOCUMENT

ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF
PARTY FILING THIS DOCUMENT

BOOK OF AUTHORITIES

CHAITONS LLP
5000 Yonge St., Floor 10
Toronto, ON M2N 7E9
Attn: Harvey Chaiton / Danish Afroz / Laura
Culleton
Tel: 416-218-1129 / 1137 / 1128
Email: harvey@chaitons.com /
dafroz@chaitons.com / laurac@chaitons.com
File Number: ●

SHAREK LOGAN & VAN LEENEN LLP
2100 Rice Howard Place
10060 Jasper Avenue, NW
Edmonton, AB T5J 3R8
Attn: Amber M. Poburan / Justin Williams
Tel: 780-413-3105
Email: apoburan@sharekco.com
File Number: 23279/AMP



Canada Federal Statutes
Companies' Creditors Arrangement Act
Interpretation

Most Recently Cited in: In the Matter of The Body Shop Canada Limited, 2024 ONSC 3882, 2024 CarswellOnt 104111 (Ont. S.C.J. [Commercial List], Jul 5, 2024)

R.S.C. 1985, c. C-36, s. 3

s 3.

Currency

3.

3(1)Application

This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than \$5,000,000 or any other amount that is prescribed.

3(2)Affiliated companies

For the purposes of this Act,

- (a) companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each of them is controlled by the same person; and
- (b) two companies affiliated with the same company at the same time are deemed to be affiliated with each other.

3(3)Company controlled

For the purposes of this Act, a company is controlled by a person or by two or more companies if

- (a) securities of the company to which are attached more than fifty per cent of the votes that may be cast to elect directors of the company are held, other than by way of security only, by or for the benefit of that person or by or for the benefit of those companies; and
- (b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the company.

3(4)Subsidiary

For the purposes of this Act, a company is a subsidiary of another company if

- (a) it is controlled by
 - (i) that other company,
 - (ii) that other company and one or more companies each of which is controlled by that other company, or
 - (iii) two or more companies each of which is controlled by that other company; or
- (b) it is a subsidiary of a company that is a subsidiary of that other company.

Amendment History

Canada Federal Statutes
Companies' Creditors Arrangement Act
Interpretation

Most Recently Cited in: John Doe (G.E.B. #26) v. Roman Catholic Episcopal Corporation of St. John's, 2024 NLCA 26, 2024 CarswellNfld 215 (N.L. C.A., Jul 22, 2024)

R.S.C. 1985, c. C-36, s. 2

s 2.

Currency

2.

2(1) Definitions

In this Act,

"aircraft objects" [Repealed 2012, c. 31, s. 419.]

"bargaining agent" means any trade union that has entered into a collective agreement on behalf of the employees of a company; ("*agent négociateur*")

"bond" includes a debenture, debenture stock or other evidences of indebtedness; ("*obligation*")

"cash-flow statement", in respect of a company, means the statement referred to in paragraph 10(2)(a) indicating the company's projected cash flow; ("*état de l'évolution de l'encaisse*")

"claim" means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*; ("*réclamation*")

"collective agreement", in relation to a debtor company, means a collective agreement within the meaning of the jurisdiction governing collective bargaining between the debtor company and a bargaining agent; ("*convention collective*")

"company" means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies; ("*compagnie*")

"court" means

(a) in Nova Scotia, British Columbia and Prince Edward Island, the Supreme Court,

(a.1) in Ontario, the Superior Court of Justice,

(b) in Quebec, the Superior Court,

(c) in New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench, and

(c.1) in Newfoundland and Labrador, the Trial Division of the Supreme Court, and

(d) in Yukon and the Northwest Territories, the Supreme Court, and in Nunavut, the Nunavut Court of Justice;
("tribunal")

"debtor company" means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or

(d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent;

("compagnie débitrice")

"director" means, in the case of a company other than an income trust, a person occupying the position of director by whatever name called and, in the case of an income trust, a person occupying the position of trustee by whatever name called;
("administrateur")

"eligible financial contract" means an agreement of a prescribed kind; ("*contrat financier admissible*")

"equity claim" means a claim that is in respect of an equity interest, including a claim for, among others,

(a) a dividend or similar payment,

(b) a return of capital,

(c) a redemption or retraction obligation,

(d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or

(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);

("réclamation relative à des capitaux propres")

"equity interest" means

(a) in the case of a company other than an income trust, a share in the company — or a warrant or option or another right to acquire a share in the company — other than one that is derived from a convertible debt, and

(b) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt;

("intérêt relatif à des capitaux propres")

"financial collateral" means any of the following that is subject to an interest, or in the Province of Quebec a right, that secures payment or performance of an obligation in respect of an eligible financial contract or that is subject to a title transfer credit support agreement:

(a) cash or cash equivalents, including negotiable instruments and demand deposits,

2021 ONSC 659
Ontario Superior Court of Justice

Laurentian University of Sudbury

2021 CarswellOnt 1224, 2021 ONSC 659, 328 A.C.W.S. (3d) 668, 87 C.B.R. (6th) 278

**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 LAURENTIAN UNIVERSITY OF SUDBURY**

G.B. Morawetz C.J. Ont. S.C.J.

Heard: February 1, 2021
Judgment: February 1, 2021
Docket: CV-21-656040-00CL

Counsel: D.J. Miller, Mitch W. Grossell, Andrew Hanrahan, Derek Harland, Natasha MacParland, Michael Kennedy, for Applicant

Ashley John Taylor, Elizabeth Pillon, for Monitor

Peter J. Osborne, for Board of Governors

Pamela L.J. Huff, Aryo Shalviri, for Royal Bank of Canada

Stuart Brotman, Dylan Chochla, for Toronto Dominion Bank

Martin R. Kaplan, Vern W. DaRe, for Firm Capital Mortgage Fund Inc., DIP Lender

George Benchetrit, for Bank of Montreal

Subject: Civil Practice and Procedure; Insolvency; Public

Related Abridgment Classifications

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act

XIX.2 Initial application

XIX.2.a Grant and length of stay

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act

XIX.2 Initial application

XIX.2.d Miscellaneous

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act

XIX.7 Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Qualifying company Applicant, publicly funded university and registered charity, faced liquidity crisis and applied for interim relief pursuant to initial order under Companies' Creditors Arrangement Act (CCAA) in order to restructure — Applicant was "debtor company" to which CCAA applied — "Debtor company" is defined, inter alia, as "company" that is "insolvent" or has committed act of bankruptcy within meaning of Bankruptcy and Insolvency Act (BIA) — Section 2(1) of CCAA defines "company" to include, among other things, company incorporated by or under CCAA of legislature of province — Applicant was incorporated under An Act to Incorporate Laurentian University of Sudbury, and therefore was "company" for purposes of CCAA — Further, as not-for-profit, non-share capital corporation, applicant fell under Ontario Corporations Act — Applicant's status as not-for-

profit, non-share capital corporation did not impact applicability of CCAA — CCAA does not define "insolvent", but court commonly references definition of "insolvent person" under BIA in assessing whether applicant is debtor company in context of CCAA — Applicant was plainly insolvent and faced severe liquidity crisis Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s 2, "insolvent person"; Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s 2(1) "company".

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Miscellaneous Applicant university faced liquidity crisis and applied for protection of Companies' Creditors Arrangement Act so that it could restructure — Applicant applied for interim relief pursuant to initial order under Act — Application granted — Applicant was plainly insolvent — Stay in favour of directors and officers was critical to retain key officers with knowledge that would assist applicant in restructuring — Limited stay granted in respect of students' association (non-applicant stay party), for whom applicant had guaranteed credit facility — Where business operations of group of entities are inextricably intertwined, courts have found it necessary and appropriate to extend stay in respect of non-applicant parties — If counterparties were to exercise remedies due to applicant's insolvency, it would disrupt non-applicant stay party and have financial implications for applicant — Applicant to continue to make pre- and post-filing payments including payment of certain rebates, refunds or other amounts owing or owed to students — Applicant to pay amounts payable to students in respect of student scholarship, bursary, or grants — If applicant was unable to continue to process such payments, vulnerable students might be irreparably harmed.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Miscellaneous Applicant university faced liquidity crisis and applied for relief pursuant to initial order under Companies' Creditors Arrangement Act protection in order to restructure — Application granted — \$400,000 super-priority administration charge in favour of monitor and its counsel, applicant's counsel and advisors, and independent counsel to Board of Governors was reasonable — \$2 million charges approved in favour of directors and officers, but charge would only be available to extent claim was not covered by insurance or if applicant's insurance did not respond to claims — Sealing order granted with respect to confidential correspondence between applicant and Ministry of Colleges and Universities — Requested relief complied with s. 11.001 of Act as it was limited to relief reasonably necessary for continued operation of applicant in ordinary course of business.

Table of Authorities

Cases considered by *G.B. Morawetz C.J. Ont. S.C.J.*:

Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re (2000), 2000 CarswellOnt 3269, 19 C.B.R. (4th) 158 (Ont. S.C.J.) — considered

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) — referred to

Canwest Publishing Inc. / Publications Canwest Inc., Re (2010), 2010 ONSC 222, 2010 CarswellOnt 212, 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]) — referred to

Cinram International Inc., Re (2012), 2012 ONSC 3767, 2012 CarswellOnt 8413, 91 C.B.R. (5th) 46 (Ont. S.C.J. [Commercial List]) — referred to

Lydian International Limited (Re) (2019), 2019 ONSC 7473, 2019 CarswellOnt 21645, 75 C.B.R. (6th) 314 (Ont. S.C.J. [Commercial List]) — referred to

Mountain Equipment Co-Operative (Re) (2020), 2020 BCSC 2037, 2020 CarswellBC 3324 (B.C. S.C.) — referred to
Sierra Club of Canada v. Canada (Minister of Finance) (2002), 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellOnt 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 211 D.L.R. (4th) 193, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 287 N.R. 203, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 93 C.R.R. (2d) 219, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, 2002 CSC 41 (S.C.C.) — considered

Sino-Forest Corp., Re (2012), 2012 ONSC 2063, 2012 CarswellOnt 4117 (Ont. S.C.J. [Commercial List]) — referred to
Stelco Inc., Re (2004), 2004 CarswellOnt 1211, 48 C.B.R. (4th) 299, [2004] O.T.C. 284 (Ont. S.C.J. [Commercial List]) — referred to

TLC The Land Conservancy of British Columbia, Inc. No. S36826, Re (2014), 2014 BCSC 97, 2014 CarswellBC 160, 96 E.T.R. (3d) 17, [2014] 7 W.W.R. 122, 58 B.C.L.R. (5th) 321 (B.C. S.C.) — referred to

Tamerlane Ventures Inc., Re (2013), 2013 ONSC 5461, 2013 CarswellOnt 12213, 6 C.B.R. (6th) 328 (Ont. S.C.J. [Commercial List]) — referred to

Target Canada Co., Re (2015), 2015 ONSC 1487, 2015 CarswellOnt 3261, 23 C.B.R. (6th) 314 (Ont. S.C.J.) — referred to

Statutes considered:

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

Generally — referred to

s. 2 "insolvent person" — considered

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

Generally — referred to

s. 2(1) "company" — referred to

s. 10(2) — considered

s. 11 — considered

s. 11.001 [en. 2019, c. 29, s. 136] — considered

s. 11.02(1) [en. 2005, c. 47, s. 128] — considered

s. 11.02(3) [en. 2005, c. 47, s. 128] — pursuant to

s. 11.51 [en. 2005, c. 47, s. 128] — considered

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

Corporations Act, R.S.O. 1990, c. C.38

Generally — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43

Generally — referred to

s. 137(2) — referred to

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

Generally — referred to

Words and phrases considered:

debtor company

The [*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (CCAA)] applies to a "debtor company" whose liabilities exceed \$5 million.

[Section 2(1) of the] *CCAA* defines "company" to include, among other things, a company incorporated by or under an *Act* of the legislature of a province. A "debtor company" is defined, inter alia, as a "company" that is "insolvent" or that has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*.

...

While the *CCAA* does not define "insolvent", the definition of "insolvent person" under the *BIA* is commonly referenced by the Court in assessing whether an applicant is a debtor company in the context of the *CCAA*. . . .

The tests for "insolvent person" under the *BIA* are disjunctive. A company satisfying either (i), (ii) or (iii) of the test is considered insolvent for the purposes of the *CCAA*.

In addition to the foregoing tests, in [*Stelco Inc. (Re)*, 2004 CarswellOnt 1211 (S.C.) at paras. 21-22], Farley J. held that a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring.

APPLICATION by publicly funded university for interim relief pursuant to initial order under *Companies' Creditors Arrangement Act*.

