s. 86(2.1) [en. 1998, c. 19, s. 266(1)] — referred to
Excise Tax Act, R.S.C. 1985, c. E-15
Generally — referred to

s. 222 [en. 1990, c. 45, s. 12(1)] — considered

s. 222(1) [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3)(a) [en. 1990, c. 45, s. 12(1)] — considered
Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)
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s. 227(4) — considered

s. 227(4.1) [en. 1998, c. 19, s. 226(1)] — considered

s. 227(4.1)(a) [en. 1998, c. 19, s. 226(1)] — considered
Statutes considered *Abella J.* (dissenting):
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11 — considered

s. 11(1) — considered

s. 11(3) — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 37(1) — considered
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s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered
Interpretation Act, R.S.C. 1985, c. I-21
s. 2(1)"enactment" — considered

s. 44(f) — considered
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Generally — referred to

APPEAL by creditor from judgment reported at 2009 CarswellBC 1195, 2009 BCCA 205, [2009] G.S.T.C. 79, 98 B.C.L.R. (4th) 242, [2009] 12 W.W.R. 684, 270 B.C.A.C. 167, 454 W.A.C. 167, 2009 G.T.C. 2020 (Eng.) (B.C. C.A.), allowing Crown's appeal from dismissal of application for immediate payment of tax debt.

***Deschamps J.*:**

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1 For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In that respect, two questions are raised. The first requires reconciliation of provisions of the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

2 Ted LeRoy Trucking Ltd. ("LeRoy Trucking") commenced proceedings under the *CCAA* in the Supreme Court of British Columbia on December 13, 2007, obtaining a stay of proceedings with a view to reorganizing its financial affairs. LeRoy Trucking sold certain redundant assets as authorized by the order.

3 Amongst the debts owed by LeRoy Trucking was an amount for Goods and Services Tax ("GST") collected but unremitted to the Crown. The *ETA* creates a deemed trust in favour of the Crown for amounts collected in respect of GST. The deemed trust extends to any property or proceeds held by the person collecting GST and any property of that person held by a secured creditor, requiring that property to be paid to the Crown in priority to all security interests. The *ETA* provides that the deemed trust operates despite any other enactment of Canada except the *BIA*. However, the *CCAA* also provides that subject to certain exceptions, none of which mentions GST, deemed trusts in favour of the Crown do not operate under the *CCAA*. Accordingly, under the *CCAA* the Crown ranks as an unsecured creditor in respect of GST. Nonetheless, at the time LeRoy Trucking commenced *CCAA* proceedings the leading line of jurisprudence held that the *ETA* took precedence over the *CCAA* such that the Crown enjoyed priority for GST claims under the *CCAA*, even though it would have lost that same priority under the *BIA*. The *CCAA* underwent substantial amendments in 2005 in which some of the provisions at issue in this appeal were renumbered and reformulated (S.C. 2005, c. 47). However, these amendments only came into force on September 18, 2009. I will refer to the amended provisions only where relevant.

4 On April 29, 2008, Brenner C.J.S.C., in the context of the *CCAA* proceedings, approved a payment not exceeding $5 million, the proceeds of redundant asset sales, to Century Services, the debtor's major secured creditor. LeRoy Trucking proposed to hold back an amount equal to the GST monies collected but unremitted to the Crown and place it in the Monitor's trust account until the outcome of the reorganization was known. In order to maintain the *status quo* while the success of the reorganization was uncertain, Brenner C.J.S.C. agreed to the proposal and ordered that an amount of $305,202.30 be held by the Monitor in its trust account.

5 On September 3, 2008, having concluded that reorganization was not possible, LeRoy Trucking sought leave to make an assignment in bankruptcy under the *BIA*. The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. Brenner C.J.S.C. dismissed the latter application. Reasoning that the purpose of segregating the funds with the Monitor was "to facilitate an ultimate payment of the GST monies which were owed pre-filing, but only if a viable plan emerged", the failure of such a reorganization, followed by an assignment in bankruptcy, meant the Crown would lose priority under the *BIA* (2008 BCSC 1805, [2008] G.S.T.C. 221 (B.C. S.C. [In Chambers])).

6 The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, [2009] G.S.T.C. 79, 270 B.C.A.C. 167 (B.C. C.A.)). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

7 First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a

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purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)*, [2005] G.S.T.C. 1, 73 O.R. (3d) 737 (Ont. C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

8 Second, Tysoe J.A. concluded that by ordering the GST funds segregated in the Monitor's trust account on April 29, 2008, the judge had created an express trust in favour of the Crown from which the monies in question could not be diverted for any other purposes. The Court of Appeal therefore ordered that the money held by the Monitor in trust be paid to the Receiver General.

2. Issues

9 This appeal raises three broad issues which are addressed in turn:

(1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the *CCAA* and give priority to the Crown's *ETA* deemed trust during *CCAA* proceedings as held in *Ottawa Senators*?

(2) Did the court exceed its *CCAA* authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?

(3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

3. Analysis

10 The first issue concerns Crown priorities in the context of insolvency. As will be seen, the *ETA* provides for a deemed trust in favour of the Crown in respect of GST owed by a debtor "[d]espite ... any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)" (s. 222(3)), while the *CCAA* stated at the relevant time that "notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be [so] regarded" (s. 18.3(1)). It is difficult to imagine two statutory provisions more apparently in conflict. However, as is often the case, the apparent conflict can be resolved through interpretation.

11 In order to properly interpret the provisions, it is necessary to examine the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence. It will be seen that Crown priorities in the insolvency context have been significantly pared down. The resolution of the second issue is also rooted in the context of the *CCAA*, but its purpose and the manner in which it has been interpreted in the case law are also key. After examining the first two issues in this case, I will address Tysoe J.A.'s conclusion that an express trust in favour of the Crown was created by the court's order of April 29, 2008.

3.1 Purpose and Scope of Insolvency Law

12 Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

13 Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the *BIA*. The *BIA* offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the *BIA* itself is a fairly recent statute — it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The *BIA* is available to insolvent debtors owing $1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

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14 Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

15 As I will discuss at greater length below, the purpose of the *CCAA* — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

16 Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.), at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

17 Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected — notably creditors and employees — and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

18 Early commentary and jurisprudence also endorsed the *CCAA's* remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

19 The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA's* objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

20 Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more

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2015 ONSC 303
Ontario Superior Court of Justice

Target Canada Co., Re

2015 CarswellOnt 620, 2015 ONSC 303, [2015] O.J. No. 247, 22 C.B.R. (6th) 323, 248 A.C.W.S. (3d) 753

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 Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC.

Morawetz R.S.J.

Heard: January 15, 2015
Judgment: January 16, 2015
Docket: CV-15-10832-00CL

Counsel: Tracy Sandler, Jeremy Dacks for Applicants, Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC
Jay Swartz for Target Corporation
Alan Mark, Melaney Wagner, Jesse Mighton for Proposed Monitor, Alvarez and Marsal Canada ULC ("Alvarez")
Terry O'Sullivan for Honourable J. Ground, Trustee of the Proposed Employee Trust
Susan Philpott for Proposed Employee Representative Counsel, for Employees of the Applicants

Subject: Insolvency; Property
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Proceedings subject to stay
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.d Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Proceedings subject to stay — Miscellaneous
Applicant group of companies were involved in Canadian operations of U.S. retailer T Co. — Canadian operations suffered significant loss in every quarter — T Co. decided to stop funding Canadian operations — Applicants sought to wind down Canadian operations and applied for relief under Companies' Creditors Arrangement Act (CCAA) — Application granted — Initial order granted — Stay of proceedings granted — Stay extended to certain limited partnerships, which were related to or carried on operations integral to applicants' business — Stay of proceedings extended to rights of third party tenants against landlords that arose out of insolvency — Stay extended to T Co. and its U.S. subsidiaries in relation to claims derivative of claims against Canadian operations.
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Miscellaneous
Applicant group of companies were involved in Canadian operations of U.S. retailer T Co. — Canadian operations suffered significant loss in every quarter — T Co. decided to stop funding Canadian operations — Applicants sought to wind down

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Canadian operations and applied for relief under Companies' Creditors Arrangement Act (CCAA) — Application granted — Initial order granted — Stay of proceedings granted — It was appropriate to grant broad relief to ensure status quo was maintained — Applicants were all insolvent — Although there was no prospect restructured "going concern" solution would result, use of CCAA protection was appropriate in circumstances — Creation of employee trust to cover payments to employees was approved — Key employee retention program (KERP) and charge as security for KERP payments were approved — Appointment of Employee Representative Counsel was approved — DIP Lenders' Charge and DIP Facility were approved — Administration charge and Directors' and Officers' charge approved.

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Generally — referred to

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

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

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

s. 11.2(4) [en. 1997, c. 12, s. 124] — considered

s. 11.7(1) [en. 1997, c. 12, s. 124] — considered

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

s. 36 — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

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Words and phrases considered:

insolvent

"Insolvent" is not expressly defined in the [*Companies' Creditors Arrangement Act* (CCAA)]. However, for the purposes of the CCAA, a debtor is insolvent if it meets the definition of an "insolvent person" in section 2 of the *Bankruptcy and Insolvency Act* . . . or if it is "insolvent" as described in Stelco Inc. (Re), [2004] O.J. No. 1257, [Stelco], leave to appeal refused, [2004] O.J. No. 1903, leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336, where Farley, J. found that "insolvency" includes a corporation "reasonably expected to run out of liquidity within [a] reasonable proximity of time as compared with the time reasonably required to implement a restructuring".

APPLICATION for relief under *Companies' Creditors Arrangement Act*.

***Morawetz R.S.J.*:**

1 Target Canada Co. ("TCC") and the other applicants listed above (the "Applicants") seek relief under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the "CCAA"). While the limited partnerships listed in Schedule "A" to the draft Order (the "Partnerships") are not applicants in this proceeding, the Applicants seek to have a stay of proceedings and other benefits of an initial order under the CCAA extended to the Partnerships, which are related to or carry on operations that are integral to the business of the Applicants.

2 TCC is a large Canadian retailer. It is the Canadian operating subsidiary of Target Corporation, one of the largest retailers in the United States. The other Applicants are either corporations or partners of the Partnerships formed to carry on specific aspects of TCC's Canadian retail business (such as the Canadian pharmacy operations) or finance leasehold improvements in leased Canadian stores operated by TCC. The Applicants, therefore, do not represent the entire Target enterprise; the Applicants consist solely of entities that are integral to the Canadian retail operations. Together, they are referred as the "Target Canada Entities".

3 In early 2011, Target Corporation determined to expand its retail operations into Canada, undertaking a significant investment (in the form of both debt and equity) in TCC and certain of its affiliates in order to permit TCC to establish and operate Canadian retail stores. As of today, TCC operates 133 stores, with at least one store in every province of Canada. All but three of these stores are leased.

4 Due to a number of factors, the expansion into Canada has proven to be substantially less successful than expected. Canadian operations have shown significant losses in every quarter since stores opened. Projections demonstrate little or no prospect of improvement within a reasonable time.

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5 After exploring multiple solutions over a number of months and engaging in extensive consultations with its professional advisors, Target Corporation concluded that, in the interest of all of its stakeholders, the responsible course of action is to cease funding the Canadian operations.

6 Without ongoing investment from Target Corporation, TCC and the other Target Canada Entities cannot continue to operate and are clearly insolvent. Due to the magnitude and complexity of the operations of the Target Canada Entities, the Applicants are seeking a stay of proceedings under the CCAA in order to accomplish a fair, orderly and controlled wind-down of their operations. The Target Canada Entities have indicated that they intend to treat all of their stakeholders as fairly and equitably as the circumstances allow, particularly the approximately 17,600 employees of the Target Canada Entities.

7 The Applicants are of the view that an orderly wind-down under Court supervision, with the benefit of inherent jurisdiction of the CCAA, and the oversight of the proposed monitor, provides a framework in which the Target Canada Entities can, among other things:

a) Pursue initiatives such as the sale of real estate portfolios and the sale of inventory;

b) Develop and implement support mechanisms for employees as vulnerable stakeholders affected by the wind-down, particularly (i) an employee trust (the "Employee Trust") funded by Target Corporation; (ii) an employee representative counsel to safeguard employee interests; and (iii) a key employee retention plan (the "KERP") to provide essential employees who agree to continue their employment and to contribute their services and expertise to the Target Canada Entities during the orderly wind-down;

c) Create a level playing field to ensure that all affected stakeholders are treated as fairly and equitably as the circumstances allow; and

d) Avoid the significant maneuvering among creditors and other stakeholders that could be detrimental to all stakeholders, in the absence of a court-supervised proceeding.