G.B. Morawetz C.J. Ont. S.C.J.:

Introduction

1 Laurentian University of Sudbury ("LU" or the "Applicant") seeks certain relief pursuant to an order (the "Initial Order") under the *Companies' Creditors Arrangement Act* (the "CCAA").¹

2 LU is a publicly funded, bilingual and tricultural postsecondary institution in Sudbury, Ontario. Since inception, LU has provided higher education to the community of Sudbury and Northern Ontario at large and is an integral part of the economic fabric of the Northern Ontario community.

3 As a result of many years of recurring operational deficits in the millions of dollars, and notwithstanding LU's recent efforts to improve its financial stability, LU is experiencing a liquidity crisis and is insolvent.

4 LU submits that it requires the protection of the Court and the relief available under the CCAA so that it can financially and operationally restructure itself in order to emerge as a financially sustainable university for the benefit of all its stakeholders.

5 The facts with respect to this application are briefly summarized below and more fully set out in the Affidavit of Dr. Robert Haché sworn January 30, 2021, filed in support of this application (the "Haché Affidavit").²

6 For the following reasons, the Interim Order is granted.

Overview of the Applicant

7 LU is a non-share capital corporation that was incorporated pursuant to *An Act to Incorporate Laurentian University of Sudbury*, S.O. 1960, c. 151, as amended by S.O. 1961–62, c. 154 (the "LU Act") and is a registered charity pursuant to the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

8 The governance structure of LU is bicameral. The Board of Governors (the "Board"), the President, and the Vice-Chancellor generally have powers over the operational and financial management of LU, whereas the Senate of LU (the "Senate") is responsible for the academic policy of LU.

9 LU primarily focuses on undergraduate programming, with approximately 8,200 total domestic and international undergraduate students (approximately 6,250 full-time equivalents) enrolled in the 2020-21 academic year. LU has five undergraduate faculties, each of which offer programs in both English and French, and students can choose from 132 undergraduate programs to enroll in.

10 LU also has a graduate program, with approximately 1,098 total domestic and international graduate students enrolled during the 2020-21 academic year. LU offers 43 Masters and PhD programs in a variety of disciplines.

11 LU has a federated school structure whereby it has formal affiliations with several independent universities under the overall LU umbrella: the University of Sudbury, the University of Thorneloe, and Huntington University. The Federated Universities are integrated into LU, however, each of the Federated Universities are separate legal entities and are governed by Boards that are independent of LU.

12 LU is one of the largest employers in the Greater Sudbury area. As at December 30, 2020, LU employed approximately 1,751 people, of which approximately 758 are full-time employees. Total salaries and benefits represent the single largest expense item for LU on an annual basis (approximately \$134 million of \$201 million in total expenses during fiscal year 2019-20).

13 Approximately 612 LU employees are represented by the Laurentian University Faculty Association ("LUFA"). Approximately 268 non-faculty staff are represented by the Laurentian University Staff Union ("LUSU").

14 LUFA and the Board of LU are parties to a Collective Agreement (the "LUFA CA"), with a three-year term that expired on June 30, 2020.

15 Since April 2020, LU and LUFA have been engaged in bargaining with respect to a new collective bargaining agreement.

16 On July 1, 2018, LUSU and LU entered into a Collective Agreement that was set to expire on June 30, 2021 (the "LUSU CA").

Assets and Liabilities

17 LU does not prepare interim financial statements. The most recent audited statements for the year ended April 30, 2020, are attached to the Haché Affidavit.

18 As at April 30, 2020, LU had assets with a book value totaling approximately \$358 million, of which approximately \$33 million is comprised of current assets such as cash and short-term investments, accounts receivable, and other current assets. The remaining assets of LU consist primarily of investments in LU's segregated endowment fund (\$53 million) and capital assets (\$272 million), comprising LU's land and buildings.

19 As at April 30, 2020, LU had liabilities with a book value totaling approximately \$322 million, comprised of: (i) approximately \$43 million of current liabilities; (ii) approximately \$168 million of deferred contributions; and (iii) approximately \$110 million in long-term liabilities.

LU's Liquidity Crisis and Insolvency

20 LU has experienced recurring operational deficits in the millions of dollars each year for a significant period of time. These operational deficits have led to the accumulated deficit in the operational fund of LU of approximately \$20 million at the end of 2019-20 fiscal year. In the current 2020-21 fiscal year, LU projects a further operational deficit of \$5.6 million.

21 LU takes the position that it is insolvent and absent the relief sought in the Initial Order, will run out of cash to meet payroll in February.

22 LU advises that it has a number of structural issues that are causing financial challenges and that need to be resolved to ensure long-term stability, including:

(a) The terms of the LUFA CA are above market in several respects, and that issue is exacerbated by the tenuous labour relationship between LU and LUFA;

(b) Operationally, the structure of the academic programming offered by LU and the distribution of enrollment among the programs offered is flawed and must be addressed; and

(c) With its current cost structure, it costs more for LU and the Federated Universities to educate each student than the average for all Ontario universities by approximately \$2,000 per student, per year.

23 LU submits that the financial challenges that LU faces are significant and, absent fundamental change, LU's short-term and long-term financial and operational sustainability are at risk.

Objective of CCAA Filing

24 As part of its restructuring strategy, LU intends to implement long-term financial stability initiatives including, among other things:

- (a) A review of the breadth of academic programs offered at LU and their enrollment levels;
- (b) A re-evaluation of the Federated Universities model;
- (c) Negotiations with LU's unions regarding what LU must look like in the future and ensuring that a restructured LU can be aligned with collective agreements that will facilitate its future sustainability;
- (d) Identification of opportunities for future revenue generation;
- (e) Refinement of the student experience at LU to continue providing a top-notch education; and
- (f) Consideration of options for addressing current and long-term indebtedness.

Law and Analysis

25 The CCAA applies to a "debtor company" whose liabilities exceed \$5 million. A "debtor company" is defined, *inter alia*, as a "company" that is "insolvent" or that has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*.³

26 The CCAA defines "company" to include, among other things, a company incorporated by or under an Act of the legislature of a province.⁴

27 The Applicant is incorporated under an act of the legislature of the Province of Ontario, the LU Act, and therefore is a "company" for the purposes of the CCAA.⁵ Further, as a not-for-profit, non-share capital corporation, the Applicant falls under the Corporations Act (Ontario).⁶

28 There have been several CCAA proceedings commenced in respect of not-for-profit corporations, such as *Canadian Red Cross Society*⁷ and *The Land Conservancy of British Columbia*.⁸

29 I am satisfied that the Applicant's status as a not-for-profit, non-share capital corporation does not impact the applicability of the CCAA to the Applicant.

Insolvency

30 The insolvency of a debtor is assessed at the time of the filing of the CCAA application. While the CCAA does not define "insolvent", the definition of "insolvent person" under the BIA is commonly referenced by the Court in assessing whether an applicant is a debtor company in the context of the CCAA.⁹ The BIA defines "insolvent person" as follows:¹⁰

"insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

- (i) who is for any reason unable to meet his obligations as they generally become due,
- (ii) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
- (iii) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

31 The tests for "insolvent person" under the BIA are disjunctive. A company satisfying either (i), (ii) or (iii) of the test is considered insolvent for the purposes of the CCAA.¹¹

32 In addition to the foregoing tests, in *Stelco*, Farley J. held that a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring.¹²

33 Based on the evidence set out in the Haché Affidavit and as summarized in the Report of Ernst & Young Inc., the Proposed Monitor, I find that the Applicant is plainly insolvent and faces a severe liquidity crisis.

34 I also find that the Applicant is a "debtor company" to which the CCAA applies.

Stay of Proceedings

35 Pursuant to section 11.02(1) of the CCAA, a Court may grant an order staying all proceedings in respect of a debtor company for a period of not more than ten days, provided that the Court is satisfied that circumstances exist to make the order appropriate.

36 The Applicant submits that it is just and appropriate to grant a stay of proceedings. The Applicant submits that it requires a stay of proceedings in order to provide it with the breathing room necessary to financially and operationally restructure itself in order to emerge as a sustainable and long-term financially viable university to continue providing quality post-secondary education in Northern Ontario.

37 The Proposed Initial Order provides for a stay of proceedings in favour of the Applicant's current and future directors and officers who may subsequently be appointed. The Applicant submits that the stay in favour of the current and future directors and officers is critical to retain the involvement of the Board and key officers who have knowledge that will assist the Applicant in negotiating with stakeholders and implementing a restructuring plan. I accept this submission.

38 The Applicant also seeks a limited stay in respect of the Laurentian University Students General Association (the "Non-Applicant Stay Party" or "the SGA"). The stay in respect of the Non-Applicant Stay Party is limited to preventing any person from: (i) commencing proceedings against the Non-Applicant Stay Party, (ii) terminating, repudiating, making any demand or otherwise altering any contractual relationships with the Non-Applicant Stay Party or enforcing any rights or remedies, or (iii) discontinuing or ceasing to perform any obligations under any contractual agreements with the Non-Applicant Stay Party, resulting from the commencement of this CCAA proceeding by the Applicant, the stay of proceedings granted to the Applicant and any default or cross-default arising due to the foregoing.

39 CCAA courts have, on numerous occasions, extended the initial stay of proceedings to non-applicants.¹³ The Court's authority to grant such an order is derived from its broad jurisdiction under ss. 11 and 11.02(1) of the CCAA to make an initial order on "any terms that [the Court] may impose." It is well-established that it is appropriate for the Court to extend the protection of the stay of proceedings to third party entities where such parties are integrally and closely interrelated to the debtor companies' business or where doing so furthers the primary purpose of the CCAA, being the successful restructuring of an insolvent company.¹⁴

40 In particular, where the business operations of a group of entities are inextricably intertwined, such as where there are agreements among the entities, guarantees provided by certain entities in the group in respect of the obligations of other entities in the group or shared cash management systems, courts have found it necessary and appropriate to extend a stay in respect of non-applicant parties.¹⁵

41 In the present circumstances, the Applicant has provided a written guarantee in respect of a credit facility obtained by the Non-Applicant Stay Party. If counterparties were to exercise remedies due to the Applicant's insolvency, it would disrupt the Non-Applicant Stay Party and have financial implications for the Applicant.

42 In my view, it is desirable to avoid disruption to the Non-Applicant Stay Party which is particularly critical given the Applicant's status as an operating university and its overarching aim in this CCAA proceeding to avoid or minimize any

Most Negative Treatment: Recently added (treatment not yet designated)

Most Recent Recently added (treatment not yet designated): Chowdhury v. Exquisite Bay Development Inc. | 2024 ONSC 41, 2024 CarswellOnt 69 | (Ont. S.C.J., Jan 2, 2024)

2004 CarswellOnt 1211

Ontario Superior Court of Justice [Commercial List]

Stelco Inc., Re

2004 CarswellOnt 1211, [2004] O.J. No. 1257, [2004] O.T.C. 284, 129 A.C.W.S. (3d) 1065, 48 C.B.R. (4th) 299

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

IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH
RESPECT TO STELCO INC. AND THE OTHER APPLICANTS LISTED IN SCHEDULE "A"

APPLICATION UNDER THE COMPANIES' CREDITORS
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Farley J.

Heard: March 5, 2004

Judgment: March 22, 2004

Docket: 04-CL-5306

Counsel: Michael E. Barrack, James D. Gage, Geoff R. Hall for Applicants
David Jacobs, Michael McCreary for Locals, 1005, 5328, 8782 of the United Steel Workers of America
Ken Rosenberg, Lily Harmer, Rob Centa for United Steelworkers of America
Bob Thornton, Kyla Mahar for Ernst & Young Inc., Monitor of the Applicants
Kevin J. Zych for Informal Committee of Stelco Bondholders
David R. Byers for CIT
Kevin McElcheran for GE
Murray Gold, Andrew Hatnay for Retired Salaried Beneficiaries
Lewis Gottheil for CAW Canada and its Local 523
Virginie Gauthier for Fleet
H. Whiteley for CIBC
Gail Rubenstein for FSCO
Kenneth D. Kraft for EDS Canada Inc.

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act

XIX.7 Miscellaneous

Headnote

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

Steel company S Inc. applied for protection under Companies' Creditors Arrangement Act ("CCAA") on January 29, 2004 — Union locals moved to rescind initial order and dismiss initial application of S Inc. and its subsidiaries on ground S Inc. was not "debtor company" as defined in s. 2 of CCAA because S Inc. was not insolvent — Motion dismissed — Given time and steps

s. 12(1) "claim" — referred to

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11

Generally — referred to

Words and phrases considered:

debtor company

It seems to me that the [*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36] test of insolvency . . . which I have determined is a proper interpretation is that the [*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3] definition of [s. 2(1)] (a), (b) or (c) of insolvent person is acceptable with the caveat that as to (a), a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring.

MOTION by union that steel company was not "debtor company" as defined in *Companies' Creditors Arrangement Act*.

Farley J.:

1 As argued this motion by Locals 1005, 5328 and 8782 United Steel Workers of America (collectively "Union") to rescind the initial order and dismiss the application of Stelco Inc. ("Stelco") and various of its subsidiaries (collectively "Sub Applicants") for access to the protection and process of the *Companies' Creditors Arrangement Act* ("CCAA") was that this access should be denied on the basis that Stelco was not a "debtor company" as defined in s. 2 of the CCAA because it was not insolvent.

2 Allow me to observe that there was a great deal of debate in the materials and submissions as to the reason(s) that Stelco found itself in with respect to what Michael Locker (indicating he was "an expert in the area of corporate restructuring and a leading steel industry analyst") swore to at paragraph 12 of his affidavit was the "current crisis":

12. Contending with weak operating results and resulting tight cash flow, management has deliberately chosen not to fund its employee benefits. By contrast, Dofasco and certain other steel companies have consistently funded both their employee benefit obligations as well as debt service. If Stelco's management had chosen to fund pension obligations, presumably with borrowed money, *the current crisis* and related restructuring plans would focus on debt restructuring as opposed to the reduction of employee benefits and related liabilities. [Emphasis added.]

3 For the purpose of determining whether Stelco is insolvent and therefore could be considered to be a debtor company, it matters not what the cause or who caused the financial difficulty that Stelco is in as admitted by Locker on behalf of the Union. The management of a corporation could be completely incompetent, inadvertently or advertently; the corporation could be in the grip of ruthless, hard hearted and hard nosed outside financiers; the corporation could be the innocent victim of uncaring policy of a level of government; the employees (unionized or non-unionized) could be completely incompetent, inadvertently or advertently; the relationship of labour and management could be absolutely poisonous; the corporation could be the victim of unforeseen events affecting its viability such as a fire destroying an essential area of its plant and equipment or of rampaging dumping. One or more or all of these factors (without being exhaustive), whether or not of varying degree and whether or not in combination of some may well have been the cause of a corporation's difficulty. The point here is that Stelco's difficulty exists; the only question is whether Stelco is insolvent within the meaning of that in the "debtor company" definition of the CCAA. However, I would point out, as I did in closing, that no matter how this motion turns out, Stelco does have a problem which has to be addressed - addressed within the CCAA process if Stelco is insolvent or addressed outside that process if Stelco is determined not to be insolvent. The status quo will lead to ruination of Stelco (and its Sub Applicants) and as a result will very badly affect its stakeholder, including pensioners, employees (unionized and non-unionized), management, creditors, suppliers, customers, local and other governments and the local communities. In such situations, time is a precious commodity; it cannot be wasted; no matter how much some would like to take time outs, the clock cannot be stopped. The watchwords of the Commercial List are equally applicable in such circumstances. They are communication, cooperation and common sense. I appreciate that these cases frequently invoke emotions running high and wild; that is understandable on a human basis but it is the considered, rational approach which will solve the problem.

4 The time to determine whether a corporation is insolvent for the purpose of it being a "debtor company" and thus able to make an application to proceed under the CCAA is the date of filing, in this case January 29, 2004.

5 The Monitor did not file a report as to this question of insolvency as it properly advised that it wished to take a neutral role. I understand however, that it did provide some assistance in the preparation of Exhibit C to Hap Steven's affidavit.

6 If I determine in this motion that Stelco is not insolvent, then the initial order would be set aside. See *Montreal Trust Co. of Canada v. Timber Lodge Ltd.* (1992), 15 C.B.R. (3d) 14 (P.E.I. C.A.). The onus is on Stelco as I indicated in my January 29, 2004 endorsement.

7 S. 2 of the CCAA defines "debtor company" as:

"debtor company" means any company that:

(a) is bankrupt or insolvent;

(b) has committed an act of bankruptcy within the meaning of *Bankruptcy and Insolvency Act* ["BIA"] or deemed insolvent within the meaning of the *Winding-Up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts;

(c) has made an authorized assignment against which a receiving order has been made under the *Bankruptcy and Insolvency Act*; or

(d) is in the course of being wound-up under the *Winding-Up and Restructuring Act* because the company is insolvent.

8 Counsel for the Existing Stelco Lenders and the DIP Lenders posited that Stelco would be able to qualify under (b) in light of the fact that as of January 29, 2004 whether or not it was entitled to receive the CCAA protection under (a) as being insolvent, it had ceased to pay its pre-filing debts. I would merely observe as I did at the time of the hearing that I do not find this argument attractive in the least. The most that could be said for that is that such game playing would be ill advised and in my view would not be rewarded by the exercise of judicial discretion to allow such an applicant the benefit of a CCAA stay and other advantages of the procedure for if it were capriciously done where there is not reasonable need, then such ought not to be granted. However, I would point out that if a corporation did capriciously do so, then one might well expect a creditor-initiated application so as to take control of the process (including likely the ouster of management including directors who authorized such unnecessary stoppage); in such a case, while the corporation would not likely be successful in a corporation application, it is likely that a creditor application would find favour of judicial discretion.

9 This judicial discretion would be exercised in the same way generally as is the case where s. 43(7) of the BIA comes into play whereby a bankruptcy receiving order which otherwise meets the test may be refused. See *Kenwood Hills Development Inc., Re* (1995), 30 C.B.R. (3d) 44 (Ont. Bkcty.) where at p. 45 I observed:

The discretion must be exercised judicially based on credible evidence; it should be used according to common sense and justice and in a manner which does not result in an injustice: See *Re Churchill Forest Industries (Manitoba) Ltd.* (1971), 16 C.B.R. (NS) 158 (Man. Q.B.).

10 Anderson J. in *MTM Electric Co., Re* (1982), 42 C.B.R. (N.S.) 29 (Ont. Bkcty.) at p. 30 declined to grant a bankruptcy receiving order for the eminently good sense reason that it would be counterproductive: "Having regard for the value of the enterprise and having regard to the evidence before me, I think it far from clear that a receiving order would confer a benefit on anyone." This common sense approach to the judicial exercise of discretion may be contrasted by the rather more puzzling approach in *TDM Software Systems Inc., Re* (1986), 60 C.B.R. (N.S.) 92 (Ont. S.C.).

11 The Union, supported by the International United Steel Workers of America ("International"), indicated that if certain of the obligations of Stelco were taken into account in the determination of insolvency, then a very good number of large Canadian

corporations would be able to make an application under the CCAA. I am of the view that this concern can be addressed as follows. The test of insolvency is to be determined on its own merits, not on the basis that an otherwise technically insolvent corporation should not be allowed to apply. However, if a technically insolvent corporation were to apply and there was no material advantage to the corporation and its stakeholders (in other words, a pressing need to restructure), then one would expect that the court's discretion would be judicially exercised against granting CCAA protection and ancillary relief. In the case of Stelco, it is recognized, as discussed above, that it is in crisis and in need of restructuring - which restructuring, if it is insolvent, would be best accomplished within a CCAA proceeding. Further, I am of the view that the track record of CCAA proceedings in this country demonstrates a healthy respect for the fundamental concerns of interested parties and stakeholders. I have consistently observed that much more can be achieved by negotiations outside the courtroom where there is a reasonable exchange of information, views and the exploration of possible solutions and negotiations held on a without prejudice basis than likely can be achieved by resorting to the legal combative atmosphere of the courtroom. A mutual problem requires a mutual solution. The basic interest of the CCAA is to rehabilitate insolvent corporations for the benefit of all stakeholders. To do this, the cause(s) of the insolvency must be fixed on a long term viable basis so that the corporation may be turned around. It is not achieved by positional bargaining in a tug of war between two parties, each trying for a larger slice of a defined size pie; it may be achieved by taking steps involving shorter term equitable sacrifices and implementing sensible approaches to improve productivity to ensure that the pie grows sufficiently for the long term to accommodate the reasonable needs of the parties.

12 It appears that it is a given that the Sub Applicants are in fact insolvent. The question then is whether Stelco is insolvent.

13 There was a question as to whether Stelco should be restricted to the material in its application as presented to the Court on January 29, 2004. I would observe that CCAA proceedings are not in the nature of the traditional adversarial lawsuit usually found in our courtrooms. It seems to me that it would be doing a disservice to the interest of the CCAA to artificially keep the Court in the dark on such a question. Presumably an otherwise deserving "debtor company" would not be allowed access to a continuing CCAA proceeding that it would be entitled to merely because some potential evidence were excluded for traditional adversarial technical reasons. I would point out that in such a case, there would be no prohibition against such a corporation reapplying (with the additional material) subsequently. In such a case, what would be the advantage for anyone of a "pause" before being able to proceed under the rehabilitative process under the CCAA. On a practical basis, I would note that all too often corporations will wait too long before applying, at least this was a significant problem in the early 1990s. In *Inducon Development Corp., Re* (1991), 8 C.B.R. (3d) 306 (Ont. Gen. Div.), I observed:

Secondly, CCAA is designed to be remedial; it is not, however, designed to be preventative. CCAA should not be the last gasp of a dying company; it should be implemented, if it is to be implemented, at a stage prior to the death throes.

14 It seems to me that the phrase "death throes" could be reasonably replaced with "death spiral". In *Cumberland Trading Inc., Re* (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div. [Commercial List]), I went on to expand on this at p. 228:

I would also observe that all too frequently debtors wait until virtually the last moment, the last moment, or in some cases, beyond the last moment before even beginning to think about reorganizational (and the attendant support that any successful reorganization requires from the creditors). I noted the lamentable tendency of debtors to deal with these situations as "last gasp" desperation moves in *Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 308 (Ont. Gen. Div.). To deal with matters on this basis minimizes the chances of success, even if "success" may have been available with earlier spade work.

15 I have not been able to find in the CCAA reported cases any instance where there has been an objection to a corporation availing itself of the facilities of the CCAA on the basis of whether the corporation was insolvent. Indeed, as indicated above, the major concern here has been that an applicant leaves it so late that the timetable of necessary steps may get impossibly compressed. That is not to say that there have not been objections by parties opposing the application on various other grounds. Prior to the 1992 amendments, there had to be debentures (plural) issued pursuant to a trust deed; I recall that in *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101, 1 O.R. (3d) 289 (Ont. C.A.), the initial application was rejected in the morning because there had only been one debenture issued but another one was issued prior to the return to court that afternoon. This case stands for the general proposition that the CCAA should be given a large and liberal interpretation. I should note that there was in *Enterprise Capital Management Inc. v. Semi-Tech Corp.* (1999), 10 C.B.R. (4th) 133 (Ont. S.C.J.

[Commercial List]) a determination that in a creditor application, the corporation was found not to be insolvent, but see below as to BIA test (c) my views as to the correctness of this decision.

16 In *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) I observed at p. 32:

One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors.

17 In *Anvil Range Mining Corp., Re* (2002), 34 C.B.R. (4th) 157 (Ont. C.A.), the court stated to the same effect:

The second submission is that the plan is contrary to the purposes of the CCAA. Courts have recognized that the purpose of the CCAA is to enable compromises to be made for the common benefit of the creditors and the company and to keep the company alive and out of the hands of liquidators.

18 Encompassed in this is the concept of saving employment if a restructuring will result in a viable enterprise. See *Diemaster Tool Inc. v. Skvortsoff (Trustee of)* (1991), 3 C.B.R. (3d) 133 (Ont. Gen. Div.). This concept has been a continuing thread in CCAA cases in this jurisdiction stretching back for at least the past 15 years, if not before.

19 I would also note that the jurisprudence and practical application of the bankruptcy and insolvency regime in place in Canada has been constantly evolving. The early jails of what became Canada were populated to the extent of almost half their capacity by bankrupts. Rehabilitation and a fresh start for the honest but unfortunate debtor came afterwards. Most recently, the *Bankruptcy Act* was revised to the BIA in 1992 to better facilitate the rehabilitative aspect of making a proposal to creditors. At the same time, the CCAA was amended to eliminate the threshold criterion of there having to be debentures issued under a trust deed (this concept was embodied in the CCAA upon its enactment in 1933 with a view that it would only be large companies with public issues of debt securities which could apply). The size restriction was continued as there was now a threshold criterion of at least \$5 million of claims against the applicant. While this restriction may appear discriminatory, it does have the practical advantage of taking into account that the costs (administrative costs including professional fees to the applicant, and indeed to the other parties who retain professionals) is a significant amount, even when viewed from the perspective of \$5 million. These costs would be prohibitive in a smaller situation. Parliament was mindful of the time horizons involved in proposals under BIA where the maximum length of a proceeding including a stay is six months (including all possible extensions) whereas under CCAA, the length is in the discretion of the court judicially exercised in accordance with the facts and the circumstances of the case. Certainly sooner is better than later. However, it is fair to observe that virtually all CCAA cases which proceed go on for over six months and those with complexity frequently exceed a year.