8 The Applicants are of the view that these factors are entirely consistent with the well-established purpose of a CCAA stay: to give a debtor the "breathing room" required to restructure with a view to maximizing recoveries, whether the restructuring takes place as a going concern or as an orderly liquidation or wind-down.

9 TCC is an indirect, wholly-owned subsidiary of Target Corporation and is the operating company through which the Canadian retail operations are carried out. TCC is a Nova Scotia unlimited liability company. It is directly owned by Nicollet Enterprise 1 S. à r.l. ("NE1"), an entity organized under the laws of Luxembourg. Target Corporation (which is incorporated under the laws of the State of Minnesota) owns NE1 through several other entities.

10 TCC operates from a corporate headquarters in Mississauga, Ontario. As of January 12, 2015, TCC employed approximately 17,600 people, almost all of whom work in Canada. TCC's employees are not represented by a union, and there is no registered pension plan for employees.

11 The other Target Canada Entities are all either: (i) direct or indirect subsidiaries of TCC with responsibilities for specific aspects of the Canadian retail operation; or (ii) affiliates of TCC that have been involved in the financing of certain leasehold improvements.

12 A typical TCC store has a footprint in the range of 80,000 to 125,000 total retail square feet and is located in a shopping mall or large strip mall. TCC is usually the anchor tenant. Each TCC store typically contains an in-store Target brand pharmacy, Target Mobile kiosk and a Starbucks café. Each store typically employs approximately 100 - 150 people, described as "Team Members" and "Team Leaders", with a total of approximately 16,700 employed at the "store level" of TCC's retail operations.

13 TCC owns three distribution centres (two in Ontario and one in Alberta) to support its retail operations. These centres are operated by a third party service provider. TCC also leases a variety of warehouse and office spaces.

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14 In every quarter since TCC opened its first store, TCC has faced lower than expected sales and greater than expected losses. As reported in Target Corporation's Consolidated Financial Statements, the Canadian segment of the Target business has suffered a significant loss in every quarter since TCC opened stores in Canada.

15 TCC is completely operationally funded by its ultimate parent, Target Corporation, and related entities. It is projected that TCC's cumulative pre-tax losses from the date of its entry into the Canadian market to the end of the 2014 fiscal year (ending January 31, 2015) will be more than $2.5 billion. In his affidavit, Mr. Mark Wong, General Counsel and Secretary of TCC, states that this is more than triple the loss originally expected for this period. Further, if TCC's operations are not wound down, it is projected that they would remain unprofitable for at least 5 years and would require significant and continued funding from Target Corporation during that period.

16 TCC attributes its failure to achieve expected profitability to a number of principal factors, including: issues of scale; supply chain difficulties; pricing and product mix issues; and the absence of a Canadian online retail presence.

17 Following a detailed review of TCC's operations, the Board of Directors of Target Corporation decided that it is in the best interests of the business of Target Corporation and its subsidiaries to discontinue Canadian operations.

18 Based on the stand-alone financial statements prepared for TCC as of November 1, 2014 (which consolidated financial results of TCC and its subsidiaries), TCC had total assets of approximately $5.408 billion and total liabilities of approximately $5.118 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC's financial situation.

19 Mr. Wong states that TCC's operational funding is provided by Target Corporation. As of November 1, 2014, NE1 (TCC's direct parent) had provided equity capital to TCC in the amount of approximately $2.5 billon. As a result of continuing and significant losses in TCC's operations, NE1 has been required to make an additional equity investment of $62 million since November 1, 2014.

20 NE1 has also lent funds to TCC under a Loan Facility with a maximum amount of $4 billion. TCC owed NE1 approximately $3.1 billion under this Facility as of January 2, 2015. The Loan Facility is unsecured. On January 14, 2015, NE1 agreed to subordinate all amounts owing by TCC to NE1 under this Loan Facility to payment in full of proven claims against TCC.

21 As at November 1, 2014, Target Canada Property LLC ("TCC Propco") had assets of approximately $1.632 billion and total liabilities of approximately $1.643 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC Propco's financial situation. TCC Propco has also borrowed approximately $1.5 billion from Target Canada Property LP and TCC Propco also owes U.S. $89 million to Target Corporation under a Demand Promissory Note.

22 TCC has subleased almost all the retail store leases to TCC Propco, which then made real estate improvements and sub-sub leased the properties back to TCC. Under this arrangement, upon termination of any of these sub-leases, a "make whole" payment becomes owing from TCC to TCC Propco.

23 Mr. Wong states that without further funding and financial support from Target Corporation, the Target Canada Entities are unable to meet their liabilities as they become due, including TCC's next payroll (due January 16, 2015). The Target Canada Entities, therefore state that they are insolvent.

24 Mr. Wong also states that given the size and complexity of TCC's operations and the numerous stakeholders involved in the business, including employees, suppliers, landlords, franchisees and others, the Target Canada Entities have determined that a controlled wind-down of their operations and liquidation under the protection of the CCAA, under Court supervision and with the assistance of the proposed monitor, is the only practical method available to ensure a fair and orderly process for all stakeholders. Further, Mr. Wong states that TCC and Target Corporation seek to benefit from the framework and the flexibility

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provided by the CCAA in effecting a controlled and orderly wind-down of the Canadian operations, in a manner that treats stakeholders as fairly and as equitably as the circumstances allow.

25 On this initial hearing, the issues are as follows:

a) Does this court have jurisdiction to grant the CCAA relief requested?

a) Should the stay be extended to the Partnerships?

b) Should the stay be extended to "Co-tenants" and rights of third party tenants?

c) Should the stay extend to Target Corporation and its U.S. subsidiaries in relation to claims that are derivative of claims against the Target Canada Entities?

d) Should the Court approve protections for employees?

e) Is it appropriate to allow payment of certain pre-filing amounts?

f) Does this court have the jurisdiction to authorize pre-filing claims to "critical" suppliers;

g) Should the court should exercise its discretion to authorize the Applicants to seek proposals from liquidators and approve the financial advisor and real estate advisor engagement?

h) Should the court exercise its discretion to approve the Court-ordered charges?

26 "Insolvent" is not expressly defined in the CCAA. However, for the purposes of the CCAA, a debtor is insolvent if it meets the definition of an "insolvent person" in section 2 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("BIA") or if it is "insolvent" as described in *Stelco Inc., Re*, [2004] O.J. No. 1257 (Ont. S.C.J. [Commercial List]), [*Stelco*], leave to appeal 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.), where Farley, J. found that "insolvency" includes a corporation "reasonably expected to run out of liquidity within [a] reasonable proximity of time as compared with the time reasonably required to implement a restructuring" (at para 26). The decision of Farley, J. in *Stelco* was followed in *Priszm Income Fund, Re*, [2011] O.J. No. 1491 (Ont. S.C.J.), 2011 and *Canwest Global Communications Corp., Re*, [2009] O.J. No. 4286 (Ont. S.C.J. [Commercial List]) [*Canwest*].

27 Having reviewed the record and hearing submissions, I am satisfied that the Target Canada Entities are all insolvent and are debtor companies to which the CCAA applies, either by reference to the definition of "insolvent person" under the *Bankruptcy and Insolvency Act* (the "BIA") or under the test developed by Farley J. in *Stelco*.

28 I also accept the submission of counsel to the Applicants that without the continued financial support of Target Corporation, the Target Canada Entities face too many legal and business impediments and too much uncertainty to wind-down their operations without the "breathing space" afforded by a stay of proceedings or other available relief under the CCAA.

29 I am also satisfied that this Court has jurisdiction over the proceeding. Section 9(1) of the CCAA provides that an application may be made to the court that has jurisdiction in (a) the province in which the head office or chief place of business of the company in Canada is situated; or (b) any province in which the company's assets are situated, if there is no place of business in Canada.

30 In this case, the head office and corporate headquarters of TCC is located in Mississauga, Ontario, where approximately 800 employees work. Moreover, the chief place of business of the Target Canada Entities is Ontario. A number of office locations are in Ontario; 2 of TCC's 3 primary distribution centres are located in Ontario; 55 of the TCC retail stores operate in Ontario; and almost half the employees that support TCC's operations work in Ontario.

31 The Target Canada Entities state that the purpose for seeking the proposed initial order in these proceedings is to effect a fair, controlled and orderly wind-down of their Canadian retail business with a view to developing a plan of compromise or

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arrangement to present to their creditors as part of these proceedings. I accept the submissions of counsel to the Applicants that although there is no prospect that a restructured "going concern" solution involving the Target Canada Entities will result, the use of the protections and flexibility afforded by the CCAA is entirely appropriate in these circumstances. In arriving at this conclusion, I have noted the comments of the Supreme Court of Canada in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) ("*Century Services*") that "courts frequently observe that the CCAA is skeletal in nature", and does not "contain a comprehensive code that lays out all that is permitted or barred". The flexibility of the CCAA, particularly in the context of large and complex restructurings, allows for innovation and creativity, in contrast to the more "rules-based" approach of the BIA.

32 Prior to the 2009 amendments to the CCAA, Canadian courts accepted that, in appropriate circumstances, debtor companies were entitled to seek the protection of the CCAA where the outcome was not going to be a going concern restructuring, but instead, a "liquidation" or wind-down of the debtor companies' assets or business.

33 The 2009 amendments did not expressly address whether the CCAA could be used generally to wind-down the business of a debtor company. However, I am satisfied that the enactment of section 36 of the CCAA, which establishes a process for a debtor company to sell assets outside the ordinary course of business while under CCAA protection, is consistent with the principle that the CCAA can be a vehicle to downsize or wind-down a debtor company's business.

34 In this case, the sheer magnitude and complexity of the Target Canada Entities business, including the number of stakeholders whose interests are affected, are, in my view, suited to the flexible framework and scope for innovation offered by this "skeletal" legislation.

35 The required audited financial statements are contained in the record.

36 The required cash flow statements are contained in the record.

37 Pursuant to s. 11.02 of the CCAA, the court may make an order staying proceedings, restraining further proceedings, or prohibiting the commencement of proceedings, "on any terms that it may impose" and "effective for the period that the court considers necessary" provided the stay is no longer than 30 days. The Target Canada Entities, in this case, seek a stay of proceedings up to and including February 13, 2015.

38 Certain of the corporate Target Canada Entities (TCC, TCC Health and TCC Mobile) act as general or limited partners in the partnerships. The Applicants submit that it is appropriate to extend the stay of proceedings to the Partnerships on the basis that each performs key functions in relation to the Target Canada Entities' businesses.

39 The Applicants also seek to extend the stay to Target Canada Property LP which was formerly the sub-leasee/sub-sub lessor under the sub-sub lease back arrangement entered into by TCC to finance the leasehold improvements in its leased stores. The Applicants contend that the extension of the stay to Target Canada Property LP is necessary in order to safeguard it against any residual claims that may be asserted against it as a result of TCC Propco's insolvency and filing under the CCAA.

40 I am satisfied that it is appropriate that an initial order extending the protection of a CCAA stay of proceedings under section 11.02(1) of the CCAA should be granted.

41 Pursuant to section 11.7(1) of the CCAA, Alvarez & Marsal Inc. is appointed as Monitor.

42 It is well established that the court has the jurisdiction to extend the protection of the stay of proceedings to Partnerships in order to ensure that the purposes of the CCAA can be achieved (see: *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]); *Priszm Income Fund, Re*, 2011 ONSC 2061 (Ont. S.C.J.); *Canwest Publishing Inc./ Publications Canwest Inc., Re*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) ("*Canwest Publishing*") and *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List]) ("*Canwest Global*").

43 In these circumstances, I am also satisfied that it is appropriate to extend the stay to the Partnerships as requested.

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44 The Applicants also seek landlord protection in relation to third party tenants. Many retail leases of non-anchored tenants provide that tenants have certain rights against their landlords if the anchor tenant in a particular shopping mall or centre becomes insolvent or ceases operations. In order to alleviate the prejudice to TCC's landlords if any such non-anchored tenants attempt to exercise these rights, the Applicants request an extension of the stay of proceedings (the "Co-Tenancy Stay") to all rights of these third party tenants against the landlords that arise out of the insolvency of the Target Canada Entities or as a result of any steps taken by the Target Canada Entities pursuant to the Initial Order.

45 The Applicants contend that the authority to grant the Co-Tenancy Stay derives from the broad jurisdiction under sections 11 and 11.02(1) of the CCAA to make an initial order on any terms that the court may impose. Counsel references *T. Eaton Co., Re*, 1997 CarswellOnt 1914 (Ont. Gen. Div.) as a precedent where a stay of proceedings of the same nature as the Co-Tenancy Stay was granted by the court in Eaton's second CCAA proceeding. The Court noted that, if tenants were permitted to exercise these "co-tenancy" rights during the stay, the claims of the landlord against the debtor company would greatly increase, with a potentially detrimental impact on the restructuring efforts of the debtor company.

46 In these proceedings, the Target Canada Entities propose, as part of the orderly wind-down of their businesses, to engage a financial advisor and a real estate advisor with a view to implementing a sales process for some or all of its real estate portfolio. The Applicants submit that it is premature to determine whether this process will be successful, whether any leases will be conveyed to third party purchasers for value and whether the Target Canada Entities can successfully develop and implement a plan that their stakeholders, including their landlords, will accept. The Applicants further contend that while this process is being resolved and the orderly wind-down is underway, the Co-Tenancy Stay is required to postpone the contractual rights of these tenants for a finite period. The Applicants contend that any prejudice to the third party tenants' clients is significantly outweighed by the benefits of the Co-Tenancy Stay to all of the stakeholders of the Target Canada Entities during the wind-down period.

47 The Applicants therefore submit that it is both necessary and appropriate to grant the Co-Tenancy Stay in these circumstances.

48 I am satisfied the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time. To the extent that the affected parties wish to challenge the broad nature of this stay, the same can be addressed at the "comeback hearing".

49 The Applicants also request that the benefit of the stay of proceedings be extended (subject to certain exceptions related to the cash management system) to Target Corporation and its U.S. subsidiaries in relation to claims against these entities that are derivative of the primary liability of the Target Canada Entities.

50 I am satisfied that the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time and the stay is granted, again, subject to the proviso that affected parties can challenge the broad nature of the stay at a comeback hearing directed to this issue.

51 With respect to the protection of employees, it is noted that TCC employs approximately 17,600 individuals.

52 Mr. Wong contends that TCC and Target Corporation have always considered their employees to be integral to the Target brand and business. However, the orderly wind-down of the Target Canada Entities' business means that the vast majority of TCC employees will receive a notice immediately after the CCAA filing that their employment is to be terminated as part of the wind-down process.

53 In order to provide a measure of financial security during the orderly wind-down and to diminish financial hardship that TCC employees may suffer, Target Corporation has agreed to fund an Employee Trust to a maximum of $70 million.

54 The Applicants seek court approval of the Employee Trust which provides for payment to eligible employees of certain amounts, such as the balance of working notice following termination. Counsel contends that the Employee Trust was developed in consultation with the proposed monitor, who is the administrator of the trust, and is supported by the proposed Representative

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

Most Recently Cited in: Indiva Limited et al. , 2024 ONSC 3691, 2024 CarswellOnt 9626 | (Ont. S.C.J. [Commercial List], Jun 21, 2024)

R.S.C. 1985, c. C-36, s. 11.001

s 11.001 Relief reasonably necessary

Currency

11.001Relief reasonably necessary
An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

Amendment History
2019, c. 29, s. 136

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

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2019 ONSC 7473
Ontario Superior Court of Justice [Commercial List]

Lydian International Limited (Re)

2019 CarswellOnt 21645, 2019 ONSC 7473, 314 A.C.W.S. (3d) 12, 75 C.B.R. (6th) 314

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 ARRANGMENT OF LYDIAN INTERNATIONAL LIMITED, LYDIAN CANADA VENTURES CORPORATION AND LYDIAN U.K. CORPORATION LIMITED (Applicants)

Geoffrey B. Morawetz C.J. Ont. S.C.J.

Heard: December 23, 2019
Judgment: December 23, 2019
Docket: CV-19-00633392-00CL

Proceedings: additional reasons at *Lydian International Limited (Re)* (2020), 2020 CarswellOnt 200, 2020 ONSC 34, Geoffrey B. Morawetz C.J. Ont. S.C.J. (Ont. S.C.J. [Commercial List])

Counsel: Elizabeth Pillon, Sanja Sopic, Nicholas Avis, for Applicants
Pamela Huff, for Resource Capital Fund VI L.P.
Alan Merskey, for OSISKO Bermuda Limited
D.J. Miller, for proposed Monitor, Alvarez & Marsal Canada Inc.
David Bish, for ORION Capital Management
Bruce Darlington, for ING Bank N.V./ABS Svensk Exportkrerdit (publ)

Subject: Civil Practice and Procedure; Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — "Come-back" clause

Applicants were part of project of gold exploration and development business in Armenia — Applicants were experiencing liquidity issues due to blockades of project and other external factors — Applicants contended that they required immediate protection under federal Companies' Creditors Arrangement Act ("CCAA") for breathing room to pursue remedial steps on time-sensitive basis — Applicants brought application for creditor protection and other relief under CCAA — Application granted — Section 11.02(1) of CCAA had been recently amended — Maximum stay period permitted in initial application was reduced from 30 days to 10 days — Previous s. 11.02 of CCAA provided that after initial stay of up to 30 days, "comeback" hearing was scheduled, and parties could request that certain provisions addressed in initial order could be reconsidered — Practice of granting wide-sweeping relief at initial hearing had to be altered in light of recent amendments — Intent of amendments is to limit relief granted on first day — Ensuing 10-day period allows for stabilization of operations and negotiating window, followed by comeback hearing where request for expanded relief can be considered, on proper notice to all affected parties — This is consistent with objectives of amendments, which include requirement for "participants in an insolvency proceeding to act in good faith" and "improving participation of all players" — It may also result in more meaningful comeback hearings — Absent exceptional circumstances, relief to be granted in initial hearing "shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period" — Period being no more than 10 days, and whenever possible, status quo should be maintained during that period — It was appropriate to grant order under s. 11.02 of CCAA in respect of applicants — Applicants were "debtor companies" under CCAA, were insolvent and had liabilities in excess of $5 million — Under circumstances, it was appropriate to grant order that extended stay to non-applicant

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parties — Applicants also granted charge on their assets in maximum amount of US $350,000 and charge over property in favour of their former and current directors in limited amount of $200,000 Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s 11.001; Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s 11.02.

Table of Authorities

Cases considered by *Geoffrey 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

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]) — considered

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Clover Leaf Holdings Company, Re (2019), 2019 ONSC 6966, 2019 CarswellOnt 20001 (Ont. S.C.J. [Commercial List]) — considered

Jaguar Mining Inc., Re (2013), 2014 ONSC 494, 2013 CarswellOnt 18630, 12 C.B.R. (6th) 290 (Ont. S.C.J. [Commercial List]) — considered

Sino-Forest Corp., Re (2012), 2012 ONSC 2063, 2012 CarswellOnt 4117 (Ont. S.C.J. [Commercial List]) — referred to

Target Canada Co., Re (2015), 2015 ONSC 303, 2015 CarswellOnt 620, 22 C.B.R. (6th) 323 (Ont. S.C.J.) — referred to

Statutes considered:

Business Corporations Act, R.S.A. 2000, c. B-9

Generally — referred to

Business Corporations Act, S.B.C. 2002, c. 57

Generally — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Generally — referred to

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

Generally — referred to

s. 2(1) "company" — considered

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

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

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

s. 11.02(2) [en. 2005, c. 47, s. 128] — considered

s. 11.7 [en. 1997, c. 12, s. 124] — considered

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

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

APPLICATION for creditor protection and other relief under *Companies' Creditors Arrangement Act*.

***Geoffrey B. Morawetz C.J. Ont. S.C.J.*:**

Introduction

1 Lydian International Limited ("Lydian International"), Lydian Canada Ventures Corporation ("Lydian Canada") and Lydian UK Corporation Limited ("Lydian UK", and collectively, the "Applicants") apply for creditor protection and other relief under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA"). The Applicants seek an initial order, substantially in the form attached to the application record. No party attending on the motion opposed the requested relief.

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2 The Applicants are part of a gold exploration and development business in south central Armenia (the "Amulsar Project"). The Amulsar Project is directly owned and operated by Lydian Armenia CJSC ("Lydian Armenia"), a wholly-owned subsidiary of the Applicants.

3 As set out in the affidavit of Edward A. Sellers sworn December 22, 2019 (the "Sellers Affidavit"), the Applicants have been experiencing and continue to experience liquidity issues due to blockades of the Amulsar Project and other external factors. The Sellers Affidavit details such activities and Mr. Sellers deposes that these activities have prevented Lydian Armenia and its employees, contractors and suppliers from accessing, constructing and ultimately operating the Amulsar Project.

4 Mr. Sellers states that the lack of progress at the Amulsar Project has prevented the Lydian Group (as that term is defined below) from generating any positive cash flow and has also triggered defaults on certain of the Lydian Group's obligations to its lenders which, if enforced, the Lydian Group would be unable to satisfy.

5 The Lydian Group has operated under forbearance agreements in respect of these defaults since October 2018, but the most recent forbearance agreement expired on December 20, 2019.

6 The Applicants contend that they now require immediate protection under the CCAA for the breathing room they require to pursue remedial steps on a time sensitive basis.

7 The Applicants intend to continue discussions with their lenders and other stakeholders, including the Government of Armenia ("GOA"). The Applicants also intend to continue evaluating potential financing and/or sale options, all with a view to achieving a viable path forward.

The Applicants

8 Lydian International is a corporation continued under the laws of the Bailiwick of Jersey, Channel Islands, from the Province of Alberta pursuant to the *Companies (Jersey) Law 1991*. Lydian International was originally incorporated under the Business Corporations Act, R.S.A. 2000, c. B-9 (Alberta) on February 14, 2006 as "Dawson Creek Capital Corp.", and subsequently became Lydian International on December 12, 2007.

9 Lydian International's registered office is located in Jersey. On June 12, 2019, Lydian International shareholders approved its continuance under the Canada Business Corporations Act, R.S.C., 1985, c. C-44, but this continuance has yet to be implemented.

10 Lydian International has two types of securities listed on the Toronto Stock exchange: (1) ordinary shares and (2) warrants that expired in 2017.

11 Lydian Canada is a direct, wholly owned subsidiary of Lydian International. Lydian Canada is incorporated under the Business Corporations Act, S.B.C. 2002, c. 57 (British Columbia) and has a registered head office in Toronto. Its registered and records office is located in British Columbia.

12 Lydian UK is a corporation incorporated in the United Kingdom and is a direct, wholly-owned subsidiary of Lydian Canada with a head office located in the United Kingdom. Lydian UK has no material assets in the UK.

13 Lydian International and Lydian UK have assets in Canada in the form of deposits with the Bank of Nova Scotia in Toronto.

14 The Applicants are part of a corporate group (the "Lydian Group") with a number of other subsidiaries ultimately owned by Lydian International. Other than the Applicants, certain of the Lydian Group's subsidiaries are Lydian U.S. Corporation ("Lydian US"), Lydian International Holdings Limited ("Lydian Holdings"), Lydian Resources Armenia Limited ("Lydian Resources") and Lydian Armenia, a corporation incorporated under the laws of the Republic of Armenia. Together, Lydian U.S., Lydian Holdings, Lydian Resources and Lydian Armenia are the "Non-Applicant" parties.

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15 The Applicants submit that due to the complete integration of the business and operations of the Lydian Group, an extension of the stay of proceedings over the Non-Applicant parties is appropriate.

16 The Applicants contend that the Lydian Group is highly integrated and its business and affairs are directed primarily out of Canada. Substantially all of its strategic business affairs, including key decision-making, are conducted in Toronto and Vancouver.

17 Further, all the Applicants and Non-Applicant Parties are borrowers or guarantors of the Lydian Group's secured indebtedness. The Lydian Group's loan agreements are governed primarily by the laws of Ontario.