20 Restructurings are not now limited in practical terms to corporations merely compromising their debts with their creditors in a balance sheet exercise. Rather there has been quite an emphasis recently on operational restructuring as well so that the emerging company will have the benefit of a long term viable fix, all for the benefit of stakeholders. See *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) at p. 314 where Borins J. states:

The proposed plan exemplifies the policy and objectives of the Act as it proposes a regime for the court-supervised reorganization for the Applicant company intended to avoid the devastating social and economic effects of a creditor-initiated termination of its ongoing business operations and enabling the company to carry on its business in a manner in which it is intended to cause the least possible harm to the company, its creditors, its employees and former employees and the communities in which it carries on and carried on its business operations.

21 The CCAA does not define "insolvent" or "insolvency". Houlden & Morawetz, *The 2004 Annotated Bankruptcy and Insolvency Act* (Toronto, Carswell; 2003) at p. 1107 (N5) states:

In interpreting "debtor company", reference must be had to the definition of "insolvent person" in s. 2(1) of the *Bankruptcy and Insolvency Act* . . .

To be able to use the Act, a company must be bankrupt or insolvent: *Reference re Companies' Creditors Arrangement Act (Canada)*, 16 C.B.R. 1, [1934] S.C.R. 659, [1934] 4 D.L.R. 75. The company must, in its application, admit its insolvency.

22 It appears to have become fairly common practice for applicants and others when reference is made to insolvency in the context of the CCAA to refer to the definition of "insolvent person" in the BIA. That definition is as follows:

s. 2(1) . . .

"insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, and whose liability to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

23 Stelco acknowledges that it does not meet the test of (b); however, it does assert that it meets the test of both (a) and (c). In addition, however, Stelco also indicates that since the CCAA does not have a reference over to the BIA in relation to the (a) definition of "debtor company" as being a company that is "(a) bankrupt or insolvent", then this term of "insolvent" should be given the meaning that the overall context of the CCAA requires. See the modern rule of statutory interpretation which directs the court to take a contextual and purposive approach to the language of the provision at issue as illustrated by *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.) at p. 580:

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.

24 I note in particular that the (b), (c) and (d) aspects of the definition of "debtor company" all refer to other statutes, including the BIA; (a) does not. S. 12 of the CCAA defines "claims" with reference over to the BIA (and otherwise refers to the BIA and the *Winding-Up and Restructuring Act*). It seems to me that there is merit in considering that the test for insolvency under the CCAA may differ somewhat from that under the BIA, so as to meet the special circumstances of the CCAA and those corporations which would apply under it. In that respect, I am mindful of the above discussion regarding the time that is usually and necessarily (in the circumstances) taken in a CCAA reorganization restructuring which is engaged in coming up with a plan of compromise and arrangement. The BIA definition would appear to have been historically focussed on the question of bankruptcy - and not reorganization of a corporation under a proposal since before 1992, secured creditors could not be forced to compromise their claims, so that in practice there were no reorganizations under the former *Bankruptcy Act* unless all secured creditors voluntarily agreed to have their secured claims compromised. The BIA definition then was essentially useful for being a pre-condition to the "end" situation of a bankruptcy petition or voluntary receiving order where the upshot would be a realization on the bankrupt's assets (not likely involving the business carried on - and certainly not by the bankrupt). Insolvency under the BIA is also important as to the Paulian action events (eg., fraudulent preferences, settlements) as to the conduct of the debtor prior to the bankruptcy; similarly as to the question of provincial preference legislation. Reorganization under a plan or proposal, on the contrary, is with a general objective of the applicant continuing to exist, albeit that the CCAA may also be used to have an orderly disposition of the assets and undertaking in whole or in part.

25 It seems to me that given the time and steps involved in a reorganization, and the condition of insolvency perforce requires an expanded meaning under the CCAA. Query whether the definition under the BIA is now sufficient in that light for the allowance of sufficient time to carry through with a realistically viable proposal within the maximum of six months allowed under the BIA? I think it sufficient to note that there would not be much sense in providing for a rehabilitation program of

restructuring/reorganization under either statute if the entry test was that the applicant could not apply until a rather late stage of its financial difficulties with the rather automatic result that in situations of complexity of any material degree, the applicant would not have the financial resources sufficient to carry through to hopefully a successful end. This would indeed be contrary to the renewed emphasis of Parliament on "rescues" as exhibited by the 1992 and 1997 amendments to the CCAA and the BIA.

26 Allow me now to examine whether Stelco has been successful in meeting the onus of demonstrating with credible evidence on a common sense basis that it is insolvent within the meaning required by the CCAA in regard to the interpretation of "debtor company" in the context and within the purpose of that legislation. To a similar effect, see *PWA Corp. v. Gemini Group Automated Distribution Systems Inc.* (1993), 103 D.L.R. (4th) 609 (Ont. C.A.), leave to appeal to S.C.C. dismissed [(1993), 49 C.P.R. (3d) ix (S.C.C.)] wherein it was determined that the trial judge was correct in holding that a party was not insolvent and that the statutory definition of insolvency pursuant to the BIA definition was irrelevant to determine that issue, since the agreement in question effectively provided its own definition by implication. It seems to me that the CCAA test of insolvency advocated by Stelco and which I have determined is a proper interpretation is that the BIA definition of (a), (b) or (c) of insolvent person is acceptable with the caveat that as to (a), a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring. That is, there should be a reasonable cushion, which cushion may be adjusted and indeed become in effect an encroachment depending upon reasonable access to DIP between financing. In the present case, Stelco accepts the view of the Union's affiant, Michael Mackey of Deloitte and Touche that it will otherwise run out of funding by November 2004.

27 On that basis, allow me to determine whether Stelco is insolvent on the basis of (i) what I would refer to as the CCAA test as described immediately above, (ii) BIA test (a) or (iii) BIA test (c). In doing so, I will have to take into account the fact that Stephen, albeit a very experienced and skilled person in the field of restructurings under the CCAA, unfortunately did not appreciate that the material which was given to him in Exhibit E to his affidavit was modified by the caveats in the source material that in effect indicated that based on appraisals, the fair value of the real assets acquired was in excess of the purchase price for two of the U.S. comparators. Therefore the evidence as to these comparators is significantly weakened. In addition at Q. 175-177 in his cross examination, Stephen acknowledged that it was reasonable to assume that a purchaser would "take over some liabilities, some pension liabilities and OPEB liabilities, for workers who remain with the plant." The extent of that assumption was not explored; however, I do note that there was acknowledgement on the part of the Union that such an assumption would also have a reciprocal negative effect on the purchase price.

28 The BIA tests are disjunctive so that anyone meeting any of these tests is determined to be insolvent: see *Optical Recording Laboratories Inc., Re* (1990), 75 D.L.R. (4th) 747 (Ont. C.A.) at p. 756; *Viteway Natural Foods Ltd., Re* (1986), 63 C.B.R. (N.S.) 157 (B.C. S.C.) at p. 161. Thus, if I determine that Stelco is insolvent on *any one* of these tests, then it would be a "debtor company" entitled to apply for protection under the CCAA.

29 In my view, the Union's position that Stelco is not insolvent under BIA (a) because it has not entirely used up its cash and cash facilities (including its credit line), that is, it is not yet as of January 29, 2004 run out of liquidity conflates inappropriately the (a) test with the (b) test. The Union's view would render the (a) test necessarily as being redundant. See *R. v. Proulx*, [2000] 1 S.C.R. 61 (S.C.C.) at p. 85 for the principle that no legislative provision ought to be interpreted in a manner which would "render it mere surplusage." Indeed the plain meaning of the phrase "unable to meet his obligations as they generally become due" requires a construction of test (a) which permits the court to take a purposive assessment of a debtor's ability to meet his future obligations. See *King Petroleum Ltd., Re* (1978), 29 C.B.R. (N.S.) 76 (Ont. S.C.) where Steele J. stated at p. 80:

With respect to cl. (a), it was argued that at the time the disputed payments were made the company was able to meet its obligations as they generally became due because no major debts were in fact due at that time. This was premised on the fact that the moneys owed to Imperial Oil were not due until 10 days after the receipt of the statements and that the statements had not then been received. I am of the opinion that this is not a proper interpretation of cl. (a). *Clause (a) speaks in the present and future tenses and not in the past.* I am of the opinion that the company was an "insolvent person" within the meaning of cl. (a) because by the very payment-out of the money in question it placed itself in a position that it was unable to meet its obligations as they would generally become due. In other words, it had placed itself in a position

that it would not be able to pay the obligations that it knew it had incurred and which it knew would become due in the immediate future. [Emphasis added.]

30 *King Petroleum Ltd.* was a case involving the question in a bankruptcy scenario of whether there was a fraudulent preference during a period when the corporation was insolvent. Under those circumstances, the "immediate future" does not have the same expansive meaning that one would attribute to a time period in a restructuring forward looking situation.

31 Stephen at paragraphs 40-49 addressed the restructuring question in general and its applicability to the Stelco situation. At paragraph 41, he outlined the significant stages as follows:

The process of restructuring under the CCAA entails a number of different stages, the most significant of which are as follows:

- (a) identification of the debtor's stakeholders and their interests;
- (b) arranging for a process of meaningful communication;
- (c) dealing with immediate relationship issues arising from a CCAA filing;
- (d) sharing information about the issues giving rise to the debtor's need to restructure;
- (e) developing restructuring alternatives; and
- (f) building a consensus around a plan of restructuring.

32 I note that January 29, 2004 is just 9-10 months away from November 2004. I accept as correct his conclusion based on his experience (and this is in accord with my own objective experience in large and complicated CCAA proceedings) that Stelco would have the liquidity problem within the time horizon indicated. In that regard, I also think it fair to observe that Stelco realistically cannot expect any increase in its credit line with its lenders or access further outside funding. To bridge the gap it must rely upon the stay to give it the uplift as to pre-filing liabilities (which the Union misinterpreted as a general turnaround in its cash position without taking into account this uplift). As well, the Union was of the view that recent price increases would relieve Stelco's liquidity problems; however, the answers to undertaking in this respect indicated:

With respect to the Business Plan, the average spot market sales price per ton was \$514, and the average contract business sales price per ton was \$599. The Forecast reflects an average spot market sales price per ton of \$575, and average contract business sales price per ton of \$611. The average spot price used in the forecast considers further announced price increases, recognizing, among other things, the timing and the extent such increases are expected to become effective. The benefit of the increase in sales prices from the Business Plan is essentially offset by the substantial increase in production costs, and in particular in raw material costs, primarily scrap and coke, as well as higher working capital levels and a higher loan balance outstanding on the CIT credit facility as of January 2004.

I accept that this is generally a cancel out or wash in all material respects.

33 I note that \$145 million of cash resources had been used from January 1, 2003 to the date of filing. Use of the credit facility of \$350 million had increased from \$241 million on November 30, 2003 to \$293 million on the date of filing. There must be a reasonable reserve of liquidity to take into account day to day, week to week or month to month variances and also provide for unforeseen circumstances such as the breakdown of a piece of vital equipment which would significantly affect production until remedied. Trade credit had been contracting as a result of appreciation by suppliers of Stelco's financial difficulties. The DIP financing of \$75 million is only available if Stelco is under CCAA protection. I also note that a shut down as a result of running out of liquidity would be complicated in the case of Stelco and that even if conditions turned around more than reasonably expected, start-up costs would be heavy and quite importantly, there would be a significant erosion of the customer base (reference should be had to the Slater Hamilton plant in this regard). One does not liquidate assets which one would not sell in the ordinary course of business to thereby artificially salvage some liquidity for the purpose of the test: see *Pacific Mobile*

Corp., Re (1979), 32 C.B.R. (N.S.) 209 (C.S. Que.) at p. 220. As a rough test, I note that Stelco (albeit on a consolidated basis with all subsidiaries) running significantly behind plan in 2003 from its budget of a profit of \$80 million now to a projected loss of \$192 million and cash has gone from a positive \$209 million to a negative \$114 million.

34 Locker made the observation at paragraph 8 of his affidavit that:

8. Stelco has performed poorly for the past few years primarily due to an inadequate business strategy, poor utilization of assets, inefficient operations and generally weak management leadership and decision-making. This point is best supported by the fact that Stelco's local competitor, Dofasco, has generated outstanding results in the same period.

Table 1 to his affidavit would demonstrate that Dofasco has had superior profitability and cashflow performance than its "neighbour" Stelco. He went on to observe at paragraphs 36-37:

36. Stelco can achieve significant cost reductions through means other than cutting wages, pensions and benefits for employees and retirees. Stelco could bring its cost levels down to those of restructured U.S. mills, with the potential for lowering them below those of many U.S. mills.

37. Stelco could achieve substantial savings through productivity improvements within the mechanisms of the current collective agreements. More importantly, a major portion of this cost reduction could be achieved through constructive negotiations with the USWA in an out-of-court restructuring that does not require intervention of the courts through the vehicle of CCAA protection.