18 Finally, the Lydian Group's forbearance and restructuring efforts have been directed out of Toronto.

19 The Lydian Group is focused on constructing the Amulsar Project, its wholly-owned development stage gold mine in Armenia. The Amulsar Project was funded by a combination of equity and debt capital and stream financing. The debt and stream financing arrangements are secured over substantially all the assets of Lydian Armenia and Lydian International in the shares of various groups of the Lydian Group.

20 The Applicants contend that time is of the essence given the Applicants' minimal cash position and negative cash flow.

Issues

21 The issues for consideration are whether:

(a) the Applicants meet the criteria for protection under the CCAA;

(b) the CCAA stay should be extended to the Non-Applicant Parties;

(c) the proposed monitor, Alvarez & Marsal Canada Inc. ("A&M") should be appointed as monitor;

(d) Ontario is the appropriate venue for this proceeding;

(e) this court should issue a letter of request of the Royal Court of Jersey;

(f) this Court should exercise its discretion to grant the Administration Charge and the D & O Charge (as defined below); and

(g) it is appropriate to grant a stay extension immediately following the issuance of the Initial Order.

Law and Analysis

22 Pursuant to section 11.02(1) of the CCAA, a court may make an order staying all proceedings in respect of a debtor company for a period of not more than 10 days, provided that the court is satisfied that circumstances exist to make the order appropriate.

23 Section 11.02(1) of the CCAA was recently amended and the maximum stay period permitted in an initial application was reduced from 30 days to 10 days. Section 11.001 which came into force at the same time as the amendment to s. 11.02(1), limits initial orders to "ordinary course" relief.

24 Section 11.001 provides:

> 11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

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25 The News Release issued by Innovation, Science and Economic Development Canada specifically states that these amendments "limit the decisions that can be taken at the outset of a CCAA proceeding to measures necessary to avoid the immediate liquidation of an insolvent company, thereby improving participation of all players."

26 In my view, the intent of s. 11.001 is clear. Absent exceptional circumstances, the relief to be granted in the initial hearing "shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period". The period being no more than 10 days, and whenever possible, the *status quo* should be maintained during that period.

27 Following the granting of the initial order, a number of developments can occur, including:

(a) notification to all stakeholders of the CCAA application;

(b) stabilization of the operation of debtor companies;

(c) ongoing negotiations with key stakeholders who were consulted prior to the CCAA filing;

(d) commencement of negotiations with stakeholders who were not consulted prior to the CCAA filing;

(e) negotiations of DIP facilities and DIP Charges;

(f) negotiations of Administration Charges;

(g) negotiation of Key Employee Incentives Programs;

(h) negotiation of Key Employee Retention Programs;

(i) consultation with regulators;

(j) consultation with tax authorities;

(k) consideration as to whether representative counsel is required; and

(l) consultation and negotiation with key suppliers.

28 This list is not intended to be exhaustive. It is merely illustrative of the many issues that can arise in a CCAA proceeding.

29 Prior to the recent amendments, it was not uncommon for an initial order to include provisions that would affect some or all of the aforementioned issues and parties. The previous s. 11.02 provided that the initial stay period could be for a period of up to 30 days. After the initial stay, a "comeback" hearing was scheduled and, in theory, parties could request that certain provisions addressed in the initial order could be reconsidered.

30 The practice of granting wide-sweeping relief at the initial hearing must be altered in light of the recent amendments. The intent of the amendments is to limit the relief granted on the first day. The ensuing 10-day period allows for a stabilization of operations and a negotiating window, followed by a comeback hearing where the request for expanded relief can be considered, on proper notice to all affected parties.

31 In my view, this is consistent with the objectives of the amendments which include the requirement for "participants in an insolvency proceeding to act in good faith" and "improving participation of all players". It may also result in more meaningful comeback hearings.

32 It is against this backdrop that the requested relief at the initial hearing should be scrutinized so as to ensure that it is restricted to what is reasonably necessary for the continued operations of the debtor company during the initial stay period.

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33 For the reasons that follow, I conclude that it is appropriate to grant a s. 11.02 order in respect of the Applicants.

34 I am satisfied that Lydian Canada meets the CCAA definition of "company" and is eligible for CCAA protection.

35 I have also considered whether the foreign incorporated companies are "companies" pursuant to the CCAA. Such entities must satisfy the disjunctive test of being an "incorporated company" either "having assets or doing business in Canada".

36 In *Cinram International Inc., Re*, 2012 ONSC 3767, 91 C.B.R. (5th) 46 (Ont. S.C.J. [Commercial List]), I stated that the threshold for having assets in Canada is low and that holding funds in a Canadian bank account brings a foreign corporation within the definition of "company" under the CCAA.

37 In this case, both Lydian International and Lydian UK meet the definition of "company" because both corporations have assets in and do business in Canada.

38 In my view the Applicants are each "debtor companies" under the CCAA. The Applicants are insolvent and have liabilities in excess of $5 million. I am satisfied that the Applicants are eligible for CCAA protection.

39 The Applicants seek to extend the stay to Lydian Armenia, Lydian Holdings, Lydian Resources Armenia Limited and Lydian US. I am satisfied that, in the circumstances, it is appropriate to grant an order that extends the stay to the Non-Applicant Parties. The stay is intended to stabilize operations in the Lydian Group. This finding is consistent with CCAA jurisprudence: see e.g., *Sino-Forest Corp., Re*, 2012 ONSC 2063 (Ont. S.C.J. [Commercial List]), at paras. 5, 18, and 31; Canwest Global Communications Corp., Re200959 C.B.R. (5th) 72(Ont. S.C.J. [Commercial List]); and *Target Canada Co., Re*, 2015 ONSC 303, 22 C.B.R. (6th) 323 (Ont. S.C.J.), at paras. 49-50.

40 I am also satisfied that is appropriate to appoint A & M as monitor pursuant to the provisions of s. 11.7 of the CCAA.

41 With respect to whether Ontario is the appropriate venue for this proceeding, Lydian Canada's registered head office is located in Toronto and its registered and records offices are located in Vancouver. In my view, Ontario has jurisdiction over Lydian Canada. The registered head offices for Lydian International and Lydian UK are in Jersey and the UK respectively, however, both entities have assets in Ontario, those being funds on deposit with the Bank of Nova Scotia in Toronto. Further, it seems to me that both Lydian International and Lydian UK have a strong nexus to Ontario and accordingly I am satisfied that Ontario is the appropriate jurisdiction to hear this application.

42 I am also satisfied that, in these circumstances, it is appropriate for this court to issue to the Royal Court of Jersey a letter of request as referenced in the application record.

Administration Charge

43 The Applicants seek a charge on their assets in the maximum amount of US $350,000 to secure the fees and disbursements incurred in connection with services rendered by counsel to the Applicants, A & M and A & M's counsel, in respect of the CCAA proceedings (the "Administration Charge").

44 Section 11.52 of the CCAA provides the ability for the court to grant the Administration Charge.

45 The recently enacted s. 11.001 of the CCAA limits the requested relief on this motion, including the Administration Charge, to what is reasonably necessary for the continued operation of the Applicants during the Initial Stay Period. The Sellers Affidavit outlines the complex issues facing the Applicants.

46 In *Canwest Publishing Inc. / Publications Canwest Inc., Re*, 2010 ONSC 222, 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]), Pepall J. (as she then was) identified six non-exhaustive factors that the court may consider in addition to s. 11.52 of the CCAA when determining whether to grant an administration charge. These factors include:

(a) the size and complexity of business being restructured;

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(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 appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the monitor.

47 It seems to me that the proposed restructuring will require extensive input from the professional advisors and there is an immediate need for such advice. The requested relief is supported by A & M.

48 I am satisfied that the Administration Charge in the limited amount of US $350,000 is appropriate in the circumstances and is reasonably necessary for the continued operation of the business at this time.

D & O Charge

49 The Applicants also seek a charge over the property in favour of their former and current directors in the limited amount of $200,000 (the "D & O Charge").

50 The Applicants maintain Directors' and Officers' liability insurance (the "D & O Insurance") which provides a total of $10 million in coverage.

51 The D & O Insurance is set to expire on December 31, 2019.

52 Section 11.51 of the CCAA provides the court with the express statutory jurisdiction to grant the D & O charge in an amount the court considers appropriate, provided notice is given to the secured creditors who are likely to be affected.

53 In *Jaguar Mining Inc., Re*, 2014 ONSC 494, 12 C.B.R. (6th) 290 (Ont. S.C.J. [Commercial List]), I set out a number of factors to be considered in determining whether to grant a directors' and officers' charge:

(a) whether notice has been given to the secured creditors likely to be affected by the charge;

(b) whether the amount is appropriate;

(c) whether the Applicant could obtain adequate indemnification insurance for the director at a reasonable cost; and

(d) whether the charge applies in respect of any obligation incurred by a director or officer as a result of the directors' or officers' gross negligence or willful misconduct.

54 Having reviewed the Sellers Affidavit, it seems to me that the granting of the D & O charge is necessary in the circumstances. In arriving at this conclusion, I have also taken into account that the D & O Insurance will lapse shortly; having directors involved in the process is desirable; that the secured creditors likely to be affected do not object; and that A & M has advised that it is supportive of the D & O Charge. Further, the requested amount is one that I consider to be reasonably necessary for the continued operation of the Applicants.

Extension of the Stay of Proceedings

55 The Applicants have requested that, if the initial order is granted, I should immediately entertain and grant an order extending the Stay Period until and including January 17, 2020 which will provide the Applicants and all stakeholders with enough time to adequately prepare for a comeback hearing.

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56 The Applicants submit that I am authorized to grant a stay extension immediately after granting the initial order because section 11.02(2) of the CCAA does not provide a minimum waiting time before an applicant can seek a stay extension. The Applicants reference recent decisions where courts have scheduled hearings within two or three days after the granting of an initial order. Reference is made to *Clover Leaf Holdings Company, Re*, 2019 ONSC 6966 (Ont. S.C.J. [Commercial List]) and *Re Wayland group Corp. et al.* (2 December 2019), Toronto CV-19-00632079-00CL. In *Clover Leaf*, the stay extension for 36 days and additional relief including authorization for DIP financing was granted three days after the initial order and in *Wayland*, the stay extension was granted two days after the initial order.

57 I acknowledge that, in this case, it may be challenging for the Applicants to return to court at or near the end of the 10-day initial stay period due to the year-end holidays. I also acknowledge that the offices of many of the parties involved in these proceedings may not be open during the holidays.

58 However, the statutory maximum 10-day stay as referenced in s. 11.02(1) expires on January 2, 2020 and the courts are open on that day.

59 As noted above, absent exceptional circumstances, I do not believe that it is desirable to entertain motions for supplementary relief in the period immediately following the granting of an initial order.

60 It could very well be that circumstances existed in both *Clover Leaf* and *Wayland* that justified the stay extension and the ancillary relief being granted shortly after the initial order.

61 However, in this case, I have not been persuaded on the evidence that it is necessary for the stay extension to be addressed prior to January 2, 2020 and I decline to do so.

Disposition

62 The initial order is granted with a Stay Period in effect until January 2, 2020. In view of the holiday schedules of many parties, the following procedures are put in place. The Applicants can file a motion returnable on January 2, 2020, requesting that the stay be extended to January 23, 2020. Any party that wishes to oppose the extension of the stay to January 23, 2020 is required to notify the Applicant, A & M and the Commercial List Office of their intention to do so no later than 2:00 p.m. on December 30, 2019. In the event that the requested stay extension is unopposed, there will be no need for counsel to attend on the return of the motion. I will consider the motion based on the materials filed.

63 If any objections are received by 2:00 p.m. on December 30, 2019, the hearing on January 2, 2020 will address the opposed extension request. Any further relief will be considered at the Comeback Motion on January 23, 2020.

Application granted.

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2022 ONSC 4348
Ontario Superior Court of Justice

MPX International Corporation

2022 CarswellOnt 11589, 2022 ONSC 4348, 1 C.B.R. (7th) 251, 2022 A.C.W.S. 3315

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 MPX INTERNATIONAL CORPORATION, BIOCANNABIS PRODUCTS LTD., CANVEDA INC., THE CING-X CORPORATION, SPARTAN WELLNESS CORPORATION, MPXI ALBERTA CORPORATION, MCLN INC., AND SALUS BIOPHARMA CORPORATION

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

Heard: July 25, 2022
Judgment: August 3, 2022
Docket: CV-22-684542-00CL

Counsel: Sean Zweig, Mike Shakra, Thomas Gray, for Applicant
Kyle Plunkett, Sam Babe, for Proposed Monitor, KSV Restructuring Inc.
Kenneth Kraft, Sara-Ann Wilson, for Proposed DIP Lender
Alex Moore, for Debenture Trustee

Subject: Civil Practice and Procedure; 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 — Extension of order
Applicants were parent company and several of its subsidiaries — Applicant parent company owned several non-applicant subsidiaries holding assets — Applicants were in liquidity crisis and unable to meet their obligations — Applicants collectively had over $5 million in debt — Debts were guaranteed by subsidiary companies — Applicants were unable to fund next payroll — Applicants believed that under Companies' Creditors Arrangement Act, stay of proceedings was in best interests of their stakeholders — Applicants sought to market and sell their interests in non-applicant corporations to stabilize operations — Applicants sought for stay of proceedings to extend to non-applicant companies to prevent immediate loss for stakeholders — Applicants applied for stay of proceedings and other relief under Act — Application granted — Stay of proceedings under Act granted — Stay of proceedings was to extend to non-applicant parties — Court was satisfied applicants were insolvent and considered "debtor companies" as defined by Act — Factors weighed in favour of staying proceedings — Stay of proceedings would have allowed applicants and non-applicant parties to normalize operations and prevent immediate loss of value for stakeholders — Without benefit of stay, applicants' ability to market and sell their interests in non-applicant parties' assets would have been compromised — Court granted additional relief including DIP loan and lenders' charge, administration charge, directors' charge and postponement of annual general shareholder's meeting.
Table of Authorities
Cases considered by *G.B. Morawetz A.C.J. Ont. S.C.J.*:

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

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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

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Statutes considered:

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Generally — referred to

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Canada Business Corporations Act, R.S.C. 1985, c. C-44

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s. 2(1) "debtor company" — considered

s. 11 — pursuant to

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

s. 11.2(5) [en. 2005, c. 47, s. 128] — referred to

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

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

APPLICATION for stay under *Companies' Creditors Arrangement Act* and other relief.

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

INTRODUCTION

1 At the conclusion of the hearing, the Applicants were granted relief under the CCAA with reasons to follow. These are the reasons.

2 MPX International Corporation ("MPXI"), BioCannabis Products Ltd. ("BioCannabis"), Canveda Inc. ("Canveda"), The CinG-X Corporation ("CinG-X"), Spartan Wellness Corporation ("Spartan"), MPXI Alberta Corporation ("MPXI Alberta"), MCLN Inc. ("MCLN"), and Salus BioPharma Corporation ("Salus BioPharma") (each individually, an "Applicant", and collectively, the "Applicants") seek relief under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C–36, as amended (the "CCAA") and the issuance of an order (the Initial Order")

3 MPXI is a reporting issuer listed on the Canadian Securities Exchange. It wholly-owns each of the other Applicants, and wholly-owns or has an interest in several other non-Applicant affiliates (each subsidiary of MPXI individually a "Subsidiary" and together the "Subsidiaries", and collectively with MPXI, the "Company"). Through its Subsidiaries, it is involved in cannabis production and resale, management consulting for cannabis companies, and cannabis education.

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4 The Applicants are in a liquidity crisis and are not able to meet their obligations as they become due. Absent the approval of the interim financing proposed to be made available under the DIP Loan (as defined below), the Company will not be able to fund its next payroll scheduled to be paid on July 29, 2022. The Applicants believe that this CCAA proceeding is in the best interests of their stakeholders.

5 The Applicants submit that the relief sought in the Initial Order is limited to what is reasonably necessary to allow the Applicants to maintain the *status quo* and continue operations in the ordinary course during the initial 10-day stay of proceedings (the "Stay of Proceedings"). The Applicants intend to return to this Court for additional relief necessary to advance the CCAA proceedings at a hearing to be scheduled prior to the expiration of the Stay of Proceedings (the "Comeback Hearing").

FACTS

6 The facts underlying this Application are more fully set out in the affidavit of Jeremy Blumer, sworn July 25, 2022 (the "Initial Affidavit"). All capitalized terms used but not defined herein have the meanings ascribed to them in the Initial Affidavit.

7 All of the Applicants are Canadian companies. MPXI is the ultimate parent company, and all of the other Applicants are wholly-owned by MPXI. Each of the Applicants is incorporated under the Business Corporations Act, R.S.O. 1990, c. B.16 (Ontario) (the "OBCA"), the Business Corporations Act (Alberta), RSA 2000, c B–9 (the "ABCA") or the Canada Business Corporations Act, RSC 1985, c C–44 (the "CBCA").

8 MPXI was incorporated under the OBCA by articles of incorporation dated October 17, 2018. At the time of its incorporation, MPXI was a subsidiary of MPX Bioceutical Corporation ("MPX Bio"). It was incorporated in order to effect a plan of arrangement (the "Arrangement") among MPXI, MPX Bio and iAnthus Capital Holdings Inc. under the Business Corporations Act (British Columbia), SBC 2002, c 57.

9 The Canadian cannabis "plant-touching" operations of the Company are conducted through Canveda, which was incorporated under the CBCA. Canveda is a licensed cultivator, processor, and seller under the Cannabis Act, and maintains a fully constructed 12,000 square foot facility located in Peterborough, Ontario (the "Canveda Facility").

10 Spartan, a CBCA company, and MCLN, an OBCA company, are both in the business of telehealth and cannabis education. Other than MPXI Alberta, which was incorporated under the ABCA, all of the remaining Applicants (BioCannabis, CinG-X, and Salus Biopharma) were incorporated under the OBCA. None of these Applicants currently have any material business, assets, or operations.

11 Aside from the Applicants, MPXI has partial interests in certain Canadian entities. MPXI holds approximately 50% of the common shares and warrants of Salus International Management Ltd. ("Salus International"), an OBCA company. Salus International controls voting shares representing over 97% of the votes of a Thai corporation, Salus Bioceutical (Thailand) Co., Ltd. ("Salus Bioceutical"). The Applicants contend that Salus Bioceutical is a key and valuable asset for MPXI, and its continued operations will be important for the Applicants to successfully restructure their affairs and maximize value for their stakeholders.

12 MPXI also holds a minority interest in Prime Pharmaceutical Corporation, which controls another subsidiary. Because MPXI is not involved in the business or operations of these companies, neither are Applicants or Non-Applicant Stay Parties.

13 The other Non-Applicant Stay Parties are registered in Australia, Lesotho, Malta, Switzerland, South Africa, Thailand, and the United Kingdom. Notwithstanding that these parties are not Applicants, the Applicants believe that it is critical to the best interests of the Applicants and their stakeholders to extend the benefits of the Stay of Proceedings to the Non-Applicant Stay Parties.

14 MPXI is a multinational diversified cannabis company in the business of developing and operating assets across the international cannabis industry with an emphasis on cultivating, manufacturing and marketing products which include cannabinoids as their primary active ingredient.

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15 Canveda is licensed to produce, sell, and export cannabis. The Canveda Facility produces high quality cannabis flower, and Canveda holds the following licenses:

(a) a license issued by Health Canada to produce, sell, and export all categories of authorized Canadian cannabis products, including topicals, extracts and edibles;

(b) a license issued by the Canada Revenue Agency authorizing Canveda to purchase excise stamps for the purposes of collecting and remitting excise duty on cannabis products;

(c) a license issued by the Alberta Gaming, Liquor & Cannabis Commission authorizing Canveda to market cannabis products in Alberta; and

(d) a license issued by the Saskatchewan Liquor and Gaming Authority authorizing Canveda to supply cannabis to Saskatchewan from its Peterborough location.

16 MPXI owns several medicinal and recreational cannabis brands and products that are produced and distributed by Canveda across the Provinces of Alberta, British Columbia, Ontario, and Saskatchewan.

17 Two of MPXI's Subsidiaries — Spartan and MCLN — focus on telehealth and cannabis education.

18 The remainder of the Applicants do not have material assets or operations.

19 Aside from the Applicants, the Company has material assets, including certain facilities and licenses, through the following businesses:

20 Salus International, which is registered under the OBCA, provides design, planning, financing, training, and on-going operational support to cannabis initiatives, partnerships, and joint ventures in southeast Asia.

21 Salus Bioceutical is a joint venture between Salus International and certain Thai investors, and Salus International controls over 97% of the votes of Salus Bioceutical. Salus Bioceutical is involved in the cultivation, processing and distribution of high-quality, EU-GMP compliant, medical-grade cannabis products such as CBD distillate, isolate powder, and water-soluble isolate for the medical community in Thailand.

22 Salus Bioceutical is a Subsidiary with assets and operations into which the Company has invested financial and other resources. The Applicants contend that it is critical for the Company that Salus Bioceutical be able to continue its operations without disruption.

23 The Company also has operations in Switzerland, South Africa, and Malta. In Switzerland, Holyworld SA is a wholly-owned Subsidiary that leases a laboratory that can produce up to 30kg of distillate per month. Holyworld SA has struggled with cash flow resulting in material unpaid liabilities.

24 In South Africa, MPXI indirectly holds an 80% interest through another Subsidiary in First Growth Holdings (Pty) Ltd. ("First Growth"). First Growth is licensed to cultivate and export cannabis at a facility it leases, and it is expected that the biomass produced from the First Growth Facility will primarily support the Company's operations in Malta.

25 The Company's operations in Malta are conducted mainly through MPXI Malta Operations Ltd. ("Malta Operations"), a company in which MPXI holds at least 75% of the voting shares, and Alphafarma Operations Ltd. ("Alphafarma"), a company wholly-owned by Malta Operations through MPXI Malta Property Limited. Alphafarma recently obtained EU-GMP Certification, as well as a License for the Production of Cannabis for Medicinal and Research Purposes.

26 As at March 31, 2022, the Company had total consolidated assets with a book value of approximately $47,133,302, and liabilities with a book value of approximately $37,244,120. The Applicants expect to have only approximately $169,196 cash on hand at the close of business today, and are facing an urgent liquidity crisis.

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27 MPXI has closed multiple tranches of a private placement offering (the "Offering") of units (the "Units") of MPXI. Each Unit consists of one 12% secured convertible debenture of MPXI (the "Debentures", and the holders of the Debentures the "Debentureholders") in the principal amount of US$1,000, as well as certain common share purchase warrants.

28 MPXI has struggled to make interest payments under the Debenture Indenture. MPXI failed to make interest payments on the Coupon Date on: March 31, 2021; September 30, 2021; December 31, 2021; and March 31, 2022. After each of these dates, waivers of the event of default provision related to the payment of interest were granted by Debentureholders. In other cases, MPXI has satisfied the payment of interest through the issuance of additional Units.

29 MPXI has also obtained short-term financing pursuant to a series of loans (the "Bridge Loans") through which the lenders converted the principal owing into Units in the Offering on terms favourable to the lenders. As of July 21, 2022, the total face value of the principal of outstanding convertible debentures is US$19,281,000. There are no outstanding Bridge Loans because they were all converted to Units.

30 MPXI's obligations in respect of the Debentures are secured by the following:

(a) a general security agreement dated June 30, 2020 securing all of the present and after-acquired property of MPXI; and

(b) a pledge agreement dated June 30, 2020 by MPXI pledging all of the shares it holds of BioCannabis, Canveda, Holyworld SA, MCLN, MPX Australia Pty. Ltd., MPXI Alberta, MPXI Malta Holding Limited, MPXI Malta Operations Limited, MPXI UK Limited, Salus BioPharma, Spartan, CinG-X. MPXI also later deposited its shares in Salus International with the trustee of the Debenture Indenture.

31 The Debenture Indenture is guaranteed by BioCannabis, Canveda, Holyworld SA, MCLN, MPX Australia Pty Ltd, MPXI Alberta, MPXI UK, MPXI Malta Operations Limited, Salus BioPharma, Spartan and CinG-X pursuant to a guarantee agreement dated June 30, 2020, as well as MPXI Malta Holding Limited pursuant to a separate guarantee agreement with the same date. Each of these parties other than Holyworld SA executed general security agreements in favour of the trustee of the Debenture Indenture.