I accept his constructive comments that there is room for cost reductions and that there are substantial savings to be achieved through productivity improvements. However, I do not see anything detrimental to these discussions and negotiations by having them conducted within the umbrella of a CCAA proceeding. See my comments above regarding the CCAA in practice.

35 But I would observe and I am mystified by Locker's observations at paragraph 12 (quoted above), that Stelco should have borrowed to fund pension obligations to avoid its current financial crisis. This presumes that the borrowed funds would not constitute an obligation to be paid back as to principal and interest, but rather that it would assume the character of a cost-free "gift".

36 I note that Mackey, without the "laundry list" he indicates at paragraph 17 of his second affidavit, is unable to determine at paragraph 19 (for himself) whether Stelco was insolvent. Mackey was unable to avail himself of all available information in light of the Union's refusal to enter into a confidentiality agreement. He does not closely adhere to the BIA tests as they are defined. In the face of positive evidence about an applicant's financial position by an experienced person with expertise, it is not sufficient to displace this evidence by filing evidence which goes no further than raising questions: see *Anvil Range Mining Corp.*, *supra* at p. 162.

37 The Union referred me to one of my decisions *Standard Trustco Ltd. (Trustee of) v. Standard Trust Co.* (1993), 13 O.R. (3d) 7 (Ont. Gen. Div.) where I stated as to the MacGirr affidavit:

The Trustee's cause of action is premised on MacGirr's opinion that STC was insolvent as at August 3, 1990 and therefore the STC common shares and promissory note received by Trustco in return for the Injection had no value at the time the Injection was made. Further, MacGirr ascribed no value to the opportunity which the Injection gave to Trustco to restore STC and salvage its thought to be existing \$74 million investment. In stating his opinion MacGirr defined solvency as:

- (a) the ability to meet liabilities as they fall due; and
- (b) that assets exceed liabilities.

On cross-examination MacGirr testified that in his opinion on either test STC was insolvent as at August 3, 1990 since as to (a) STC was experiencing then a negative cash flow and as to (b) the STC financial statements incorrectly reflected values. As far as (a) is concerned, I would comment that while I concur with MacGirr that at some time in the long run a

company that is experiencing a negative cash flow will eventually not be able to meet liabilities as they fall due but that is not the test (which is a "present exercise"). On that current basis STC was meeting its liabilities on a timely basis.

38 As will be seen from that expanded quote, MacGirr gave his own definitions of insolvency which are not the same as the s. 2 BIA tests (a), (b) and (c) but only a very loose paraphrase of (a) and (c) and an omission of (b). Nor was I referred to the *King Petroleum Ltd.* or *Proulx* cases *supra*. Further, it is obvious from the context that "sometime in the long run . . . eventually" is not a finite time in the foreseeable future.

39 I have not given any benefit to the \$313 - \$363 million of improvements referred to in the affidavit of William Vaughan at paragraph 115 as those appear to be capital expenditures which will have to be accommodated within a plan of arrangement or after emergence.

40 It seems to me that if the BIA (a) test is restrictively dealt with (as per my question to Union counsel as to how far in the future should one look on a prospective basis being answered "24 hours") then Stelco would not be insolvent under that test. However, I am of the view that that would be unduly restrictive and a proper contextual and purposive interpretation to be given when it is being used for a restructuring purpose even under BIA would be to see whether there is a reasonably foreseeable (at the time of filing) expectation that there is a looming liquidity condition or crisis which will result in the applicant running out of "cash" to pay its debts as they generally become due in the future without the benefit of the stay and ancillary protection and procedure by court authorization pursuant to an order. I think this is the more appropriate interpretation of BIA (a) test in the context of a reorganization or "rescue" as opposed to a threshold to bankruptcy consideration or a fraudulent preferences proceeding. On that basis, I would find Stelco insolvent from the date of filing. Even if one were not to give the latter interpretation to the BIA (a) test, clearly for the above reasons and analysis, if one looks at the meaning of "insolvent" within the context of a CCAA reorganization or rescue solely, then of necessity, the time horizon must be such that the liquidity crisis would occur in the sense of running out of "cash" but for the grant of the CCAA order. On that basis Stelco is certainly insolvent given its limited cash resources unused, its need for a cushion, its rate of cash burn recently experienced and anticipated.

41 What about the BIA (c) test which may be roughly referred to as an assets compared with obligations test. See *New Quebec Raglan Mines Ltd. v. Blok-Andersen*, [1993] O.J. No. 727 (Ont. Gen. Div. [Commercial List]) as to fair value and fair market valuation. The Union observed that there was no intention by Stelco to wind itself up or proceed with a sale of some or all of its assets and undertaking and therefore some of the liabilities which Stelco and Stephen took into account would not crystallize. However, as I discussed at the time of the hearing, the (c) test is what one might reasonably call or describe as an "artificial" or notional/hypothetical test. It presumes certain things which are in fact not necessarily contemplated to take place or to be involved. In that respect, I appreciate that it may be difficult to get one's mind around that concept and down the right avenue of that (c) test. See my views at trial in *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.*, [2001] O.J. No. 3394 (Ont. S.C.J. [Commercial List]) at paragraphs 13, 21 and 33; affirmed [2003] O.J. No. 5242 (Ont. C.A.). At paragraph 33, I observed in closing:

33 . . . They (and their expert witnesses) all had to contend with dealing with rambling and complicated facts and, in Section 100 BIA, a section which is difficult to administer when fmv [fair market value] in a notational or hypothetical market involves ignoring what would often be regarded as self evidence truths but at the same time appreciating that this notational or hypothetical market requires that the objects being sold have to have realistic true to life attributes recognized.

42 The Court of Appeal stated at paragraphs 24-25 as follows:

24. Nor are the appellants correct to argue that the trial judge also assumed an imprudent vendor in arriving at his conclusion about the fair market value of the OYSF note would have to know that in order to realize value from the note any purchaser would immediately put OYSF and thus OYDL itself into bankruptcy to pre-empt a subsequent triggering event in favour of EIB. While this was so, and the trial judge clearly understood it, the error in this submission is that it seeks to inject into the analysis factors subjected to the circumstances of OYDL as vendor and not intrinsic to the value of the OYSF note. The calculation of fair market value does not permit this but rather must assume an unconstrained vendor.

Canada Federal Statutes
Bankruptcy and Insolvency Act
Interpretation

Most Recently Cited in: Poonian v. British Columbia (Securities Commission), 2024 SCC 28, 2024 CSC 28, 2024 CarswellBC 2171, 2024 CarswellBC 2172 | (S.C.C., Jul 31, 2024)

R.S.C. 1985, c. B-3, s. 2

s 2. Definitions

Currency

2. Definitions

In this Act

"**affidavit**" includes statutory declaration and solemn affirmation; ("*affidavit*")

"**aircraft objects**" [Repealed 2012, c. 31, s. 414.]

"**application**", with respect to a bankruptcy application filed in a court in the Province of Quebec, means a motion; (*Version anglaise seulement*)

"**assignment**" means an assignment filed with the official receiver; ("*cession*")

"**bank**" means

(a) every bank and every authorized foreign bank within the meaning of section 2 of the *Bank Act*,

(b) every other member of the Canadian Payments Association established by the *Canadian Payments Act*, and

(c) every local cooperative credit society, as defined in subsection 2(1) of the Act referred to in paragraph (b), that is a member of a central cooperative credit society, as defined in that subsection, that is a member of that Association;

(*"banque"*)

"**bankrupt**" means a person who has made an assignment or against whom a bankruptcy order has been made or the legal status of that person; ("*failli*")

"**bankruptcy**" means the state of being bankrupt or the fact of becoming bankrupt; ("*faillite*")

"**bargaining agent**" means any trade union that has entered into a collective agreement on behalf of the employees of a person; ("*agent négociateur*")

"**child**" [Repealed 2000, c. 12, s. 8(1).]

"**claim provable in bankruptcy**," "**provable claim**" or "**claim provable**" includes any claim or liability provable in proceedings under this Act by a creditor; ("*réclamation prouvable en matière de faillite*" ou "*réclamation prouvable*")

- (a) its units are listed on a prescribed stock exchange on the date of the initial bankruptcy event, or
- (b) the majority of its units are held by a trust whose units are listed on a prescribed stock exchange on the date of the initial bankruptcy event;

("fiducie de revenu")

"insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

- (a) who is for any reason unable to meet his obligations as they generally become due,
- (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
- (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

("personne insolvable")

"legal counsel" means any person qualified, in accordance with the laws of a province, to give legal advice; *("conseiller juridique")*

"locality of a debtor" means the principal place

- (a) where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,
- (b) where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or
- (c) in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated;

("localité")

"Minister" means the Minister of Industry; *("ministre")*

"net termination value" means the net amount obtained after netting or setting off or compensating the mutual obligations between the parties to an eligible financial contract in accordance with its provisions; *("valeurs nettes dues à la date de résiliation")*

"official receiver" means an officer appointed under subsection 12(2); *("séquestre officiel")*

"person" includes a partnership, an unincorporated association, a corporation, a cooperative society or a cooperative organization, the successors of a partnership, of an association, of a corporation, of a society or of an organization and the heirs, executors, liquidators of the succession, administrators or other legal representatives of a person; *("personne")*

"prescribed"

- (a) in the case of the form of a document that is by this Act to be prescribed and the information to be given therein, means prescribed by directive issued by the Superintendent under paragraph 5(4)(e), and
- (b) in any other case, means prescribed by the General Rules;

("prescrit")

2021 ONSC 6453
Ontario Superior Court of Justice

McEwan Enterprises Inc.

2021 CarswellOnt 13630, 2021 ONSC 6453, 336 A.C.W.S. (3d) 618, 93 C.B.R. (6th) 80

**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 MCEWAN ENTERPRISES INC.

G.B. Morawetz C.J. Ont. S.C.J.

Heard: September 28, 2021
Judgment: October 1, 2021
Docket: CV-21-00669445-00CL

Counsel: Robert J. Chadwick, Caroline Descours, Trish Barrett, for Applicant
Sean Zweig, Joshua Foster, for Monitor
Virginie Gauthier, for The Cadillac Fairview Corporation Limited

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act

XIX.3 Arrangements

XIX.3.a Approval by court

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous
Applicant restaurant and catering business experiencing financial difficulties brought application for orders under Companies' Creditors Arrangement Act to ensure ongoing operation of business during restructuring — Application granted — Applicant was "debtor company" under Act as its liabilities exceeded monetary threshold required and it met traditional test for insolvency as well as expanded test based on looming liquidity condition — Applicant intended to honour all its obligations to its customers, employees, suppliers and service providers during restructuring, and it was appropriate to also approve payment of its pre-filing obligations — Court proceedings were open to public and there were no extenuating circumstances that warranted altering notice provisions proscribed under Act — Extending stay of proceedings to co-owner/chef personally and to subsidiary company operating part of business was appropriate as enforcement actions against them would be detrimental to restructuring efforts and to applicant's many stakeholders — Administration and directors' charges were warranted to secure fees and disbursements incurred by monitor and counsel and to indemnify directors and officers for liabilities incurred during restructuring.

Table of Authorities

Cases considered by G.B. Morawetz C.J. Ont. S.C.J.:

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) — referred to

Cinram International Inc., Re (2012), 2012 ONSC 3767, 2012 CarswellOnt 8413, 91 C.B.R. (5th) 46 (Ont. S.C.J. [Commercial List]) — referred to

JTI-Macdonald Corp., Re (2019), 2019 ONSC 1625, 2019 CarswellOnt 3653, 69 C.B.R. (6th) 285 (Ont. S.C.J. [Commercial List]) — referred to

Laurentian University of Sudbury (2021), 2021 ONSC 659, 2021 CarswellOnt 1224, 87 C.B.R. (6th) 278 (Ont. S.C.J.) — referred to

Performance Sports Group Ltd., Re (2016), 2016 ONSC 6800, 2016 CarswellOnt 17492, 41 C.B.R. (6th) 245 (Ont. S.C.J. [Commercial List]) — referred to

Sherman Estate v. Donovan (2021), 2021 SCC 25, 2021 CSC 25, 2021 CarswellOnt 8339, 2021 CarswellOnt 8340, 66 C.P.C. (8th) 1, 67 E.T.R. (4th) 163, 458 D.L.R. (4th) 361, 72 C.R. (7th) 223 (S.C.C.) — considered

Stelco Inc., Re (2004), 2004 CarswellOnt 1211, 48 C.B.R. (4th) 299, [2004] O.T.C. 284 (Ont. S.C.J. [Commercial List]) — referred to

Stelco Inc., Re (2004), 2004 CarswellOnt 2936 (Ont. C.A.) — referred to

Stelco Inc., Re (2004), 2004 CarswellOnt 5200, 2004 CarswellOnt 5201, 338 N.R. 196 (note) (S.C.C.) — referred to

Tamerlane Ventures Inc., Re (2013), 2013 ONSC 5461, 2013 CarswellOnt 12213, 6 C.B.R. (6th) 328 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

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

Generally — referred to

s. 2 "insolvent person" — considered

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

Generally — considered

s. 2(1) "debtor company" — considered

s. 11 — referred to

s. 11.02 [en. 2005, c. 47, s. 128] — referred to

s. 11.02(1) [en. 2005, c. 47, s. 128] — referred to

s. 11.51 [en. 2005, c. 47, s. 128] — considered

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

s. 23(1)(a) — considered

APPLICATION by restaurant and catering business for orders under *Companies' Creditors Arrangement Act*.