32 In addition to the obligations owing in relation to the Debentures, Canveda has also assigned a term deposit as security in favour of Alterna Savings and Credit Union Ltd. ("Alterna") in the amount of $40,000, which amount relates to a letter of credit issued by Alterna.

33 As of July 20, 2022, Canveda had non-current accounts payable of $789,565.86, Spartan had non-current accounts payable of $126,409.49, and MPXI had non-current accounts payable of $799,635.98.

34 The Applicants also have employee liabilities. The aggregate payroll for the Company is:

(a) MPXI — approximately $90,000/month;

(b) Canveda — approximately $92,000/month;

(c) Spartan — approximately $79,000/month; and

(d) International (Non-Applicant Stay Parties) — approximately $155,150/month.

35 In addition, the Applicants are parties to several leases, including in respect of the head office of the Company in Toronto, an operational office in Ottawa, and the Canveda Facility, certain of which are not current.

36 The Applicants are also in arrears in respect of certain tax obligations, including approximately $503,302 in excise tax arrears.

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37 The Company also engages in intercompany borrowing, through which parent companies lend funds to their subsidiaries, and MPXI has advanced unsecured loans to several of its Subsidiaries. Certain Non-Applicant Stay Parties have other material unsecured liabilities. This includes a promissory note pursuant to which First Growth is a borrower in the amount of up to US $500,000. This loan is now payable and has been put to MPXI, as permitted by its terms. Finally, certain of the Applicants are also defendants in ongoing litigation.

38 The Applicants have struggled with cash flow since the onset of the COVID-19 pandemic, and their cash position is currently not sufficient to meet their obligations as they come due. They submit that the urgency of this application stems from the need for the Applicants to access financing to meet their ongoing and future payroll obligations and maintain business operations in order to preserve and maximize value while preventing enforcement action by certain contractual counterparties.

39 Pursuant to a term sheet executed July 25, 2022 (the "DIP Term Sheet"), certain of the Debentureholders holding approximately 52% of the outstanding Debentures have agreed to provide the Applicants, as borrowers, with a super-priority, non-revolving credit facility up to a maximum principal amount of $2.67 million (the "DIP Loan"). The DIP Loan will bear interest at 12% per annum, and also includes a commitment fee equal to 2% of the overall value of the DIP Loan. The funds will be advanced by certain initial Debentureholders listed on Schedule D of the DIP Term Sheet, and all Debentureholders will have an opportunity to participate in the DIP Loan based on their pro-rata share of Debentures held (the Debentureholders that participate in the DIP Loan, the "DIP Lenders"). The DIP Loan will be guaranteed by many of the Non-Applicant Stay Parties.

40 The DIP Loan is conditional, among other things, upon the granting of a priority charge in the amount of $1.2 million over the Property in favour of the DIP Lenders to secure the amounts borrowed under the DIP Loan.

41 The Applicants contend that the amount of the DIP Loan to be funded during the Stay of Proceedings (up to $1.2 million) is only that portion that is necessary to ensure the continued operation of the Applicants' business in the ordinary course for the next 10 days.

42 The rest of the DIP Loan is made up of US$500,000 that will be loaned by the Applicants to Salus International to fund the immediate operational needs of Salus Bioceutical. The Applicants contend that these proceeds are immediately necessary to ensure Salus Bioceutical's continued operations and will provide urgently required working capital to be used to pay for employee salaries, supplies, and raw goods for processing.

43 It is a condition precedent to the first advance under the DIP Loan that all head office staff be terminated with the exception of those employee(s) who are retained with the DIP Lenders' consent on such terms as the DIP Lenders' consent to. The DIP Loan is subject to other customary covenants, conditions precedent, and representations and warranties made by the Applicants.

44 It is proposed that KSV Restructuring Inc. will act as Monitor in these CCAA Proceedings (in such capacity, the "Proposed Monitor").

ISSUES

45 The issue to be considered on this application is whether to grant the proposed form of Initial Order, specifically whether:

(a) each of the Applicants is a "debtor company" to which the CCAA applies;

(b) the Stay of Proceedings should be granted in favour of the Applicants;

(c) the Stay of Proceedings should be extended to the Non-Applicant Stay Parties;

(d) the Court should approve the proposed DIP Loan and grant the DIP Lenders' Charge (as defined below);

(e) the Administration Charge (as defined below) should be granted;

(f) the Directors' Charge (as defined below) should be granted;

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(g) the Applicants should be entitled to make certain pre-filing payments with the consent of the Monitor and the DIP Lenders; and

(h) MPXI should be relieved of any obligation to call and hold its annual general meeting of shareholders (the "AGM") until further Order of this Court.

ANALYSIS AND LAW

46 The CCAA applies in respect of a "debtor company or affiliated debtor companies" whose liabilities exceed $5 million.

47 The Applicants collectively have over $5 million in debt. As of July 21, 2022, MPXI had indebtedness of approximately US$19,281,000 pursuant to the Debentures, and this debt is guaranteed by each of the other Applicants.

48 I am satisfied that each of the Applicants is insolvent and is a "debtor company" as defined in the CCAA and that the CCAA applies to the Applicants.

49 The Applicants contend that they require the Stay of Proceedings to prevent potential enforcement action by certain contractual counterparties.

50 The Applicants submit that granting the Stay of Proceedings is in the best interests of the Applicants and their stakeholders, meets the statutory requirements, and is appropriate.

51 I accept this submission.

52 This Court has authority to extend the Stay of Proceedings to the Non-Applicant Stay Parties pursuant to s. 11 and 11.02(1) of the CCAA, which allow the court to make an initial order on any terms that the court may impose. In doing so, courts have looked at factors including whether the subsidiaries of the CCAA applicants had guaranteed the applicants' secured loans; whether the non-applicants were deeply integrated into the applicants' business operations; and whether the claims against the non-applicants are derivative of the primary liability of the applicants. (See: *Lydian International Limited (Re)*,, 2019 ONSC 7473; *Sino-Forest Corporation (Re), 2012 ONSC 2063*, at paras 5, 18, and 31; *Canwest Global Communications Corp. (Re), [2009] OJ No 4286 (Ont. Sup. Ct. J.) (Commercial List)* (*Canwest Global*) at paras 28-29; and *Target*, *supra* at paras 49-50).

53 In this case, I am satisfied that these factors weigh in favour of extending the Stay of Proceedings to the Non-Applicant Stay Parties. Many of the Non-Applicant Stay Parties are guarantors for the Debentures, the primary debt of the Applicants. Further, the Non-Applicant Stay Parties are highly integrated into the business of the Company, and are all either wholly-owned or controlled by the ultimate parent company, MPXI. In addition, an extension of the stay to the Non-Applicant Stay Parties will prevent uncoordinated realization and enforcement attempts from being made in different jurisdictions, and thereby prevent immediate loss of value for the Applicants' stakeholders. Therefore, in my view, it is reasonable to extend the Stay of Proceedings to the Non-Applicant Stay Parties.

54 The Applicants intend to seek approval of a sales and investment solicitation process (the "SISP") at the Comeback Hearing. The extension of the Stay of Proceedings to the Non-Applicant Stay Parties, which the Applicants believe hold material value, is required in order to give comfort to potential bidders in the SISP that enforcement actions against the Non-Applicant Stay Parties will be stayed and that value in these entities will be preserved during the period in which the SISP is conducted. Without the benefit of the Stay of Proceedings, the Applicants' ability to market and sell their interests in the Non-Applicant Stay Parties and their respective assets would be compromised given the lack of stability that would exist.

55 Subsection 11.2(5) requires that this Court be satisfied, after considering all of the facts and circumstances in the case before it, that the interim financing sought to be approved is "reasonably necessary" for continued operations in such circumstances.

56 The Applicants submit that the DIP Loan is limited to what is strictly necessary for the continued operations of the Applicants until the Comeback Hearing; the requirement in subsection 11.2(5) is satisfied. Much of the total DIP Loan must be

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used during the 10 days before the Comeback Hearing. These amounts have been carefully scrutinized by the Proposed Monitor and the DIP Lenders, each of which agree that these amounts are required.

57 The DIP Lenders' Charge will not secure obligations incurred prior to the CCAA Proceedings, and the amount proposed to be funded is limited to the amount necessary to continue ordinary course operations prior to the Comeback Hearing. The Applicants submit the DIP Lenders' Charge sought on this application is only for the amount to be accrued in the 10-day period preceding the Comeback Hearing.

58 The Applicants submit that the following factors support approval of the DIP Loan and the DIP Lenders' Charge:

(a) the Applicants are facing an urgent liquidity crisis. The Company will be unable to fund its next payroll or meet its commitments to its suppliers. The only way in which these obligations can be met is through the proposed DIP Loan. Any loss of important contracts or employees would be devastating to the Applicants' business;

(b) the proposed DIP Loan is necessary to maintain the ongoing business and operations of the Applicants;

(c) the proposed DIP Loan will preserve the value and going concern operations of the Company's business by ensuring the continued operations of the key business segments, which is in the best interests of the Applicants and their stakeholders;

(d) the DIP Lenders require the DIP Lenders' Charge to provide the DIP Loan;

(e) the amount of the proposed DIP Loan is appropriate having regard to the Applicants' cash-flow statement and the amount that is proposed to be funded prior to the Comeback Hearing is only the portion necessary to keep the Applicants operating in the ordinary course of business during that time;

(f) the cash flow projections demonstrate that debtor-in-possession financing is urgently required to provide the Applicants with the required liquidity for continued business operations in the ordinary course;

(g) the Proposed Monitor believes the economic terms of the DIP Loan are consistent with comparable CCAA proceedings; and

(h) the Proposed Monitor is supportive of the proposed DIP Loan and creditors of the Applicants will not be prejudiced as a result of its approval.

59 The Applicants submit that approval of the proposed DIP Loan and the DIP Lenders' Charge is appropriate in the circumstances, consistent with the terms of the CCAA, reasonably necessary in order to enable the continued operation of the Applicants' business in the ordinary course, and in the best interests of the Applicants and their stakeholders — including the employees of the Applicants who are intended to be paid in the ordinary course from the proposed DIP Loan.

60 I am satisfied that the DIP Loan and the DIP Lenders' Charge are appropriate and they are approved.

61 The Applicants also seek an Administration Charge in the amount of $300,000 (the "Administration Charge") to secure the professional fees and disbursements of the Proposed Monitor, along with its counsel and the Applicants' counsel, incurred prior to, on, or subsequent to the date of the Initial Order, incurred at their standard rates and charges.

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

63 The Applicants submit that it is appropriate for this Court to exercise its jurisdiction and grant the Administration Charge, given that:

(a) the Applicants' business is highly regulated and subject to numerous statutory and regulatory restrictions and requirements;

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(b) the beneficiaries of the Administration Charge have the requisite knowledge with respect to those regulations and have, and will continue to, contribute to these CCAA Proceedings and assist the Applicants with their business;

(c) each proposed beneficiary of the Administration Charge is performing distinct functions and there is no duplication of roles;

(d) the proposed beneficiaries of the Administration Charge have no retainers, either because none was ever provided or the small retainers have been exhausted;

(e) no amounts from the initial advance under the DIP Loan will be used to pay the proposed beneficiaries of the Administration Charge;

(f) the quantum of the proposed Administration Charge is fair and reasonable;

(g) the proposed DIP Lenders support the Administration Charge; and

(h) the Proposed Monitor is supportive of the Administration Charge.

64 I am satisfied that the Administrative Charge should be granted.

65 The Applicants are seeking a Directors' Charge in the amount of $145,000 (the "Directors' Charge") to secure the indemnity of their directors and officers for liabilities they may incur during the CCAA Proceedings.

66 Section 11.51 of the CCAA affords the Court the jurisdiction to grant the Directors' Charge. This Court has held that the purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protections against liabilities that could be incurred during the restructuring.

67 The Applicants submit it is appropriate in these circumstances for this Court to exercise its jurisdiction and grant the Directors' Charge, given that:

(a) the directors and officers have indicated their continued service and involvement in these CCAA Proceedings is conditional upon the granting of the Directors' Charge;

(b) applicable insurance policies available to the Directors and Officers may provide insufficient coverage, and is contemplated to be cancelled in any event in order to conserve cash;

(c) the Directors' Charge applies only to the extent that the directors and officers do not have coverage under another directors and officers' insurance policy;

(d) the Directors' Charge would only cover obligations and liabilities that the Directors and Officers may incur after the commencement of the CCAA Proceedings and does not cover wilful misconduct or gross negligence;

(e) the Applicants require the active and committed involvement of certain directors and officers in order to continue business operations in the ordinary course;

(f) the amount of the Directors' Charge is reasonable in the circumstances and is limited to the potential exposure during the initial 10-day period; and

(g) the Proposed Monitor is supportive of the Directors' Charge.

68 I am satisfied that the Directors' Charge should be granted.

69 To preserve normal course business operations, the Applicants are seeking authorization in the Initial Order to make certain pre-filing payments, including payments for pre-filing goods or services supplied to the Applicants if, with the consent

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of the Proposed Monitor and the DIP Lenders, such expenses were incurred in the ordinary course of business and consistent with existing policies and procedures.

70 The Applicants submit that they require the continued supply of integral goods and services from their key vendors and service providers during these CCAA proceedings to maintain ordinary course operations. The Applicants' ability to operate their business in the normal course is dependent on their ability to obtain an uninterrupted supply of goods and services. The Applicants will require the consent of the Proposed Monitor and the DIP Lenders in connection with any payments on account of pre-filing obligations. Both the Proposed Monitor and the DIP Lenders are supportive of the relief. In these circumstances, I am satisfied that this specific relief is appropriate in the circumstances.

71 MPXI's AGM was recently rescheduled to July 29, 2022, which is the last date that MPXI is permitted to hold the AGM under applicable corporate and securities laws. I am satisfied it is not in the best interests of the restructuring for the Applicants to hold the AGM as scheduled.

72 This Court has the jurisdiction to order that an annual meeting need not be called until further order of the Court, and Courts have frequently exercised their jurisdiction under the CCAA to permit public debtor companies to postpone their annual meeting pending further order of the Court.

73 The Applicants submit that it would be an unnecessary distraction and unwarranted expense for MPXI to hold an AGM in the circumstances where it is insolvent and the equity value of MPXI is suspect at best. (see: *Sears Canada Inc. et al, Initial Order, Court File No. CV-17-11846-00CL*, July 22, 2017 at para 54; Canwest Global, supra note 56; Cline Mining Corporation (Re), 2014 ONSC 6998(Cline Mining)).

74 I am satisfied that the postponement of the AGM will not prejudice any stakeholder and it is just and appropriate to allow for the postponement of MPXI's AGM.

DISPOSITION

75 In my view, it is appropriate to grant the Initial Order, which has been signed.

Application granted.

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2012 ONSC 2063
Ontario Superior Court of Justice [Commercial List]

Sino-Forest Corp., Re

2012 CarswellOnt 4117, 2012 ONSC 2063, 213 A.C.W.S. (3d) 831

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 Sino-Forest Corporation, Applicant

Morawetz J.

Heard: March 30, 2012
Judgment: April 2, 2012
Docket: CV-12-9667-00CL

Counsel: Robert W. Staley, Kevin Zych, Derek J. Bell, Jonathan Bell, for Applicant
E.A. Sellers, for Sino Forest Corporation Board of Directors
Derrick Tay, Jennifer Stam, for Proposed Monitor, FTI Consulting Canada Inc.
R. J. Chadwick, B. O'Neill, C. Descours, for Ad Hoc Noteholders
M. Starnino, for Counsel in the Ontario Class Action
P. Griffin, for Ernst & Young
Jim Grout, Hugh Craig, for Ontario Securities Commission
Scott Bomhof, for Credit Suisse, TD and the Underwriter Defendants in the Canadian Class Action

Subject: Insolvency; Civil Practice and Procedure; Corporate and Commercial
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.7 Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
Application for initial order and sale process order under Companies' Creditors Arrangement Act (Can.) — Applicant was publicly-listed major integrated forest plantation operator and forest production company with assets predominantly in PRC — Published report stated that applicant was near total fraud and Ponzi scheme — Investigations launched by securities commissions in both Ontario and Hong Kong — Applicant had not been able to release 2011 Q3 results — Applicant cautioned that its historic financial statements and related audit reports should not be relied upon — Application granted — Administration Charge and Director's Charge in requested amount appropriate and necessary — Continued participation of directors desirable.
Table of Authorities
Cases considered by *Morawetz J.*:
ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 45 B.L.R. (4th) 201, 2008 CarswellOnt 2652, 42 C.B.R. (5th) 90 (Ont. S.C.J. [Commercial List]) — referred to
Nortel Networks Corp., Re (2009), 2009 CarswellOnt 4467, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) — referred to
Stelco Inc., Re (2004), 48 C.B.R. (4th) 299, 2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List]) — referred to
Stelco Inc., Re (2004), 2004 CarswellOnt 2936 (Ont. C.A.) — referred to
Stelco Inc., Re (2004), 338 N.R. 196 (note), 2004 CarswellOnt 5200, 2004 CarswellOnt 5201 (S.C.C.) — referred to
Statutes considered:
Bankruptcy Code, 11 U.S.C. 1982

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Chapter 15 — referred to

Business Corporations Act, R.S.O. 1990, c. B.16

Generally — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Generally — referred to

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

Generally — referred to

s. 2(1) "debtor company" — referred to

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

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

Morawetz J.:

Overview

1 The Applicant, Sino-Forest Corporation ("SFC"), moves for an Initial Order and Sale Process Order under the *Companies' Creditors Arrangement Act* ("CCAA").

2 The factual basis for the application is set out in the affidavit of Mr. W. Judson Martin, sworn March 30, 2012. Additional detail has been provided in a pre-filing report provided by the proposed monitor, FTI Consulting Canada Inc. ("FTI").

3 Counsel to SFC advise that, after extensive arm's-length negotiations, SFC has entered into a Support Agreement with a substantial number of its Noteholders, which requires SFC to pursue a CCAA plan as well as a Sale Process.

4 Counsel to SFC advises that the restructuring transactions contemplated by this proceeding are intended to:

(a) separate Sino-Forest's business operations from the problems facing SFC outside the People's Republic of China ("PRC") by transferring the intermediate holding companies that own the "business" and SFC's inter-company claims against its subsidiaries to a newly formed company owned primarily by the Noteholders in compromise of their claims;

(b) effect a Sale Process to determine whether anyone will purchase SFC's business operations for an amount of consideration acceptable to SFC and its Noteholders, with potential excess being made available to Junior Constituents;

(c) create a structure that will enable litigation claims to be pursued for the benefit of SFC's stakeholders; and

(d) allow Junior Constituents some "upside" in the form of a profit participation if Sino-Forest's business operations acquired by the Noteholders are monetized at a profit within seven years from Plan implementation.

5 The relief sought by SFC in this application includes:

(i) a stay of proceedings against SFC, its current or former directors or officers, any of SFC's property, and in respect of certain of SFC's subsidiaries with respect to the note indentures issued by SFC;

(ii) the granting of a Directors' Charge and Administration Charge on certain of SFC's property;

(iii) the approval of the engagement letter of SFC's financial advisor, Houlihan Lokey;

(iv) the relieving of SFC of any obligation to call and hold an annual meeting of shareholders until further order of this court; and

(v) the approval of sales process procedures.

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Facts

6 SFC was formed under the *Business Corporations Act (Ontario)*, R.S.O. 1990, c. B-16, and in 2002 filed articles of continuance under the *Canada Business Corporations Act*, R.S.C. 1985 c. C-44 ("CBCA").

7 Since 1995, SFC has been a publicly-listed company on the TSX. SFC's registered office is in Mississauga, Ontario, and its principal executive office is in Hong Kong.

8 A total of 137 entities make up the Sino-Forest Companies: 67 PRC incorporated entities (with 12 branch companies), 58 BVI incorporated entities, 7 Hong Kong incorporated entities, 2 Canadian entities and 3 entities incorporated in other jurisdictions.

9 SFC currently has three employees. Collectively, the Sino-Forest Companies employ a total of approximately 3,553 employees, with approximately 3,460 located in the PRC and approximately 90 located in Hong Kong.

10 Sino-Forest is a publicly-listed major integrated forest plantation operator and forest productions company, with assets predominantly in the PRC. Its principal businesses include the sale of standing timber and wood logs, the ownership and management of forest plantation trees, and the complementary manufacturing of downstream engineered-wood products.

11 Substantially all of Sino-Forest's sales are generated in the PRC.

12 On June 2, 2011, Muddy Waters LLC published a report (the "MW Report") which, according to submissions made by SFC, alleged, among other things, that SFC is a "near total fraud" and a "ponzi scheme".

13 On the same day that the MW Report was released, the board of directors of SFC appointed an independent committee to investigate the allegations set out in the MW Report.

14 In addition, investigations have been launched by the Ontario Securities Commission ("OSC"), the Hong Kong Securities and Futures Commissions ("HKSFC") and the Royal Canadian Mounted Police ("RCMP").

15 On August 26, 2011, the OSC issued a cease trade order with respect to the securities of SFC and with respect to certain senior management personnel. With the consent of SFC, the cease trade order was extended by subsequent orders of the OSC.

16 SFC and certain of its officers, directors and employees, along with SFC's current and former auditors, technical consultants and various underwriters involved in prior equity and debt offerings, have been named as defendants in eight class action lawsuits in Canada. Additionally, a class action was commenced against SFC and other defendants in the State of New York.

17 The affidavit of Mr. Martin also points out that circumstances are such that SFC has not been able to release Q3 2011 results and these circumstances could also impact SFC's historical financial statements and its ability to obtain an audit for its 2011 fiscal year. On January 10, 2012, SFC cautioned that its historic financial statements and related audit reports should not be relied upon.

18 SFC has issued four series of notes (two senior notes and two convertible notes), with a combined principal amount of approximately $1.8 billion, which remain outstanding and mature at various times between 2013 and 2017. The notes are supported by various guarantees from subsidiaries of SFC, and some are also supported by share pledges from certain of SFC's subsidiaries.

19 Mr. Martin has acknowledged that SFC's failure to file the Q3 results constitutes a default under the note indentures.

20 On January 12, 2012, SFC announced that holders of a majority in principal amount of SFC's senior notes due 2014 and its senior notes due 2017 agreed to waive the default arising from SFC's failure to release the Q3 results on a timely basis.

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21 The waiver agreements expire on the earlier of April 30, 2012 and any earlier termination of the waiver agreements in accordance with their terms. In addition, should SFC fail to file its audited financial statements for its fiscal year ended December 31, 2011 by March 30, 2012, the indenture trustees would be in a position to accelerate and enforce the approximately $1.8 billion in notes.

22 The audited financial statements for the fiscal year that ended on December 31, 2011 have not yet been filed.

23 Mr. Martin also deposes that, although the allegations in the MW Report have not been substantiated, the allegations have had a catastrophic negative impact on Sino-Forest's business activities and there has been a material decline in the market value of SFC's common shares and notes. Further, credit ratings were lowered and ultimately withdrawn.

24 Mr. Martin contends that the various investigations and class action lawsuits have required, and will continue to require, that significant resources be expended by directors, officers and employees of Sino-Forest. This has also affected Sino-Forest's ability to conduct its operations in the normal course of business and the business has effectively been frozen and ground to a halt. In addition, SFC has been unable to secure or renew certain existing onshore banking facilities and has been unable to obtain offshore letters of credit to facilitate its trading business. Further, relationships with the PRC government, local government, and suppliers have become strained, making it increasingly difficult to conduct any business operations.

25 As noted above, following arm's-length negotiations between SFC and the Ad Hoc Noteholders, the parties entered into a Support Agreement which provides that SFC will pursue a CCAA plan on the terms set out in the Support Agreement in order to implement the agreed upon restructuring transaction.

Application of the CCAA

26 SFC is a corporation continued under the CBCA and is a "company" as defined in the CCAA.

27 SFC also takes the position that it is a "debtor company" within the meaning of the CCAA. A "debtor company" includes a company that is insolvent.