G.B. Morawetz C.J. Ont. S.C.J.:

1 The initial hearing of this matter took place on September 28, 2021. At the conclusion of the hearing, I granted an Initial Order with reasons to follow. These are the reasons.

A. OVERVIEW

2 McEwan Enterprises Inc. ("MEI") is a full-service restaurant, catering, gourmet grocery and events company (the "Business") based in the Greater Toronto Area (the "GTA"). MEI was founded in 1987 by Mark McEwan, who leads the development, preparation and delivery of the culinary aspects of the Business.

3 Capitalized terms used but not defined herein have the meanings given to such terms in the Affidavit of Dennis Mark McEwan sworn September 27, 2021 (the "McEwan Affidavit").

4 MEI brings this application for an initial order (the "Initial Order") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"). Counsel to MEI submits that the principal objectives of these CCAA proceedings are to ensure the ongoing operations of the McEwan Group for the benefit of its many stakeholders and to effectuate a restructuring of MEI and its Business. As part of its restructuring efforts pursuant to these CCAA proceedings, MEI intends to seek to complete the sale and transfer of the Business pursuant to the proposed Transaction (as defined below).

5 MEI has been experiencing financial challenges for an extended period of time as a result of certain unprofitable McEwan Locations (as defined below), and the McEwan Group has not been profitable since 2017. MEI's financial challenges have been exacerbated by the impacts of the COVID-19 pandemic over the last approximately 18 months.

6 Counsel submits that MEI has made extensive efforts to seek consensual arrangements with its landlords in respect of its leases, but has been unable to achieve a comprehensive out-of-court resolution.

7 After extensive review and consideration of its circumstances, and its options and alternatives, and following efforts to reach consensual arrangements with landlords, MEI determined that the best available alternative in the circumstances would be a sale of substantially all of the McEwan Group's assets and the Business (the "Transaction") to the current owners of MEI, and the continuation of the Business with a reduced number of McEwan Locations. The continued involvement of Mr. McEwan as chef and operator of the Business, is premised on a continuation of Mr. McEwan's partnership with Fairfax (as defined below) as co-owners of the McEwan Group.

8 Having regard to its financial circumstances and ongoing challenges, MEI determined that it is necessary to seek protection under the CCAA in order to provide stability for the Business and preserve value, while MEI advances its efforts to restructure and right-size the Business, including pursuing the proposed Transaction.

9 Counsel advises that MEI intends to bring a subsequent motion to seek Court approval of the Transaction.

B. CURRENT CHALLENGES

10 The McEwan Group conducts the Business out of six restaurants (the "McEwan Restaurants"), as well as two food-hall locations and one gourmet grocery location (collectively with the McEwan Restaurants, the "McEwan Locations").

11 MEI is a private company incorporated under the laws of Ontario and is headquartered in Toronto. MEI is owned by Fairfax Financial Holdings Limited ("Fairfax"), through one of its subsidiaries, which holds a 55% equity interest in MEI, and by Mr. McEwan, through McEwan Holdco Inc., which owns a 45% equity interest in MEI.

12 Many of the McEwan Locations have been historically successful and profitable; however, certain locations have been underperforming for a number of years, causing an overall significant strain on MEI's profitability and liquidity. As a result of these financial challenges, in March 2020, MEI's shareholders provided approximately \$1.1 million of additional equity financing to support the operations of the Business.

13 In an effort to address the COVID-19 pandemic challenges, MEI implemented extensive cost-saving and cash conservation measures, negotiated various rent concessions, and obtained various government subsidies and support. Those efforts were insufficient to address MEI's liquidity needs during the COVID-19 pandemic. As a result, MEI needed to obtain additional financing, which it was able to obtain from one of its shareholders, Fairfax, by way of a number of unsecured loans provided in 2020 and 2021.

14 MEI has advised that it will also need further funding to continue operations while the impacts of the COVID-19 pandemic on the Business persist.

15 Counsel submits that after extensive review and consideration of its circumstances and following efforts to reach consensual arrangements with landlords, MEI determined that the best available alternative that could be implemented in the circumstances that would preserve the value of the Business for the benefit of MEI's many stakeholders, would be the Transaction. On September 27, 2021, MEI entered into a purchase agreement with 2864785 Ontario Corp. (the "Purchaser"), pursuant to which, subject to Court approval, the parties would complete the Transaction (the "Purchase Agreement").

16 MEI believes that the implementation of the Transaction will result in a sustainable Business going forward for the benefit of MEI's many stakeholders, including its 268 employees whose jobs will be preserved, its secured creditors whose obligations will be unaffected and assumed by the Purchaser, and its many suppliers and service providers whose contracts and obligations

will also all be assumed. The Transaction also provides for the necessary funding for MEI's operations by way of the Transaction Deposit of up to \$2.25 million for the period up to the closing of the Transaction.

17 MEI and its board of directors have determined that it is in the best interests of MEI and its stakeholders for MEI to file for protection under the CCAA in order to preserve the value of the Business and continue as a going concern while seeking to implement a restructuring of the Business, including the proposed Transaction.

18 Counsel submits that the commencement of these CCAA proceedings and the granting of a stay of proceedings (the "Stay of Proceedings") are necessary to provide stability to the Business, to preserve value and to permit MEI to restructure its affairs, and are in the best interests of MEI and its stakeholders.

19 MEI is also requesting that this Court exercise its discretion to extend the Stay of Proceedings in respect of the personal guarantees, indemnities and security granted by Mr. McEwan in his personal capacity in connection with certain of MEI's obligations, as well as in favour of 2860117 Ontario Limited (the "McEwan Subsidiary"), a wholly-owned subsidiary of MEI which holds MEI's 50% interest in the ONE Restaurant Partnership. The McEwan Subsidiary and Mr. McEwan are collectively referred to herein as the "Non-Filing Parties".

20 As set out in the Cash Flow Forecast, with the remaining availability under the Secured Credit Facilities and the funding from the Transaction Deposit (if approved by the Court), MEI is expected to have sufficient funding through the period of the Cash Flow Forecast.

21 Alvarez & Marsal Canada Inc. ("A&M") has consented to act as the monitor of MEI in these proceedings (in such capacity, the "Monitor").

22 In connection with A&M's appointment as the Monitor, it is contemplated that a Court-ordered charge will be granted over MEI's assets, property and undertaking (the "Property") in favour of the Monitor, its counsel, and MEI's counsel in respect of their fees and disbursements incurred prior to and following the commencement of these proceedings at their standard rates and charges (the "Administration Charge").

C. ISSUES

23 The issues to be considered on this application are whether:

- (a) MEI is a "debtor company" to which the CCAA applies;
- (b) the relief sought in the proposed Initial Order is available under the CCAA;
- (c) the stay of proceedings under the Initial Order should be extended to the Non-Filing Parties; and
- (d) the Charges (as defined below) should be granted.

D. ANALYSIS and FINDINGS

24 The CCAA applies to a "debtor company" where the total claims against such company exceeds \$5 million. The terms "debtor company" is defined in Section 2 of the CCAA. In essence, a debtor company is an insolvent company.

25 The CCAA does not define insolvency. Accordingly, in interpreting the meaning of "insolvent", courts have taken guidance from the definition of "insolvent person" in Section 2(1) of the Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3, as amended (the "BIA"), which defines an "insolvent person" as a person (i) who is not bankrupt; and (ii) who resides, carries on business or has property in Canada; (iii) whose liabilities to creditors provable as claims under the BIA amount to one thousand dollars; and (iv) who is "insolvent" under one of the following tests: (a) is for any reason unable to meet his obligations as they generally become due; (b) has ceased paying his current obligations in the ordinary course of business as they generally become due; or (c) the aggregate of his property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under

legal process, would not be sufficient to enable payment of all his obligations, due and accruing due. (See: *Stelco Inc.*, Re200448 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]) at paras. 21-22 (Ont. Sup. Ct. J. [Commercial List]), leave to appeal to C.A. refused, [2004] O.J. No. 1903 (Ont. C.A.), leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 336 (S.C.C.) [*Stelco*,]).

26 The test for "insolvent person" under the BIA is disjunctive. A company satisfying any one of the above criteria is considered insolvent for the purposes of the CCAA.

27 A company is also insolvent for the purposes of the CCAA if, at the time of filing, there is a reasonably foreseeable expectation that there is a looming liquidity condition or crisis that would result in MEI being unable to pay its debts as they generally become due if a stay or proceedings and ancillary protection are not granted by the court. (see: *Stelco*, *supra* at para. 40).

28 Having reviewed the McEwan Affidavit and hearing submissions, I am satisfied that MEI meets both the traditional test for insolvency under the BIA and the expanded test for insolvency based on a looming liquidity condition.

29 As at August 31, 2021, MEI has aggregate liabilities exceeding \$10 million. Thus, total claims against MEI exceed the \$5 million threshold amount under the CCAA.

30 Accordingly, I am satisfied MEI is a "debtor company" to which the CCAA applies.

31 Subject to the terms of the Initial Order, MEI intends to honour all of its obligations in respect of its employees, suppliers and service providers in the ordinary course, as well in respect of its customer gift cards and the Customer Program. Pursuant to the proposed Transaction, any and all outstanding amounts owing in respect of MEI's employee, trade or customer obligations will be assumed by the Purchaser upon implementation of the Transaction.

32 I am also satisfied that the Court has the jurisdiction to permit payment of pre-filing obligations in a CCAA proceeding, including where such payments are critical to the ongoing operations of a debtor company or the maintenance of its customer, supplier and employee relationships. (See: *Canwest Global Communications Corp.*, Re200959 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) (Ont. Sup. Ct. J. [Commercial List]) at paras. 41, 43; *Cinram International Inc.*, Re, 2012 ONSC 3767 (Ont. S.C.J. [Commercial List]) at para. 37 and Sch. C at paras. 66-71; and *Performance Sports Group Ltd.*, Re, 2016 ONSC 6800 at para. 24 [Performance Sports]).

33 In arriving at this conclusion, I have taken into account a number of factors in authorizing the payment of pay pre-filing obligations, including: (a) whether the goods and services were integral to the business of the applicant; (b) the applicant's need for the uninterrupted supply of the goods and services; (c) whether the applicant had sufficient inventory of the goods on hand to meet its needs; (d) the effect on the applicant's operations and ability to restructure if it could not make pre-filing payments; and (e) the fact that no payments would be made without the consent of the Monitor. (See: *Cinram*, *supra* at para. 37 and Sch. C at paras. 66-71; *Performance Sports*, *supra* at para. 25; and *JTI-Macdonald Corp.*, Re, 2019 ONSC 1625 at para. 24 [JTI-Macdonald]).

34 Pursuant to the proposed Initial Order, it is proposed that the Monitor not be required to comply with the notification requirements of Section 23(1)(a) of the CCAA to: (a) publish a newspaper notice in respect of the CCAA proceedings; (b) send a notice to known creditors; or (c) make publicly available a list showing the names, addresses and estimated claim amounts of those creditors.

35 I am satisfied that pursuant to Section 23(1)(a) of the CCAA, the Court has the jurisdiction to grant an order not requiring compliance with the applicable notice provisions and/or varying those requirements. The question is whether it is appropriate for the court to exercise its jurisdiction.

36 MEI believes that the issuance of a newspaper notice and the public posting of a list of individual creditors and their claims will not serve to provide any material benefit to the relevant parties, who are intended to not be impacted by these CCAA

proceedings, and will add unnecessary costs. MEI believes that a notice issued by MEI to its creditors will be a more efficient and less disruptive means of notifying such parties in these circumstances.

37 I have not been persuaded that it is appropriate or necessary, in these circumstances to deviate from the notice provisions prescribed by the CCAA.

38 CCAA proceedings are public proceedings. The Supreme Court, in the recent decision *Sherman Estate v. Donovan*, 2021 SCC 25 at paras. 37–38, confirmed that court proceedings are presumptively open to the public. It seems to me that, absent extenuating circumstances, any attempt to limit the publication of CCAA proceedings by altering the prescribed notice provisions is not consistent with the open court presumption which must be respected.

39 It is necessary to recognize that it is MEI that is seeking court protection from its creditors and has resorted to the CCAA to achieve its objectives. It does not lie with MEI to alter the notice provisions to suit its purposes.