28 The issued and outstanding convertible and senior notes of SFC total approximately $1.8 billion. The waiver agreements with respect to SFC's defaults under the senior notes expire on April 30, 2012. Mr. Martin contends that, but for the Support Agreement, which requires SFC to pursue a CCAA plan, the indenture trustees under the notes would be entitled to accelerate and enforce the rights of the Noteholders as soon as April 30, 2012. As such, SFC contends that it is insolvent as it is "reasonably expected to run out of liquidity within a reasonable proximity of time" and would be unable to meet its obligations as they come due or continue as a going concern. See *Stelco Inc., Re*, [2004] O.J. No. 1257 (Ont. S.C.J. [Commercial List]) at para. 26; 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.); and *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, [2008] O.J. No. 1818 (Ont. S.C.J. [Commercial List]) at paras. 12 and 32.

29 For the purposes of this application, I accept that SFC is a "debtor company" within the meaning of the CCAA and is insolvent; and, as a CBCA company that is insolvent with debts in excess of $5 million, SFC meets the statutory requirements for relief under the CCAA.

30 The required financial information, including cash-flow information, has been filed.

31 I am satisfied that it is appropriate to grant SFC relief under the CCAA and to provide for a stay of proceedings. FTI Consulting Canada, Inc., having filed its Consent to act, is appointed Monitor.

The Administration Charge

32 SFC has also requested an Administration Charge. Section 11.52 of the CCAA provides the court with the jurisdiction to grant an Administration Charge in respect of the fees and expenses of FTI and other professionals.

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33 I am satisfied that, in the circumstances of this case, an Administration Charge in the requested amount is appropriate. In making this determination I have taken into account the complexity of the business, the proposed role of the beneficiaries of the charge, whether the quantum of the proposed charge appears to be fair and reasonable, the position of the secured creditors likely to be affected by the charge and the position of FTI.

34 In this case, FTI supports the Administration Charge. Further, it is noted that the Administration Charge does not seek a super priority charge ranking ahead of the secured creditors.

The Directors' Charge

35 SFC also requests a Directors' Charge. Section 11.51 of the CCAA provides the court with the jurisdiction to grant a charge in favour of any director to indemnify the director against obligations and liabilities that they may incur as a director of the company after commencement of the CCAA proceedings.

36 Having reviewed the record, I am satisfied that the Directors' Charge in the requested amount is appropriate and necessary. In making this determination, I have taken into account that the continued participation of directors is desirable and, in this particular case, absent the Directors' Charge, the directors have indicated they will not continue in their participation in the restructuring of SFC. I am also satisfied that the insurance policies currently in place contain exclusions and limitations of coverage which could leave SFC's directors without coverage in certain circumstances.

37 In addition, the Directors' Charge is intended to rank behind the Administration Charge. Further, FTI supports the Directors' Charge and the Directors' Charge does not seek a super priority charge ranking ahead of secured creditors.

38 Based on the above, I am satisfied that the Directors' Charge is fair and reasonable in the circumstances.

The Sale Process

39 SFC has also requested approval for the Sale Process.

40 The CCAA is to be given a broad and liberal interpretation to achieve its objectives and to facilitate the restructuring of an insolvent company. It has been held that a sale by a debtor, which preserves its businesses as a going concern, is consistent with these objectives, and the court has the jurisdiction to authorize such a sale under the CCAA in the absence of a plan. See *Nortel Networks Corp., Re*, [2009] O.J. No. 3169 (Ont. S.C.J. [Commercial List]) at paras. 47-48.

41 The following questions may be considered when determining whether to authorize a sale under the CCAA in the absence of a plan (See *Nortel Networks Corp., Re*, ***supra*** at para. 49):

(i) Is the sale transaction warranted at this time?

(ii) Will the sale benefit the "whole economic community"?

(iii) Do any of the debtors' creditors have a *bone fide* reason to object to the sale of the business?

(iv) Is there a better alternative?

42 Counsel submits that as a result of the uncertainty surrounding SFC, it is impossible to know what an interested third party might be willing to pay for the underlying business operations of SFC once they are separated from the problems facing SFC outside the PRC. Counsel further contends that it is only by running the Sale Process that SFC and the court can determine whether there is an interested party that would be willing to purchase SFC's business operations for an amount of consideration that is acceptable to SFC and its Noteholders while also making excess funds available to Junior Constituents.

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43 Based on a review of the record, the comments of FTI, and the support levels being provided by the Ad Hoc Noteholders Committee, I am satisfied that the aforementioned factors, when considered in the circumstances of this case, justify the approval of the Sale Process at this point in time.

Ancillary Relief

44 I am also of the view that it is impractical for SFC to call and hold its annual general meeting at this time and, therefore, I am of the view that it is appropriate to grant an order relieving SFC of this obligation.

45 SFC seeks to have FTI authorized, as a formal representative of SFC, to apply for recognition of these proceedings, as necessary, in any jurisdiction outside of Canada, including as "foreign main proceedings" in the United States pursuant to Chapter 15 of the U.S. Bankruptcy Code. Counsel contends that such an order is necessary to facilitate the restructuring as, among other things, SFC faces class action lawsuits in New York, the notes are governed by New York law, the indenture trustees are located in New York and certain of the SFC subsidiaries may face proceedings in foreign jurisdictions in respect of certain notes issued by SFC. In my view, this relief is appropriate and is granted.

46 SFC also requests an order approving:

(i) the Financial Advisor Agreement; and

(ii) Houlihan Lokey's retention by SFC under the terms of the agreement.

47 Both SFC and FTI believe that the quantum and nature of the remuneration provided for in the Financial Advisor Agreement is fair and reasonable and that an order approving the Financial Advisor Agreement is appropriate and essential to a successful restructuring of SFC. This request has the support of parties appearing today and, in my view, is appropriate in the circumstances and is therefore granted.

Disposition

48 Accordingly, the relief requested by SFC is granted and orders shall issue substantially in the form of the Initial Order and the Sale Process Order included the Application Record.

Miscellaneous

49 SFC has confirmed that it is bound by the Support Agreement and intends to comply with it.

50 The come-back hearing is scheduled for Friday, April 13, 2012. The orders granted today contain a come-back clause. The orders were made on extremely short notice and for all practical purposes are to be treated as being made *ex parte*.

51 The scheduling of future hearings in this matter shall be coordinated through counsel to the Monitor and the Commercial List Office.

52 Finally, it would be helpful if counsel could also file materials on a USB key in addition to a paper record.

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2009 CarswellOnt 6184
Ontario Superior Court of Justice [Commercial List]

Canwest Global Communications Corp., Re

2009 CarswellOnt 6184, [2009] O.J. No. 4286, 181 A.C.W.S. (3d) 853, 59 C.B.R. (5th) 72

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

Pepall J.

Judgment: October 13, 2009
Docket: CV-09-8241-OOCL

Counsel: Lyndon Barnes, Edward Sellers, Jeremy Dacks for Applicants
Alan Merskey for Special Committee of the Board of Directors
David Byers, Maria Konyukhova for Proposed Monitor, FTI Consulting Canada Inc.
Benjamin Zarnett, Robert Chadwick for Ad Hoc Committee of Noteholders
Edmond Lamek for Asper Family
Peter H. Griffin, Peter J. Osborne for Management Directors, Royal Bank of Canada
Hilary Clarke for Bank of Nova Scotia
Steve Weisz for CIT Business Credit Canada Inc.

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.c Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Miscellaneous
Debtor companies experienced financial problems due to deteriorating economic environment in Canada — Debtor companies took steps to improve cash flow and to strengthen their balance sheets — Economic conditions did not improve nor did financial circumstances of debtor companies — They experienced significant tightening of credit from critical suppliers and trade creditors, reduction of advertising commitments, demands for reduced credit terms by newsprint and printing suppliers, and restrictions on or cancellation of credit cards for certain employees — Application was brought for relief pursuant to Companies' Creditors Arrangement Act — Application granted — Proposed monitor was appointed — Companies qualified as debtor companies under Act — Debtor companies were in default of their obligations — Required statement of projected cash-flow and other financial documents required under s. 11(2) were filed — Stay of proceedings was granted to create stability and allow debtor companies to pursue their restructuring — Partnerships in application carried on operations that were integral and closely interrelated to business of debtor companies — It was just and convenient to grant relief requested with respect to partnerships — Debtor-in-possession financing was approved — Administration charge was granted — Debtor companies' request for authorization to pay pre-filing amounts owed to critical suppliers was granted — Directors' and officers' charge was granted — Key employee retention plans were approved — Extension of time for calling of annual general meeting was granted.
Table of Authorities
Cases considered by *Pepall J.*:

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Cadillac Fairview Inc., Re (1995), 1995 CarswellOnt 36, 30 C.B.R. (3d) 29 **(Ont. Gen. Div. [Commercial List])** — referred to

Calpine Canada Energy Ltd., Re (2006), 19 C.B.R. (5th) 187, 2006 ABQB 153, 2006 CarswellAlta 446 **(Alta. Q.B.)** — referred to

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

Smurfit-Stone Container Canada Inc., Re (2009), 50 C.B.R. (5th) 71, 2009 CarswellOnt 391 **(Ont. S.C.J. [Commercial List])** — referred to

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

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Statutes considered:

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

Generally — referred to

Bankruptcy Code, 11 U.S.C.

Chapter 15 — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Generally — referred to

s. 106(6) — referred to

s. 133(1) — referred to

s. 133(1)(b) — referred to

s. 133(3) — referred to

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

Generally — considered

s. 2 "debtor company" — referred to

s. 11 — considered

s. 11(2) — referred to

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

s. 11.2(1) [en. 1997, c. 12, s. 124] — referred to

s. 11.2(4) [en. 1997, c. 12, s. 124] — considered

s. 11.4 [en. 1997, c. 12, s. 124] — considered

s. 11.4(1) [en. 1997, c. 12, s. 124] — referred to

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s. 11.4(3) [en. 1997, c. 12, s. 124] — considered

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

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

s. 23 — considered

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

s. 137(2) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 38.09 — referred to

APPLICATION for relief pursuant to *Companies' Creditors Arrangement Act.*

***Pepall J.*:**

1 Canwest Global Communications Corp. ("Canwest Global"), its principal operating subsidiary, Canwest Media Inc. ("CMI"), and the other applicants listed on Schedule "A" of the Notice of Application apply for relief pursuant to the *Companies' Creditors Arrangement Act.* [1] The applicants also seek to have the stay of proceedings and other provisions extend to the following partnerships: Canwest Television Limited Partnership ("CTLP"), Fox Sports World Canada Partnership and The National Post Company/La Publication National Post ("The National Post Company"). The businesses operated by the applicants and the aforementioned partnerships include (i) Canwest's free-to-air television broadcast business (ie. the Global Television Network stations); (ii) certain subscription-based specialty television channels that are wholly owned and operated by CTLP; and (iii) the National Post.

2 The Canwest Global enterprise as a whole includes the applicants, the partnerships and Canwest Global's other subsidiaries that are not applicants. The term Canwest will be used to refer to the entire enterprise. The term CMI Entities will be used to refer to the applicants and the three aforementioned partnerships. The following entities are not applicants nor is a stay sought in respect of any of them: the entities in Canwest's newspaper publishing and digital media business in Canada (other than the National Post Company) namely the Canwest Limited Partnership, Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc., and Canwest (Canada) Inc.; the Canadian subscription based specialty television channels acquired from Alliance Atlantis Communications Inc. in August, 2007 which are held jointly with Goldman Sachs Capital Partners and operated by CW Investments Co. and its subsidiaries; and subscription-based specialty television channels which are not wholly owned by CTLP.

3 No one appearing opposed the relief requested.

Backround Facts

4 Canwest is a leading Canadian media company with interests in twelve free-to-air television stations comprising the Global Television Network, subscription-based specialty television channels and newspaper publishing and digital media operations.

5 As of October 1, 2009, Canwest employed the full time equivalent of approximately 7,400 employees around the world. Of that number, the full time equivalent of approximately 1,700 are employed by the CMI Entities, the vast majority of whom work in Canada and 850 of whom work in Ontario.

6 Canwest Global owns 100% of CMI. CMI has direct or indirect ownership interests in all of the other CMI Entities. Ontario is the chief place of business of the CMI Entities.

7 Canwest Global is a public company continued under the *Canada Business Corporations Act* [2]. It has authorized capital consisting of an unlimited number of preference shares, multiple voting shares, subordinate voting shares, and non-voting shares. It is a "constrained-share company" which means that at least 66 2/3% of its voting shares must be beneficially owned

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