40 The CCAA sets out notice provisions, which I do not consider to be onerous. Further, the costs associated with a newspaper notice are, in my view, inconsequential when one considers the assets and liabilities of MEI.

41 However, in an effort to eliminate any possible confusion surrounding the publication of individuals whose claims are expected to be unaffected in these proceedings, I have authorized minor adjustments to the notice provisions which are reflected in the signed order.

Extending the Stay of Proceedings to the Non-Filing Parties

42 Courts have the authority under the broad jurisdiction granted under Sections 11 and 11.02 of the CCAA and the Court's inherent jurisdiction to grant a stay of proceedings in favour of third parties that are not themselves applicants in a CCAA proceeding. (See: CCAA, Sections 11 and 11.02(1); *Tamerlane Ventures Inc., Re*, 2013 ONSC 5461 at para. 21 [Tamerlane]; *Laurentian University of Sudbury, Re*, 2021 ONSC 659 at para. 39 [Laurentian]; and *Lehndorff, supra* at paras. 5, 16, 21; BOA, Tab 3).

43 The Court has considered the following non-exhaustive list of factors in determining whether to extend a stay of proceedings to non-applicant third parties:

- (a) the business and operations of the third party was significantly intertwined and integrated with those of the debtor company;
- (b) extending the stay to the third party would help maintain stability and value during the CCAA process;
- (c) not extending the stay to the third party would have a negative impact on the debtor company's ability to restructure, potentially jeopardizing the success of the restructuring and the continuance of the debtor company;
- (d) if the debtor company is prevented from concluding a successful restructuring with its creditors, the economic harm would be far-reaching and significant;
- (e) failure of the restructuring would be even more harmful to customers, suppliers, landlords and other counterparties whose rights would otherwise be stayed under the third party stay;
- (f) if the restructuring proceedings are successful, the debtor company will continue to operate for the benefit of all of its stakeholders, and its stakeholders will retain all of its remedies in the event of future breaches by the debtor company or breaches that are not related to the released claims; and
- (g) the balance of convenience favours extending the stay to the third party. (See: *JTI-Macdonald, supra* at para. 15; *Laurentian, supra* at para. 40; *Cinram, supra* at para. 37 and Sch. C at paras. 63-64; *Lehndorff, supra* at para. 21).

44 MEI submits that it is appropriate to extend the Stay of Proceedings to the Non-Filing Parties given:

(a) Mr. McEwan has granted certain personal guarantees, indemnities and/or security in respect of certain of MEI's obligations, and the McEwan Subsidiary holds MEI's interests in the ONE Restaurant Partnership, an important part of the overall Business of MEI;

(b) if any enforcement proceedings were commenced against any of the Non-Filing Parties, it would cause significant disruption to MEI, would have a detrimental effect on MEI's restructuring efforts, and there could be a significant erosion of value to the Business to the detriment of all stakeholders; and

(c) the obligations which Mr. McEwan has guaranteed, indemnified and/or secured are not anticipated to be impacted by the CCAA proceedings and would be assumed as part of the proposed Transaction, thus MEI believes there would be no prejudice in granting the requested extension of the Stay of Proceedings.

45 I accept that the extension of the Stay of Proceedings in favour of the Non-Filing Parties is appropriate in these circumstances while MEI works to implement a restructuring of the Business, including the proposed Transaction, for the benefit of its many stakeholders.

46 MEI is also seeking approval of the Administration Charge in respect of certain administrative costs of these proceedings and the Directors' Charge in respect of the indemnification of its directors and officers (the "Charges"). Pursuant to the proposed Initial Order, the Charges would rank in priority to all Encumbrances in favour of any person, except for any secured creditor of MEI. At the Comeback Hearing, MEI intends to seek an Order granting priority of the Charges ahead of all Encumbrances of those secured creditors given notice of the Comeback Hearing, other than the Encumbrances granted by MEI in favour of RBC.

47 The proposed Initial Order provides that the priority of the Charges, as among them, shall be as follows: (a) First — the Administration Charge; and (b) Second — the Directors' Charge.

48 MEI is seeking the granting of the Administration Charge over the Property to secure the fees and disbursements of the Monitor and its counsel, and MEI's counsel, in each case incurred at their standard rates and charges in the amount of \$225,000, at this time.

49 Section 11.52 of the CCAA provides the Court with the jurisdiction to grant an administration charge.

50 MEI submits that it is appropriate in the circumstances for this Court to exercise its jurisdiction and grant the Administration Charge given that:

(a) the proposed restructuring of MEI will require the involvement of professional advisors;

(b) the proposed beneficiaries of the Administration Charge have each contributed and will continue to contribute to MEI's restructuring efforts;

(c) there is no unwarranted duplication of roles; and

(d) the amount of the requested Administration Charge reflects the estimated costs of these proceedings to be incurred in the period up to the Comeback Hearing and has been reviewed with the proposed Monitor.

51 MEI is seeking the Directors' Charge over the Property to secure the indemnification of the Directors and Officers pursuant to the Initial Order for any liabilities they may incur during the CCAA proceedings in their capacities as directors and officers in the amount of \$600,000, at this time.

52 Section 11.51 of the CCAA provides the Court with the authority to grant a charge relating to directors' and officers' indemnification on a priority basis.

53 MEI submits that it is appropriate in the circumstances for this Court to exercise its jurisdiction and grant the Directors' Charge given that:

- (a) it is possible for the Directors and Officers to be held personally liable for certain of MEI's obligations during the course of these CCAA proceedings;
- (b) MEI's D&O Policy contains several exclusions and limitations to the coverage provided, and there is a potential for there to be insufficient coverage for the Directors and Officers under such D&O Policy;
- (c) the proposed Directors' Charge would apply only to the extent that the Directors and Officers do not have coverage under the D&O Policy;
- (d) the Directors' Charge would only cover liabilities that the Directors and Officers may incur after the commencement of these CCAA proceedings and does not cover wilful misconduct or gross negligence;
- (e) the Directors and Officers have been actively involved in MEI's efforts to address the current circumstances of MEI, including the review and consideration of MEI's financial circumstances, efforts to manage and address MEI's challenging liquidity position, overseeing MEI's negotiations with landlords, the pursuit of restructuring alternatives, and the preparation for and commencement of these CCAA proceedings;
- (f) to carry on business during the CCAA proceedings and to complete a successful restructuring for the benefit of MEI and its stakeholders, MEI requires the active and committed involvement of the Directors and Officers; and
- (g) the amount of the Directors' Charge has been calculated based on the estimated exposure of the Directors and Officers in the period up to the Comeback Hearing and has been reviewed with the proposed Monitor.

54 MEI believes that that the proposed amounts of each of the Charges are appropriate for the period from and after the granting of the Initial Order (if approved) until the date of the Comeback Hearing. MEI expects to request at the Comeback Hearing that the Administration Charge be increased to \$350,000 and that the Directors' Charge be increased to \$1.45 million.

55 I accept these submissions and accordingly I am satisfied that the Administration Charge and the Directors' Charge should be included in the Initial Order.

DISPOSITION

56 I am satisfied, for the foregoing reasons, that MEI meets all of the qualifications established for relief under the CCAA. An Order has been signed to reflect the foregoing. The comeback hearing has been scheduled for Thursday, October 7, 2021 at 9:00 a.m.

Application granted.

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part II — Jurisdiction of Courts (ss. 9-18.5)

Most Recently Cited in: In the Matter of The Body Shop Canada Limited, 2024 ONSC 3882, 2024 CarswellOnt 104111 (Ont. S.C.J. [Commercial List], Jul 5, 2024)

R.S.C. 1985, c. C-36, s. 11.02

s 11.02

Currency

11.02

11.02(1) Stays, etc. — initial application

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

- (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

11.02(2) Stays, etc. — other than initial application

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

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

11.02(3) Burden of proof on application

The court shall not make the order unless

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

11.02(4) Restriction

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

Amendment History

2005, c. 47, s. 128; 2019, c. 29, s. 137

Currency

Federal English Statutes reflect amendments current to May 22, 2024

Federal English Regulations Current to Gazette Vol. 158:9 (April 24, 2024)

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

2021 ONSC 7802
Ontario Superior Court of Justice [Commercial List]

Boreal Capital Partners Ltd et al. (Re)

2021 CarswellOnt 18878, 2021 ONSC 7802, 2021 A.C.W.S. 644

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

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF BOREAL CAPITAL PARTNERS
LTD., JRB-331 SHEDDON HOLDINGS LTD., 2123068 ONTARIO LIMITED, JRB-109 REYNOLDS
HOLDINGS LTD., JRB-339 CHURCH HOLDINGS LTD., JRB-147 CHURCH HOLDINGS LTD (Applicants)

Penny J.

Heard: November 25, 2021
Judgment: November 29, 2021
Docket: Toronto CV-21-00672654-00CL

Counsel: Rebecca L. Kennedy, Rachel Nicholson, Puya Fesharaki, for Applicants
Peter J. Osborne, Alex Morrison, Greg Adams, for Proposed Monitor, Ernst & Young Inc.
Daniel Shapira, Jessica Sorbara, for DIP Lender, Halmont Properties Corporation
James MacLellan, Bevan Brooksbank, for Trisura Guarantee Insurance Company

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act

XIX.2 Initial application

XIX.2.a Grant and length of stay

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — General principles

R Ltd and J Ltd entered limited partnership to develop number of real estate projects through B Ltd as general partner — B Ltd established separate corporations (together, applicants) to undertake each of five projects — When applicants faced financial and operational difficulties, major secured creditor of one project, M Ltd, refused to provide additional funds and R Ltd identified alleged deficiencies in J Ltd's management, R Ltd arranged for H Corp to provide subordinated financing to complete project and for nominee to take over management — Nominee's company, K Ltd, was subsequently appointed general partner — As deterioration of relations between R Ltd and J Ltd continued, J Ltd's construction and design management contracts were terminated — In order to avoid enforcement action by M Ltd, H Corp took assignment of obligations owed to it and advanced additional funds — By time applicants breached obligations to H Corp, it was owed \$44,820,666, secured against various real properties — Applicants applied for initial order and related relief under Companies' Creditors Arrangement Act — Application granted — There was no question applicants were insolvent — Liquidity issues had resulted in them being unable to meet obligations as they came due — Inability to pay unsecured creditors and other stakeholders without interim financing created risk of delay and frustration for projects — Applicants had acted with due diligence and good faith, and intended to continue operations if granted protection — It was appropriate for stay of proceedings to be granted, including to partnerships — Monitor was appointed — Applicants were granted authority, with consent of monitor, to make payments to third parties that provided services integral to ability to continue operations — Interim debtor-in-possession financing from H Corp was

approved — Administration charge, limited to what was reasonably necessary, was approved — Given its existing knowledge and expertise, K Ltd was appointed chief restructuring officer.

Table of Authorities

Cases considered by Penny J.:

Lydian International Limited (Re) (2019), 2019 ONSC 7473, 2019 CarswellOnt 21645, 75 C.B.R. (6th) 314 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

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

s. 2 "trustee or licensed trustee" — referred to

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

Generally — referred to

s. 11 — considered

s. 11.001 [en. 2019, c. 29, s. 136] — referred to

s. 11.2 [en. 1997, c. 12, s. 124] — referred to

s. 11.02(1) [en. 2005, c. 47, s. 128] — referred to

s. 11.7(2) [en. 1997, c. 12, s. 124] — referred to

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

APPLICATION by debtors for initial order and related relief under *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

Penny J.:

Overview

- 1 This is an application for an initial order and other related relief under the *Companies Creditors Arrangement Act*, RSC 1985, c C-36.
- 2 This matter came before me at 2:00 PM on Thursday, November 25, 2021. After reviewing the application record and at the conclusion of oral submissions, I issued the initial order sought, with reasons to follow. These are the reasons.
- 3 The principal issues on the application are whether:
 - (a) the applicants meet the criteria to obtain relief under the CCAA;
 - (b) the court should grant a stay of proceedings, and whether this court should extend the stay of proceedings to the partnership entities involved in the enterprise;
 - (c) the court should authorize the payment of certain pre-filing amounts to critical suppliers;
 - (d) the court should approve the proposed interim debtor in possession financing;
 - (e) the court should appoint Ernst & Young Inc. as the monitor of the applicants in these proceedings;
 - (f) the court should approve the administration charge; and
 - (g) the court should appoint Kesmark as the chief restructuring officer in these proceedings.

Background

- 4 In 2016, Roppongi Investments Ltd. (owned by Timothy Price) entered into a 50:50 property development partnership with JRB Capital Group Ltd. (owned by Jonathan Bowman) with the objective of developing residential real estate projects in Oakville, Ontario through Boreal Capital Partners Ltd. which would act as the general partner of Boreal Capital Partners LP, (collectively Boreal).
- 5 For each project, Boreal established a general partner and limited partner structure. There are five projects:
 - (1) the 331 Sheddon Avenue project is a 20-unit residential condominium development project. The project's completion has been delayed but it is currently at an advanced stage of construction;
 - (2) the 159 Trafalgar Road project is a potential commercial office development project. The lands for the project have been acquired and requisite permits and approvals obtained, but construction has not yet commenced at the project site;
 - (3) the 109 Reynolds Street project is a 23-unit residential condominium development. The lands for the project have been acquired and requisite permits and approvals obtained, but construction has not yet commenced at the project site;
 - (4) the 339 Church Street project is a 24-unit residential condominium development. The lands for the project have been acquired and requisite permits and approvals obtained, but construction has not yet commenced at the project site; and
 - (5) the 147 Church Street project is currently in the land assembly stage. The lands for the project have been acquired and requisite permits and approvals obtained, but construction has not yet commenced at the project site.
- 6 In August 2020, these Boreal entities faced financial and operational difficulty. Boreal required additional financing on an urgent basis to complete 331 Sheddon because the major secured creditor, Meridian Credit Union Limited, refused to provide additional financing. Roppongi also identified various alleged deficiencies in JRB's management of the Boreal entities.
- 7 As a result, Roppongi arranged for Halmont Properties Corporation to provide subordinated financing to complete 331 Sheddon. In addition, Mr. Randal Froebelius, a nominee of Roppongi and Halmont, took over the management role of the Boreal entities from JRB. Shortly thereafter, Kesmark Estates Ltd., a company managed by Mr. Froebelius, was appointed as general partner of Boreal LP. The general partner of each of the project partnerships remained but were subject to review, oversight and approval of all decisions by Mr. Froebelius.
- 8 Relations between Roppongi and JRB continued to deteriorate, which ultimately led to a resolution by Boreal LP in September 2021 to replace all the project partnerships' general partner with Kesmark and to terminate various construction and design management contracts with JRB.
- 9 In May 2021, in order to avoid immediate enforcement action by Meridian, Halmont took an assignment of the obligations owing to Meridian and advanced additional funds to ensure that the Boreal entities could continue operating.
- 10 However, on November 5, 2021 Halmont gave notice of various breaches by the Boreal entities of their obligations and stipulated that any further advances to the Boreal entities would be on a day to day basis and at Halmont's sole discretion. Ultimately, Halmont advised that it would not make any further advances to the Boreal entities outside of a formal restructuring process.
- 11 In sum, the principal assets of the Boreal entities are the real property relating to the various projects (all in various stages of active development). Halmont is the principal secured creditor, with separate charges registered against most of the real property owned by the Boreal entities. As of November 24, 2021, the Boreal entities' aggregate indebtedness to Halmont was \$44,820,666 (which includes a small unsecured portion of less than \$100,000).
- 12 The applicants are insolvent and are currently operating at a financial deficit of approximately \$8.9 million on a consolidated basis. They have relied on Halmont as the lender of last resort since October 2020, as no other lender would

provide financing to the Boreal entities given their imperiled financial state. The applicants are in default of their obligations owing to Halmont.

13 Other secured creditors of the Boreal entities include Trisura Guarantee Insurance Company, Roppongi Investments Ltd. and Canadian Western Bank, with charges registered against real properties owned by various Boreal entities. This application was made on notice to Halmont, Trisura and Roppongi, all of which support the relief being sought.

Analysis

Do the applicants meet the criteria to obtain relief under the CCAA?

14 The applicants are insolvent. Both the test under the BIA and the expanded *Stelco* test are satisfied in this case. The applicants' liabilities materially exceed their assets and they are experiencing an operational deficit: the applicants are unable to pay liabilities that are currently due and those coming due. In addition, the applicants are exposed to significant financial risk arising from claims of unsecured creditors and other stakeholders that the applicants will be unable to pay without interim financing. This includes a host of potential claims relating to delay or frustration of the development of the projects, such as by contractors and potential end users of the condominium units. The statutory financial threshold is not in issue.

Should the court grant the stay of proceedings and should the court extend the stay of proceedings to the partnership entities involved in the enterprise?

15 Section 11.02(1) permits the court to grant an initial stay of up to 10 days on an application for an initial order, provided the stay is appropriate and the applicants have acted with due diligence and in good faith. Under s. 11.001, other relief granted under s. 11 of the CCAA at the same time as an initial order under s. 11.02(1) must be limited "to relief that is reasonably necessary for the continued operation of the debtor company in the ordinary course of business during that period."

16 Absent exceptional circumstances, the relief granted during the initial stay period should be limited and where possible, the status quo should be maintained during that period. The initial stay period allows for operations to be stabilized and negotiations to occur, followed by requests for expanded relief on proper notice to affected parties at the full comeback hearing. Whether particular relief is necessary to stabilize a debtor company's operations during the initial stay period is a factual determination, based on all of the circumstances of the particular debtor. There are no "hard and fast" rules: *Re Lydian International Limited*, 2019 ONSC 7473 [Commercial List].

17 Here, the applicants are experiencing a liquidity crisis and are unable to meet their obligations generally as they become due. The applicants intend to continue operations and consult with their stakeholders in good faith if they are granted protection. Therefore, it is appropriate for this Court to grant the requested stay of proceedings in favour of the applicants.

18 The CCAA applies to debtor companies, not partnerships. Nevertheless, where the operations of partnerships are integral and closely related to the operations of the applicants, it is well-established that the court has the jurisdiction to extend the protection of the stay of proceedings to those partnerships in order to ensure that the purposes of the CCAA can be achieved.

19 The individual project partnerships are not applicants in this proceeding. The business and operations of the applicants are, however, deeply integrated with the partnerships at all levels. Omitting the partnerships from relief would frustrate the objective of seeking respite for the applicants under the CCAA.

Should the court authorize the payment of certain pre-filing amounts to critical suppliers?

20 The applicants seek authority, with the consent of the Monitor, to make payments, including pre-filing amounts owing and in arrears, to certain third parties that provide services that are integral to the Boreal entities' ability to operate. This is a measure designed to ensure that the Boreal entities can continue regular business operations during the post-filing period and efficiently complete certain projects.

21 The court has jurisdiction to make any orders that it thinks appropriate under s. 11 of the CCAA. Payment to critical suppliers, including provision for the payment of pre-filing amounts to suppliers whose services are viewed as critical to the post-filing operations of the debtor, is necessary to achieve the purposes for which the initial order is being granted.

22 A supplier is "critical" to the debtor company's post-filing operations where the particular goods or services are sufficiently integrated into the debtor company's operations that it would be materially disruptive to the debtor's operations and restructuring for the particular supplier to cease providing such services. I agree that in the circumstances, the Monitor is best suited to determine when any supplier of the Boreal entities is "critical" such that pre-filing payments should be permitted.

Should the court approve the proposed interim debtor in possession financing?

23 Section 11.2 of the CCAA gives the court authority to approve debtor-in-possession ("DIP") financing. The court may also make an order granting a priority charge to the DIP provider over the debtor's property. The security or charge may not secure pre-filing obligations.

24 As noted above, under the recent CCAA amendments, when an application for interim financing is made at the same time as an initial application, the applicant must satisfy the court that the terms of the loan are "limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period" [i.e. the initial stay period].

25 In this case, the DIP facility and related DIP lender's charge are essential elements of the measures required during the initial stay period to ensure the survival of the Boreal entities' businesses and operations until the comeback hearing.

26 The Boreal entities urgently require interim financing to provide stability, continue operations, and restructure their business. The only potential financier is their existing lender of last resort, Halmont, which has agreed to provide the DIP facility. It is appropriate for the DIP lender's charge to be secured on the Boreal entities' property given that all of the Boreal entities will derive benefit from the DIP facility proceeds. The amount sought for the initial charge is exactly calibrated to the anticipated cash needs for the next ten days. The initial draw of \$2.6 million is required to allow the Boreal entities to pay specified amounts that are expected to be due during the initial stay period — amounts specified in the Cash Flow Forecast.

27 Finally, no viable compromise or arrangement is possible without the DIP facility. Without the immediate liquidity provided by the initial DIP facility draw, the applicants' business is in serious jeopardy and will not survive beyond the initial stay period.

Should the court appoint Ernst & Young Inc. as the monitor of the applicants in these proceedings?

28 Ernst & Young has consented to act as monitor in these CCAA proceedings. It is a trustee within the meaning of subsection 2(1) of the BIA. E&Y is not subject to any of the restrictions as to who may be appointed as monitor set out in section 11.7(2) of the CCAA.

Should the court approve the administration charge?

29 Section 11.52 of the CCAA gives the court jurisdiction to grant a priority charge for the fees and expenses of financial, legal and other advisors or experts. In determining whether to approve an administration charge, the Court must consider: (a) the size and complexity of the businesses under CCAA protection; (b) the proposed role of the beneficiaries of the charge; (c) whether there is an unwarranted duplication of roles; (d) whether the quantum of the proposed charge is fair and reasonable; (e) the position of secured creditors likely to be affected by the charge; and (f) the position of the Monitor. These factors have been applied in numerous proceedings.

30 The Monitor, its counsel, the applicant's counsel and the DIP lender's counsel are essential to the operation of these CCAA proceedings. It is unlikely that these advisors will participate in the CCAA proceedings without the administration charge. Furthermore, the quantum of the proposed administration charge in the initial order is limited to what is "reasonably necessary"

for the initial stay period, given the demands on the advisors leading up to the filing together with likely further demands prior to the comeback hearing.

Should the court appoint Kesmark as the chief restructuring officer in these proceedings and grant the requested protections?

31 The court has the statutory authority to make an order appointing a CRO under s. 11 of the CCAA. These appointments may be made where the proposed CRO has expertise which will assist the applicants (and the Monitor) in achieving the objectives of the CCAA.

32 Kesmark's expertise and continued participation are critical to achieving the objectives of the CCAA in the circumstances by permitting the Boreal entities to continue their operations and plan a restructuring. Kesmark is not an "insider" of management and has the existing institutional knowledge, expertise and proven track-record to fulfill the obligations of a CRO. This appointment is supported by the Monitor.

33 CROs may also be granted certain protections from liability in the execution of their duties in a similar manner to court-appointed monitors. Providing protections in the proposed initial order to Kesmark as CRO will ensure Kesmark can: (i) continue acting as the general partner of the partnerships, (ii) continue the business normalization efforts it has undertaken since its appointment; and, (iii) manage and oversee the projects and conduct the day-to-day business of the Boreal entities.

Conclusion

34 For all these reasons, the initial order is granted.

Application granted.

Most Negative Treatment: Distinguished

Most Recent Distinguished: Arrangement de MPECO Construction inc. | 2019 QCCS 297, 2019 CarswellQue 730, EYB 2019-306949, 67 C.B.R. (6th) 87 | (Que. Bkcty., Feb 4, 2019)

2010 SCC 60, 2010 CSC 60
Supreme Court of Canada

Ted Leroy Trucking [Century Services] Ltd., Re

2010 CarswellBC 3419, 2010 CarswellBC 3420, 2010 CSC 60, 2010 SCC 60, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, [2010] S.C.J. No. 60, [2011] 2 W.W.R. 383, [2011] B.C.W.L.D. 533, [2011] B.C.W.L.D. 534, 12 B.C.L.R. (5th) 1, 196 A.C.W.S. (3d) 27, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), 296 B.C.A.C. 1, 326 D.L.R. (4th) 577, 409 N.R. 201, 503 W.A.C. 1, 72 C.B.R. (5th) 170, J.E. 2011-5

**Century Services Inc. (Appellant) and Attorney General of Canada on
behalf of Her Majesty The Queen in Right of Canada (Respondent)**

Deschamps J., McLachlin C.J.C., Binnie, LeBel, Fish, Abella, Charron, Rothstein, Cromwell JJ.

Heard: May 11, 2010
Judgment: December 16, 2010
Docket: 33239

Proceedings: reversing *Ted Leroy Trucking Ltd., Re* (2009), 2009 CarswellBC 1195, 2009 G.T.C. 2020 (Eng.), 2009 BCCA 205, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.); reversing *Ted Leroy Trucking Ltd., Re* (2008), 2008 CarswellBC 2895, 2008 BCSC 1805, [2008] G.S.T.C. 221, 2009 G.T.C. 2011 (Eng.) (B.C. S.C. [In Chambers])

Counsel: Mary I.A. Buttery, Owen J. James, Matthew J.G. Curtis for Appellant
Gordon Bourgard, David Jacyk, Michael J. Lema for Respondent

Subject: Estates and Trusts; Goods and Services Tax (GST); Tax — Miscellaneous; Insolvency

Related Abridgment Classifications

Tax

I General principles

1.7 Tax claims in bankruptcy proceedings

Tax

III Goods and Services Tax [GST] and Harmonized Sales Tax [HST]

III.12 Collection and remittance

III.12.b GST/HST held in trust

Headnote

Tax --- Goods and Services Tax — Collection and remittance — GST held in trust

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute