by Canadians. The Asper family built the Canwest enterprise and family members hold various classes of shares. In April and May, 2009, corporate decision making was consolidated and streamlined.

8 The CMI Entities generate the majority of their revenue from the sale of advertising (approximately 77% on a consolidated basis). Fuelled by a deteriorating economic environment in Canada and elsewhere, in 2008 and 2009, they experienced a decline in their advertising revenues. This caused problems with cash flow and circumstances were exacerbated by their high fixed operating costs. In response to these conditions, the CMI Entities took steps to improve cash flow and to strengthen their balance sheets. They commenced workforce reductions and cost saving measures, sold certain interests and assets, and engaged in discussions with the CRTC and the Federal government on issues of concern.

9 Economic conditions did not improve nor did the financial circumstances of the CMI Entities. They experienced significant tightening of credit from critical suppliers and trade creditors, a further 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.

10 In February, 2009, CMI breached certain of the financial covenants in its secured credit facility. It subsequently received waivers of the borrowing conditions on six occasions. On March 15, 2009, it failed to make an interest payment of US$30.4 million due on 8% senior subordinated notes. CMI entered into negotiations with an ad hoc committee of the 8% senior subordinated noteholders holding approximately 72% of the notes (the "Ad Hoc Committee"). An agreement was reached wherein CMI and its subsidiary CTLP agreed to issue US$105 million in 12% secured notes to members of the Ad Hoc Committee. At the same time, CMI entered into an agreement with CIT Business Credit Canada Inc. ("CIT") in which CIT agreed to provide a senior secured revolving asset based loan facility of up to $75 million. CMI used the funds generated for operations and to repay amounts owing on the senior credit facility with a syndicate of lenders of which the Bank of Nova Scotia was the administrative agent. These funds were also used to settle related swap obligations.

11 Canwest Global reports its financial results on a consolidated basis. As at May 31, 2009, it had total consolidated assets with a net book value of $4.855 billion and total consolidated liabilities of $5.846 billion. The subsidiaries of Canwest Global that are not applicants or partnerships in this proceeding had short and long term debt totalling $2.742 billion as at May 31, 2009 and the CMI Entities had indebtedness of approximately $954 million. For the 9 months ended May 31, 2009, Canwest Global's consolidated revenues decreased by $272 million or 11% compared to the same period in 2008. In addition, operating income before amortization decreased by $253 million or 47%. It reported a consolidated net loss of $1.578 billion compared to $22 million for the same period in 2008. CMI reported that revenues for the Canadian television operations decreased by $8 million or 4% in the third quarter of 2009 and operating profit was $21 million compared to $39 million in the same period in 2008.

12 The board of directors of Canwest Global struck a special committee of the board ("the Special Committee") with a mandate to explore and consider strategic alternatives in order to maximize value. That committee appointed Thomas Strike, who is the President, Corporate Development and Strategy Implementation of Canwest Global, as Recapitalization Officer and retained Hap Stephen, who is the Chairman and CEO of Stonecrest Capital Inc., as a Restructuring Advisor ("CRA").

13 On September 15, 2009, CMI failed to pay US$30.4 million in interest payments due on the 8% senior subordinated notes.

14 On September 22, 2009, the board of directors of Canwest Global authorized the sale of all of the shares of Ten Network Holdings Limited (Australia) ("Ten Holdings") held by its subsidiary, Canwest Mediaworks Ireland Holdings ("CMIH"). Prior to the sale, the CMI Entities had consolidated indebtedness totalling US$939.9 million pursuant to three facilities. CMI had issued 8% unsecured notes in an aggregate principal amount of US$761,054,211. They were guaranteed by all of the CMI Entities except Canwest Global, and 30109, LLC. CMI had also issued 12% secured notes in an aggregate principal amount of US$94 million. They were guaranteed by the CMI Entities. Amongst others, Canwest's subsidiary, CMIH, was a guarantor of both of these facilities. The 12% notes were secured by first ranking charges against all of the property of CMI, CTLP and the guarantors. In addition, pursuant to a credit agreement dated May 22, 2009 and subsequently amended, CMI has a senior secured revolving asset-based loan facility in the maximum amount of $75 million with CIT Business Credit Canada Inc. ("CIT"). Prior to the sale, the debt amounted to $23.4 million not including certain letters of credit. The facility is guaranteed by CTLP, CMIH and others and secured by first ranking charges against all of the property of CMI, CTLP, CMIH and other

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

guarantors. Significant terms of the credit agreement are described in paragraph 37 of the proposed Monitor's report. Upon a CCAA filing by CMI and commencement of proceedings under Chapter 15 of the Bankruptcy Code, the CIT facility converts into a DIP financing arrangement and increases to a maximum of $100 million.

15 Consents from a majority of the 8% senior subordinated noteholders were necessary to allow the sale of the Ten Holdings shares. A Use of Cash Collateral and Consent Agreement was entered into by CMI, CMIH, certain consenting noteholders and others wherein CMIH was allowed to lend the proceeds of sale to CMI.

16 The sale of CMIH's interest in Ten Holdings was settled on October 1, 2009. Gross proceeds of approximately $634 million were realized. The proceeds were applied to fund general liquidity and operating costs of CMI, pay all amounts owing under the 12% secured notes and all amounts outstanding under the CIT facility except for certain letters of credit in an aggregate face amount of $10.7 million. In addition, a portion of the proceeds was used to reduce the amount outstanding with respect to the 8% senior subordinated notes leaving an outstanding indebtedness thereunder of US$393.25 million.

17 In consideration for the loan provided by CMIH to CMI, CMI issued a secured intercompany note in favour of CMIH in the principal amount of $187.3 million and an unsecured promissory note in the principal amount of $430.6 million. The secured note is subordinated to the CIT facility and is secured by a first ranking charge on the property of CMI and the guarantors. The payment of all amounts owing under the unsecured promissory note are subordinated and postponed in favour of amounts owing under the CIT facility. Canwest Global, CTLP and others have guaranteed the notes. It is contemplated that the debt that is the subject matter of the unsecured note will be compromised.

18 Without the funds advanced under the intercompany notes, the CMI Entities would be unable to meet their liabilities as they come due. The consent of the noteholders to the use of the Ten Holdings proceeds was predicated on the CMI Entities making this application for an Initial Order under the CCAA. Failure to do so and to take certain other steps constitute an event of default under the Use of Cash Collateral and Consent Agreement, the CIT facility and other agreements. The CMI Entities have insufficient funds to satisfy their obligations including those under the intercompany notes and the 8% senior subordinated notes.

19 The stay of proceedings under the CCAA is sought so as to allow the CMI Entities to proceed to develop a plan of arrangement or compromise to implement a consensual "pre-packaged" recapitalization transaction. The CMI Entities and the Ad Hoc Committee of noteholders have agreed on the terms of a going concern recapitalization transaction which is intended to form the basis of the plan. The terms are reflected in a support agreement and term sheet. The recapitalization transaction contemplates amongst other things, a significant reduction of debt and a debt for equity restructuring. The applicants anticipate that a substantial number of the businesses operated by the CMI Entities will continue as going concerns thereby preserving enterprise value for stakeholders and maintaining employment for as many as possible. As mentioned, certain steps designed to implement the recapitalization transaction have already been taken prior to the commencement of these proceedings.

20 CMI has agreed to maintain not more than $2.5 million as cash collateral in a deposit account with the Bank of Nova Scotia to secure cash management obligations owed to BNS. BNS holds first ranking security against those funds and no court ordered charge attaches to the funds in the account.

21 The CMI Entities maintain eleven defined benefit pension plans and four defined contribution pension plans. There is an aggregate solvency deficiency of $13.3 million as at the last valuation date and a wind up deficiency of $32.8 million. There are twelve television collective agreements eleven of which are negotiated with the Communications, Energy and Paperworkers Union of Canada. The Canadian Union of Public Employees negotiated the twelfth television collective agreement. It expires on December 31, 2010. The other collective agreements are in expired status. None of the approximately 250 employees of the National Post Company are unionized. The CMI Entities propose to honour their payroll obligations to their employees, including all pre-filing wages and employee benefits outstanding as at the date of the commencement of the CCAA proceedings and payments in connection with their pension obligations.

Proposed Monitor

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

22 The applicants propose that FTI Consulting Canada Inc. serve as the Monitor in these proceedings. It is clearly qualified to act and has provided the Court with its consent to act. Neither FTI nor any of its representatives have served in any of the capacities prohibited by section of the amendments to the CCAA.

Proposed Order

23 I have reviewed in some detail the history that preceded this application. It culminated in the presentation of the within application and proposed order. Having reviewed the materials and heard submissions, I was satisfied that the relief requested should be granted.

24 This case involves a consideration of the amendments to the CCAA that were proclaimed in force on September 18, 2009. While these were long awaited, in many instances they reflect practices and principles that have been adopted by insolvency practitioners and developed in the jurisprudence and academic writings on the subject of the CCAA. In no way do the amendments change or detract from the underlying purpose of the CCAA, namely to provide debtor companies with the opportunity to extract themselves from financial difficulties notwithstanding insolvency and to reorganize their affairs for the benefit of stakeholders. In my view, the amendments should be interpreted and applied with that objective in mind.

(a) Threshhold Issues

25 Firstly, the applicants qualify as debtor companies under the CCAA. Their chief place of business is in Ontario. The applicants are affiliated debtor companies with total claims against them exceeding $5 million. The CMI Entities are in default of their obligations. CMI does not have the necessary liquidity to make an interest payment in the amount of US$30.4 million that was due on September 15, 2009 and none of the other CMI Entities who are all guarantors are able to make such a payment either. The assets of the CMI Entities are insufficient to discharge all of the liabilities. The CMI Entities are unable to satisfy their debts as they come due and they are insolvent. They are insolvent both under the *Bankruptcy and Insolvency Act*[3] definition and under the more expansive definition of insolvency used in *Stelco Inc., Re*[4]. Absent these CCAA proceedings, the applicants would lack liquidity and would be unable to continue as going concerns. The CMI Entities have acknowledged their insolvency in the affidavit filed in support of the application.

26 Secondly, the required statement of projected cash-flow and other financial documents required under section 11(2) of the CCAA have been filed.

(b) Stay of Proceedings

27 Under section 11 of the CCAA, the Court has broad jurisdiction to grant a stay of proceedings and to give a debtor company a chance to develop a plan of compromise or arrangement. In my view, given the facts outlined, a stay is necessary to create stability and to allow the CMI Entities to pursue their restructuring.

(b) Partnerships and Foreign Subsidiaries

28 The applicants seek to extend the stay of proceedings and other relief to the aforementioned partnerships. The partnerships are intertwined with the applicants' ongoing operations. They own the National Post daily newspaper and Canadian free-to-air television assets and certain of its specialty television channels and some other television assets. These businesses constitute a significant portion of the overall enterprise value of the CMI Entities. The partnerships are also guarantors of the 8% senior subordinated notes.

29 While the CCAA definition of a company does not include a partnership or limited partnership, courts have repeatedly exercised their inherent jurisdiction to extend the scope of CCAA proceedings to encompass them. See for example *Lehndorff General Partner Ltd., Re*[5]; *Smurfit-Stone Container Canada Inc., Re*[6]; and *Calpine Canada Energy Ltd., Re*[7]. In this case, the partnerships carry on operations that are integral and closely interrelated to the business of the applicants. The operations and

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

obligations of the partnerships are so intertwined with those of the applicants that irreparable harm would ensue if the requested stay were not granted. In my view, it is just and convenient to grant the relief requested with respect to the partnerships.

30 Certain applicants are foreign subsidiaries of CMI. Each is a guarantor under the 8% senior subordinated notes, the CIT credit agreement (and therefore the DIP facility), the intercompany notes and is party to the support agreement and the Use of Cash Collateral and Consent Agreement. If the stay of proceedings was not extended to these entities, creditors could seek to enforce their guarantees. I am persuaded that the foreign subsidiary applicants as that term is defined in the affidavit filed are debtor companies within the meaning of section 2 of the CCAA and that I have jurisdiction and ought to grant the order requested as it relates to them. In this regard, I note that they are insolvent and each holds assets in Ontario in that they each maintain funds on deposit at the Bank of Nova Scotia in Toronto. See in this regard *Cadillac Fairview Inc., Re*[8] and *Global Light Telecommunications Inc., Re*[9]

(C) DIP Financing

31 Turning to the DIP financing, the premise underlying approval of DIP financing is that it is a benefit to all stakeholders as it allows the debtors to protect going-concern value while they attempt to devise a plan acceptable to creditors. While in the past, courts relied on inherent jurisdiction to approve the terms of a DIP financing charge, the September 18, 2009 amendments to the CCAA now expressly provide jurisdiction to grant a DIP financing charge. Section 11.2 of the Act states:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> (3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.
>
> (4) In deciding whether to make an order, the court is to consider, among other things,
>
> > (a) the period during which the company is expected to be subject to proceedings under this Act;
> >
> > (b) how the company's business and financial affairs are to be managed during the proceedings;
> >
> > (c) whether the company's management has the confidence of its major creditors;
> >
> > (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
> >
> > (e) the nature and value of the company's property;
> >
> > (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
> >
> > (g) the monitor's report referred to in paragraph 23(1)(b), if any.

32 In light of the language of section 11.2(1), the first issue to consider is whether notice has been given to secured creditors who are likely to be affected by the security or charge. Paragraph 57 of the proposed order affords priority to the DIP charge, the administration charge, the Directors' and Officers' charge and the KERP charge with the following exception: "any validly perfected purchase money security interest in favour of a secured creditor or any statutory encumbrance existing on the date of this order in favour of any person which is a "secured creditor" as defined in the CCAA in respect of any of source deductions from wages, employer health tax, workers compensation, GST/QST, PST payables, vacation pay and banked overtime for

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

employees, and amounts under the Wage Earners' Protection Program that are subject to a super priority claim under the BIA". This provision coupled with the notice that was provided satisfied me that secured creditors either were served or are unaffected by the DIP charge. This approach is both consistent with the legislation and practical.

33 Secondly, the Court must determine that the amount of the DIP is appropriate and required having regard to the debtors' cash-flow statement. The DIP charge is for up to $100 million. Prior to entering into the CIT facility, the CMI Entities sought proposals from other third party lenders for a credit facility that would convert to a DIP facility should the CMI Entities be required to file for protection under the CCAA. The CIT facility was the best proposal submitted. In this case, it is contemplated that implementation of the plan will occur no later than April 15, 2010. The total amount of cash on hand is expected to be down to approximately $10 million by late December, 2009 based on the cash flow forecast. The applicants state that this is an insufficient cushion for an enterprise of this magnitude. The cash-flow statements project the need for the liquidity provided by the DIP facility for the recapitalization transaction to be finalized. The facility is to accommodate additional liquidity requirements during the CCAA proceedings. It will enable the CMI Entities to operate as going concerns while pursuing the implementation and completion of a viable plan and will provide creditors with assurances of same. I also note that the proposed facility is simply a conversion of the pre-existing CIT facility and as such, it is expected that there would be no material prejudice to any of the creditors of the CMI Entities that arises from the granting of the DIP charge. I am persuaded that the amount is appropriate and required.

34 Thirdly, the DIP charge must not and does not secure an obligation that existed before the order was made. The only amount outstanding on the CIT facility is $10.7 in outstanding letters of credit. These letters of credit are secured by existing security and it is proposed that that security rank ahead of the DIP charge.

35 Lastly, I must consider amongst others, the enumerated factors in paragraph 11.2(4) of the Act. I have already addressed some of them. The Management Directors of the applicants as that term is used in the materials filed will continue to manage the CMI Entities during the CCAA proceedings. It would appear that management has the confidence of its major creditors. The CMI Entities have appointed a CRA and a Restructuring Officer to negotiate and implement the recapitalization transaction and the aforementioned directors will continue to manage the CMI Entities during the CCAA proceedings. The DIP facility will enhance the prospects of a completed restructuring. CIT has stated that it will not convert the CIT facility into a DIP facility if the DIP charge is not approved. In its report, the proposed Monitor observes that the ability to borrow funds from a court approved DIP facility secured by the DIP charge is crucial to retain the confidence of the CMI Entities' creditors, employees and suppliers and would enhance the prospects of a viable compromise or arrangement being made. The proposed Monitor is supportive of the DIP facility and charge.

36 For all of these reasons, I was prepared to approve the DIP facility and charge.

(d) Administration Charge

37 While an administration charge was customarily granted by courts to secure the fees and disbursements of the professional advisors who guided a debtor company through the CCAA process, as a result of the amendments to the CCAA, there is now statutory authority to grant such a charge. Section 11.52 of the CCAA states:

> (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> > (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
> >
> > (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
> >
> > (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

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

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

38 I must therefore be convinced that (1) notice has been given to the secured creditors likely to be affected by the charge; (2) the amount is appropriate; and (3) the charge should extend to all of the proposed beneficiaries.

39 As with the DIP charge, the issue relating to notice to affected secured creditors has been addressed appropriately by the applicants. The amount requested is up to $15 million. The beneficiaries of the charge are: the Monitor and its counsel; counsel to the CMI Entities; the financial advisor to the Special Committee and its counsel; counsel to the Management Directors; the CRA; the financial advisor to the Ad Hoc Committee; and RBC Capital Markets and its counsel. The proposed Monitor supports the aforementioned charge and considers it to be required and reasonable in the circumstances in order to preserve the going concern operations of the CMI Entities. The applicants submit that the above-note professionals who have played a necessary and integral role in the restructuring activities to date are necessary to implement the recapitalization transaction.

40 Estimating quantum is an inexact exercise but I am prepared to accept the amount as being appropriate. There has obviously been extensive negotiation by stakeholders and the restructuring is of considerable magnitude and complexity. I was prepared to accept the submissions relating to the administration charge. I have not included any requirement that all of these professionals be required to have their accounts scrutinized and approved by the Court but they should not preclude this possibility.

(e) Critical Suppliers

41 The next issue to consider is the applicants' request for authorization to pay pre-filing amounts owed to critical suppliers. In recognition that one of the purposes of the CCAA is to permit an insolvent corporation to remain in business, typically courts exercised their inherent jurisdiction to grant such authorization and a charge with respect to the provision of essential goods and services. In the recent amendments, Parliament codified the practice of permitting the payment of pre-filing amounts to critical suppliers and the provision of a charge. Specifically, section 11.4 provides:

(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

(4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

42 Under these provisions, the Court must be satisfied that there has been notice to creditors likely to be affected by the charge, the person is a supplier of goods or services to the company, and that the goods or services that are supplied are critical to the company's continued operation. While one might interpret section 11.4 (3) as requiring a charge any time a person is declared to be a critical supplier, in my view, this provision only applies when a court is compelling a person to supply. The charge then provides protection to the unwilling supplier.

43 In this case, no charge is requested and no additional notice is therefore required. Indeed, there is an issue as to whether in the absence of a request for a charge, section 11.4 is even applicable and the Court is left to rely on inherent jurisdiction. The section seems to be primarily directed to the conditions surrounding the granting of a charge to secure critical suppliers. That said, even if it is applicable, I am satisfied that the applicants have met the requirements. The CMI Entities seek authorization to make certain payments to third parties that provide goods and services integral to their business. These include television

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

programming suppliers given the need for continuous and undisturbed flow of programming, newsprint suppliers given the dependency of the National Post on a continuous and uninterrupted supply of newsprint to enable it to publish and on newspaper distributors, and the American Express Corporate Card Program and Central Billed Accounts that are required for CMI Entity employees to perform their job functions. No payment would be made without the consent of the Monitor. I accept that these suppliers are critical in nature. The CMI Entities also seek more general authorization allowing them to pay other suppliers if in the opinion of the CMI Entities, the supplier is critical. Again, no payment would be made without the consent of the Monitor. In addition, again no charge securing any payments is sought. This is not contrary to the language of section 11.4 (1) or to its purpose. The CMI Entities seek the ability to pay other suppliers if in their opinion the supplier is critical to their business and ongoing operations. The order requested is facilitative and practical in nature. The proposed Monitor supports the applicants' request and states that it will work to ensure that payments to suppliers in respect of pre-filing liabilities are minimized. The Monitor is of course an officer of the Court and is always able to seek direction from the Court if necessary. In addition, it will report on any such additional payments when it files its reports for Court approval. In the circumstances outlined, I am prepared to grant the relief requested in this regard.

(f) Directors' and Officers' Charge

44 The applicants also seek a directors' and officers' ("D &O") charge in the amount of $20 million. The proposed charge would rank after the administration charge, the existing CIT security, and the DIP charge. It would rank pari passu with the KERP charge discussed subsequently in this endorsement but postponed in right of payment to the extent of the first $85 million payable under the secured intercompany note.

45 Again, the recent amendments to the CCAA allow for such a charge. Section 11.51 provides that:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> (3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.
>
> (4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

46 I have already addressed the issue of notice to affected secured creditors. I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and no order should be granted if adequate insurance at a reasonable cost could be obtained.

47 The proposed Monitor reports that the amount of $20 million was estimated taking into consideration the existing D&O insurance and the potential liabilities which may attach including certain employee related and tax related obligations. The amount was negotiated with the DIP lender and the Ad Hoc Committee. The order proposed speaks of indemnification relating to the failure of any of the CMI Entities, after the date of the order, to make certain payments. It also excludes gross negligence and wilful misconduct. The D&O insurance provides for $30 million in coverage and $10 million in excess coverage for a total of $40 million. It will expire in a matter of weeks and Canwest Global has been unable to obtain additional or replacement coverage. I am advised that it also extends to others in the Canwest enterprise and not just to the CMI Entities. The directors and senior management are described as highly experienced, fully functional and qualified. The directors have indicated that they cannot continue in the restructuring effort unless the order includes the requested directors' charge.

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

48 The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protection against liabilities they could incur during the restructuring: *General Publishing Co., Re* [10] Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. The proposed Monitor believes that the charge is required and is reasonable in the circumstances and also observes that it will not cover all of the directors' and officers' liabilities in the worst case scenario. In all of these circumstances, I approved the request.

(g) Key Employee Retention Plans

49 Approval of a KERP and a KERP charge are matters of discretion. In this case, the CMI Entities have developed KERPs that are designed to facilitate and encourage the continued participation of certain of the CMI Entities' senior executives and other key employees who are required to guide the CMI Entities through a successful restructuring with a view to preserving enterprise value. There are 20 KERP participants all of whom are described by the applicants as being critical to the successful restructuring of the CMI Entities. Details of the KERPs are outlined in the materials and the proposed Monitor's report. A charge of $5.9 million is requested. The three Management Directors are seasoned executives with extensive experience in the broadcasting and publishing industries. They have played critical roles in the restructuring initiatives taken to date. The applicants state that it is probable that they would consider other employment opportunities if the KERPs were not secured by a KERP charge. The other proposed participants are also described as being crucial to the restructuring and it would be extremely difficult to find replacements for them

50 Significantly in my view, the Monitor who has scrutinized the proposed KERPs and charge is supportive. Furthermore, they have been approved by the Board, the Special Committee, the Human Resources Committee of Canwest Global and the Ad Hoc Committee. The factors enumerated in *Grant Forest Products Inc., Re* [11] have all been met and I am persuaded that the relief in this regard should be granted.

51 The applicants ask that the Confidential Supplement containing unredacted copies of the KERPs that reveal individually identifiable information and compensation information be sealed. Generally speaking, judges are most reluctant to grant sealing orders. An open court and public access are fundamental to our system of justice. Section 137(2) of the *Courts of Justice Act* provides authority to grant a sealing order and the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)* [12] provides guidance on the appropriate legal principles to be applied. Firstly, the Court must be satisfied that the order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk. Secondly, the salutary effects of the order should outweigh its deleterious effects including the effects on the right to free expression which includes the public interest in open and accessible court proceedings.

52 In this case, the unredacted KERPs reveal individually identifiable information including compensation information. Protection of sensitive personal and compensation information the disclosure of which could cause harm to the individuals and to the CMI Entities is an important commercial interest that should be protected. The KERP participants have a reasonable expectation that their personal information would be kept confidential. As to the second branch of the test, the aggregate amount of the KERPs has been disclosed and the individual personal information adds nothing. It seems to me that this second branch of the test has been met. The relief requested is granted.

Annual Meeting

53 The CMI Entities seek an order postponing the annual general meeting of shareholders of Canwest Global. Pursuant to section 133 (1)(b) of the CBCA, a corporation is required to call an annual meeting by no later than February 28, 2010, being six months after the end of its preceding financial year which ended on August 31, 2009. Pursuant to section 133 (3), despite subsection (1), the corporation may apply to the court for an order extending the time for calling an annual meeting.

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

54 CCAA courts have commonly granted extensions of time for the calling of an annual general meeting. In this case, the CMI Entities including Canwest Global are devoting their time to stabilizing business and implementing a plan. Time and resources would be diverted if the time was not extended as requested and the preparation for and the holding of the annual meeting would likely impede the timely and desirable restructuring of the CMI Entities. Under section 106(6) of the CBCA, if directors of a corporation are not elected, the incumbent directors continue. Financial and other information will be available on the proposed Monitor's website. An extension is properly granted.

Other

55 The applicants request authorization to commence Chapter 15 proceedings in the U.S. Continued timely supply of U.S. network and other programming is necessary to preserve going concern value. Commencement of Chapter 15 proceedings to have the CCAA proceedings recognized as "foreign main proceedings" is a prerequisite to the conversion of the CIT facility into the DIP facility. Authorization is granted.

56 Canwest's various corporate and other entities share certain business services. They are seeking to continue to provide and receive inter-company services in the ordinary course during the CCAA proceedings. This is supported by the proposed Monitor and FTI will monitor and report to the Court on matters pertaining to the provision of inter-company services.

57 Section 23 of the amended CCAA now addresses certain duties and functions of the Monitor including the provision of notice of an Initial Order although the Court may order otherwise. Here the financial threshold for notice to creditors has been increased from $1000 to $5000 so as to reduce the burden and cost of such a process. The proceedings will be widely published in the media and the Initial Order is to be posted on the Monitor's website. Other meritorious adjustments were also made to the notice provisions.

58 This is a "pre-packaged" restructuring and as such, stakeholders have negotiated and agreed on the terms of the requested order. That said, not every stakeholder was before me. For this reason, interested parties are reminded that the order includes the usual come back provision. The return date of any motion to vary, rescind or affect the provisions relating to the CIT credit agreement or the CMI DIP must be no later than November 5, 2009.

59 I have obviously not addressed every provision in the order but have attempted to address some key provisions. In support of the requested relief, the applicants filed a factum and the proposed Monitor filed a report. These were most helpful. A factum is required under Rule 38.09 of the Rules of Civil Procedure. Both a factum and a proposed Monitor's report should customarily be filed with a request for an Initial Order under the CCAA.

Conclusion

60 Weak economic conditions and a high debt load do not a happy couple make but clearly many of the stakeholders have been working hard to produce as desirable an outcome as possible in the circumstances. Hopefully the cooperation will persist.

Application granted.

Footnotes

1 R.S.C. 1985, c. C. 36, as amended

2 R.S.C. 1985, c.C.44.

3 R.S.C. 1985, c. B-3, as amended.

4 (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]); leave to appeal refused 2004 CarswellOnt 2936 (Ont. C.A.).

5 (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]).

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

6 [2009] O.J. No. 349 (Ont. S.C.J. [Commercial List]).

7 (2006), 19 C.B.R. (5th) 187 (Alta. Q.B.).

8 (1995), 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List]).

9 (2004), 33 B.C.L.R. (4th) 155 (B.C. S.C.).

10 (2003), 39 C.B.R. (4th) 216 (Ont. S.C.J.).

11 [2009] O.J. No. 3344 (Ont. S.C.J. [Commercial List]). That said, given the nature of the relationship between a board of directors and senior management, it may not always be appropriate to give undue consideration to the principle of business judgment.

12 [2002] 2 S.C.R. 522 (S.C.C.).

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

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

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

Most Recently Cited in: Waygar Capital Inc. v. Quality Rugs of Canada Limited, 2024 ONSC 2486, 2024 CarswellOnt 10363 | (Ont. S.C.J. [Commercial List], Jul 5, 2024)

R.S.C. 1985, c. C-36, s. 11.2

s 11.2

Currency

11.2

11.2(1)Interim financing

On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

11.2(2)Priority — secured creditors

The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

11.2(3)Priority — other orders

The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

11.2(4)Factors to be considered

In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

11.2(5)Additional factor — initial application

When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the

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

court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

Amendment History

1997, c. 12, s. 124; 2005, c. 47, s. 128; 2007, c. 36, s. 65; 2019, c. 29, s. 138

Currency

Federal English Statutes reflect amendments current to May 22, 2024
Federal English Regulations Current to Gazette Vol. 158:9 (April 24, 2024)

End of Document

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

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

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

Most Recently Cited in: Pride Group Holdings Inc. et al. , 2024 ONSC 2026, 2024 CarswellOnt 5431, 2024 A.C.W.S. 1917 | (Ont. S.C.J. [Commercial List], Apr 9, 2024)

R.S.C. 1985, c. C-36, s. 11.4

s 11.4

Currency

11.4

11.4(1)Critical supplier

On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

11.4(2)Obligation to supply

If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

11.4(3)Security or charge in favour of critical supplier

If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

11.4(4)Priority

The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[Editor's Note: S.C. 2000, c. 30, s. 156(2) provides as follows:

> *(2) Subsection (1) [which repealed and replaced s. 11.4 of the Act] applies to proceedings commenced under the Act after September 29, 1997.]*

[Editor's Note: S.C. 2001, c. 34, s. 33(2) provides as follows:

> *(2) Subsection (1) [which repealed and replaced the portion of paragraph 11.4(3)(c) before subparagraph (i) of the Act] applies to proceedings commenced under the Act after September 29, 1997.]*

Amendment History

1997, c. 12, s. 124; 2000, c. 30, s. 156(1); 2001, c. 34, s. 33; 2005, c. 47, s. 128; 2007, c. 36, s. 65

Currency

Federal English Statutes reflect amendments current to May 22, 2024

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

2017 ONSC 4944
Ontario Superior Court of Justice

Index Energy Mills Road Corporation (Re)

2017 CarswellOnt 13040, 2017 ONSC 4944, 283 A.C.W.S. (3d) 694, 51 C.B.R. (6th) 216

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 INDEX ENERGY MILLS ROAD CORPORATION

G.B. Morawetz R.S.J.

Heard: August 16, 2017
Judgment: August 23, 2017
Docket: CV-17-580840-00CL

Counsel: Shane Kukulowicz, for Index Energy Mills Road Corporation
Brian Empey, Melaney Wagner, for Grant Thornton Ltd., Proposed Monitor
Grant Moffat, for National Bank of Canada, as Agent for Syndicate of Lenders
David Bish, for DIP Lender (Index Equity US LLC), Index Equity Sweden AB and Index Residence AB

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 — Maintenance of status quo
Debtor was incorporated to own and operate electrical co-generation facility and encountered difficulties retrofitting its facility, which resulted in energy output being lower and costlier than expected — Debtor was in default on various obligations and in litigation with former contractor — Debtor believed its underlying business was strong, but it required restructuring to inject new funds into its operations — Debtor was in negotiations with proposed DIP lender and creditor to reach agreement on SISP — Debtor brought application for initial order under Companies' Creditors Arrangement Act (CCAA), with appointment of monitor, authorization to borrow $5,000,000 pursuant to DIP facility as interest financing, with maximum of $1.6 million advanced prior to comeback hearing, and sealing order — Application granted — Applicant was debtor company with over $5,000,000 in debts and was entitled to relief under CCAA — Debtor was insolvent and met threshold requirements under s. 10 of CCAA — It was necessary and appropriate to grant stay of proceedings to preserve status quo among stakeholders and allow SISP to unfold — It was necessary and appropriate to allow debtor to pay certain amounts, including pre-filing amounts to suppliers — Monitor requested by debtor consented to appointment and was appropriate — DIP lenders charge satisfied relevant criteria and was integral part of credit facility — Coverage for liability was extended to directors and officers since they did not have insurance — To protect integrity and fairness of process, sealing order was made.
Table of Authorities
Cases considered by *G.B. Morawetz R.S.J.*:
Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) — followed

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

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

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

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

Statutes considered:

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

Generally — referred to

s. 10 — considered

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

s. 11.2(4) [en. 2005, c. 47, s. 128] — considered

s. 11.03 [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

APPLICATION by debtor corporation for initial order staying proceedings and permitting it to restructure.

***G.B. Morawetz R.S.J.*:**

Overview

1 This application is brought by Index Energy Mills Road Corporation ("Index Energy Ajax" or the "Applicant") for an order (the "Initial Order") pursuant to the Companies' Creditors Arrangement Act (the "CCAA").

2 In addition to requesting a stay of proceedings and authorization to carry on business in a manner consistent with the preservation of its property, the Applicant also requests that Grant Thornton Ltd. ("GTL") be appointed as monitor (the "Monitor"); authorization for the Applicant to borrow $5 million pursuant to a credit facility (the "DIP Facility") as interim financing from Index Equity US LLC ("Index US"), in such capacity, (the "DIP Lender") with a maximum amount of $1.6 million being advanced by the DIP Lender prior to the CCAA comeback hearing (the "Comeback Hearing"); and a sealing order with respect to certain confidential information described in the pre-filing report of the Monitor (the "Pre-Filing Report").

3 Index Energy Ajax owns and operates an electrical co-generation facility located in Ajax, Ontario that generates electricity by burning wood waste from the construction industry to produce steam to drive turbine generators (the "Biomass Facility").

4 Index Energy Ajax has encountered difficulties in retrofitting the Biomass Facility and energy output has been lower and operational costs higher than anticipated. Index Energy Ajax has also been engaged in litigation with its former engineering, procurement and construction contractor, HMI Construction Inc. ("HMI"), and has also been forced to deal with numerous liens arising from the construction associated with the Biomass Facility, including a lien claim of approximately $31.3 million registered by HMI (the "HMI Lien Claim"). The sum of $7,053,890 plus HST has been paid into court as an agreed upon holdback (the "Holdback Funds").

5 Index Energy Ajax is in default on various obligations to a syndicate of lenders comprised of National Bank of Canada, Canadian Western Bank, Laurentian Bank of Canada and Business Development Bank of Canada (collectively, the "Syndicate").

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

National Bank of Canada is the agent of the Syndicate (in that capacity, the "Agent"). The Syndicate has made demand for payment of amounts in excess of $45 million. Mr. Rickard Haraldsson, a Director of Index Energy Ajax has stated in his affidavit that Index Energy Ajax is insolvent.

6 The Applicant is of the view that its underlying business remains strong, but that it ultimately requires a restructuring to inject new funds into its operations to address the various deficiencies in the Biomass Facility. Accordingly, Index Energy Ajax states that it requires protection under the CCAA to allow it a period of time to develop and implement a sales and investment solicitation process ("SISP") and to access interim financing on a priority basis to preserve value for all stakeholders and ensure its viability as a going concern.

7 The Applicant has advised that it is currently in negotiations with Index US and the Syndicate to reach agreement on terms of a mutually acceptable SISP, which would include a stalking-horse bid, and to allow further advances under the DIP Facility beyond the initial permitted draw amount.

The Facts

8 The facts have been set out in detail in the affidavit of Rickard Haraldsson (the "Haraldsson Affidavit").

9 Index Energy Ajax was incorporated pursuant to the laws of Ontario on November 7, 2006. Its registered office is located at 170 Mills Road, Ajax, Ontario.

10 Index Energy Ajax is owned by three shareholders. Index Energy Sweden is the owner of 70% of the common shares, R. Andrews Investment Company, LLC ("R. Andrews") is the owner of 10% of the common shares and Jacqueline Kerr ("J. Kerr") is the owner of 20% of the common shares.

11 Index Energy Ajax was incorporated to retrofit the existing energy plant located in Ajax (the "Property") to become the Biomass Facility.

12 Index Energy Ajax entered into a feed-in-tariff with the Ontario Power Authority in 2010 (the "FIT Contract"). In order to retrofit the Biomass Facility, Index Energy Ajax entered into a construction contract with HMI in 2012 (the "EPC Contract"). Since 2015, there has been substantial litigation between Index Energy Ajax and HMI with regard to the HMI Lien Claim.

13 In March 2017 Index Energy Ajax paid an agreed holdback amount of $7,053,890 plus HST (the "Holdback Funds") into court and all subcontractor lien claims were vacated from title to the Property

Index Energy Ajax's Creditors

14 In 2013, Index Energy Ajax entered into a credit agreement (the "Syndicate Credit Agreement") with the Syndicate. Pursuant to the Syndicate Credit Agreement, the Syndicate agreed to provide a non-revolving construction facility in the maximum sum of $60 million and a non-revolving term facility once the retrofit was satisfactorily completed (collectively, the "Syndicate Facilities").

15 Index Energy Ajax has been in default of the Syndicate Agreement since at least May 2015.

16 On January 18, 2017, the Agent sent Index Energy Ajax a demand letter (the "Demand Letter") demanding full payment of all amounts owing to the Syndicate under the Syndicate Facilities, which at that date totaled $49,427,871.94, with interest.

17 Other creditors include Index Residence for an amount in excess of $102 million and trade creditors for an amount in excess of $4 million.

18 The proposed monitor has filed a pre-filing report which details the efforts Index Energy Ajax has taken, with the assistance of the Monitor, to solicit an appropriate DIP financier. After consulting with Index Sweden and Index Residence, one party was selected as a potential DIP lender, however, after protracted negotiations, the parties were not able to come to terms. As

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

an alternative, Index US has agreed to act as DIP Lender with the consent of the Syndicate, on terms more favourable to Index Energy Ajax than those offered by this potential lender. Details are provided in the Pre-Filing Report at paragraphs 46-53 and in the Haraldsson Affidavit at paragraph 94.

19 The DIP Lender has agreed to provide Index Energy Ajax with a DIP Facility in order for Index Energy Ajax to meet its immediate funding requirements.

20 The DIP Facility, extended by the DIP Lender is the maximum amount of $5 million (the "Principal Amount") with a maximum amount of $1.6 million being advanced by the DIP Lender prior to the CCAA Comeback Hearing pursuant to the DIP Credit Agreement.

21 The DIP Facility requires that the DIP Lender receive a court ordered priority charge over the assets of Index Energy Ajax (the "DIP Lender's Charge") which Charge will attach to all of the Index Energy Ajax Property other than the Holdback Funds, to rank ahead of all secured and unsecured creditors of Index Energy Ajax other than Caterpillar Financial Services Limited, who has a specific security interest over a construction loader (the "Loader").

The Law

22 The CCAA applies to a "debtor company" with total claims against it for more than $5 million. I am satisfied that Index Energy Ajax is such a "debtor company" and is entitled to relief under the CCAA.

23 I am also satisfied that Index Energy Ajax is insolvent. Index Energy Ajax's liabilities exceed the current value of its assets and Index Energy Ajax has insufficient funds to pay its debts and has ceased to meet its obligations as they become due.

24 I am also satisfied that Index Energy Ajax has met the other threshold requirements include the filing of cash-flow statements required by Section 10 of the CCAA. Further, since the chief place of business of Index Energy Ajax is Ajax, Ontario, this court has jurisdiction to hear this application.

25 I am also satisfied that it is both necessary and appropriate to grant a stay of proceedings to Index Energy Ajax. The stay is crucial as it preserves the status quo among the stakeholders while Index Energy Ajax stabilizes operations and considers its alternatives. Index Energy Ajax has indicated that it wishes to embark on a SISP and a stay is necessary to allow the time for the SISP to unfold.

26 Index Energy Ajax also seeks authorization to pay pre-filing expenses up to the amount of $450,000 if it is determined, in consultation with the Monitor, to be necessary for the continued operation of the business or preservation of the Property.

27 Index Energy Ajax takes the position that the continued availability of supplies is necessary to ensure a successful SISP and ultimate emergence of a restructured business in some form. Mr. Haraldsson states that a number of the suppliers to Index Energy Ajax are vital to its ongoing operations and it may be necessary for them to be paid all or a portion of the obligations arising prior to the date of the Initial Oder to ensure their survival and their continued ability to provide supplies to Index Energy Ajax.

28 Mr. Haraldsson states that the operation of the Biomass Facility, and the maximizing of value for the stakeholders would be materially prejudiced if the required suppliers ceased to carry on business and ceased to supply.

29 Accordingly, Index Energy Ajax seeks authority to pay such amounts as they are required, including amounts owing prior to the date of the Initial Order, to ensure continued supply and successful restructuring.

30 There is authority to authorize an applicant to pay certain amounts, including pre-filing amounts to suppliers where the applicant is not seeking a charge in respect of critical suppliers (see: *Cinram International Inc., Re*, 2012 ONSC 3767 (Ont. S.C.J. [Commercial List]), at para. 68 of Schedule "C", ("Cinram") and *Smurfit-Stone Container Canada Inc., Re* [2009 CarswellOnt 391 (Ont. S.C.J. [Commercial List])], 2009 CanLII 2493 (at para. 21 ("Smufit-Stone")).

31 In granting this authority, the courts have considered a number of factors, including:

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

(a) whether the goods and services are integral to the business of the applicants;

(b) the applicants dependency on the uninterrupted supply of the goods or services;

(c) the fact that no payments would be made with the consent of the monitor;

(d) the monitor's support and willingness to work with the applicant to ensure that payments to suppliers in respect of pre-filing liabilities are minimized;

(e) whether the applicant has sufficient inventory of the goods on hand to meet its needs; and

(f) the effect on the debtors' ongoing operations and ability to restructure if it were unable to make pre-filing payments to their critical suppliers.

32 In these circumstances, I have been persuaded that it is both necessary and appropriate to provide the requested authorization to Index Energy Ajax.

33 Pursuant to section 11.7 of the CCAA, the court is required to appoint a monitor. GTL has consented to its appointment as Monitor in this case and I am satisfied that it is appropriate to appoint GTL as Monitor.

34 The proposed Initial Order provides for the following charges, in the following priority:

(a) First - the Administration Charge (to the maximum amount of $1 million);

(b) Second — the DIP Lender's Charge; and

(c) Third — the Director's Charge (to the maximum amount of $250,000).

35 The Applicant proposes that the Administration Charge rank in priority to the DIP Lender's Charge. The Applicant proposes that the Charge attach to all of its Property, other than the Holdback Funds, to the extent they are valid claims to rank in priority to all secured and unsecured creditors of the Applicant, other than Caterpillar in relation to the Loader or the proceeds thereof.

36 With respect to the DIP Facility, Index Energy Ajax is seeking approval of a $5 million DIP Facility. The DIP Facility would be secured by a DIP Lender's Charge, which would attach to all of the Applicant's Property, other than the Holdback Funds, to rank ahead of all secured and unsecured creditors of the Applicant, other than Caterpillar in relation to the Loader or the proceeds thereof and subject only to the Administration Charge.

37 As previously noted, the granting of the DIP Lender's Charge is condition precedent under the DIP Credit Agreement and I am satisfied that it is an integral part of the negotiating consideration of the DIP Facility.

38 The court has jurisdiction to grant a priority DIP financing charge pursuant to section 11.2 of the CCAA.

39 Subsection 11.2(4) of the CCAA sets out the factors to be considered by the court in determining whether to grant a priority DIP financing charge. The factors are not exhaustive and in *Canwest Global Communications Corp., Re*, [2009] O.J. No. 4286 (Ont. S.C.J. [Commercial List]) ("Canwest"), Pepall J. (as she then was) stressed the importance of meeting the following three criteria:

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

(b) whether the amount to be granted under the DIP financing is appropriate and required having regard to the debtor's cash-flow statement; and

(c) whether the DIP charge secures an obligation that existed before the order was made (which it should not).

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

40 In this case, I have concluded that the proposed DIP Lender's Charge satisfies the relevant criteria and should be granted. In arriving at this conclusion, I have considered the following:

(i) The secured creditors who would be primed by the proposed DIP Lender's Charge, namely the Syndicate, Index Residence and HMI were given notice of the proposed DIP Lender's Charge. Caterpillar, the secured creditor who will not be primed, was not given notice;

(ii) The maximum amount of the DIP Facility is appropriate based on the anticipated cash requirements, as reflected in the cash-flow projections prepared with the assistance of GTL. The amount advanced under the DIP Facility is limited to $1.6 million until the Comeback Hearing, when more comprehensive service will have occurred;

(iii) Management of Index Energy Ajax's business and affairs will have the benefit of additional oversight and consultation provided by the Monitor;

(iv) It is conceivable that the DIP Facility will enhance the value expected to be available for all stakeholders.

41 The Proposed Initial Order, contemplates the indemnification of the Applicant's directors and officers, the creation of a Directors' Charge and a related stay of proceedings in respect of claims against the directors and officers. The statutory authority for the granting of this relief is found in sections 11.03 and 11.51 of the CCAA.

42 I am satisfied that it is appropriate to extend coverage to the directors and officers and that it is necessary to grant the requested Charge as Index Energy Ajax does not have any directors' and officers' insurance. This relief is accordingly granted.

43 The Pre-Filing Report contains certain appendices which the Applicant regards as sensitive commercial information relating to the process undertaken to obtain DIP financing and the optimization plan of the Applicant. The Applicant is of the view that if publically available, this information could have a material detrimental effect on the Applicant's restructuring. Having considered the guidance provided by the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (S.C.C.), I am satisfied that it is appropriate, in order to protect the integrity and fairness of the process, to grant an order sealing the confidential appendices.

Summary

44 In the result, the Initial Order is granted in the form requested by Index Energy Ajax. The Comeback Hearing has been scheduled before me on Monday, September 11, 2017 at 8:30 a.m.

Application granted.

End of Document

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

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

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

Most Recently Cited in: In the Matter of The Body Shop Canada Limited , 2024 ONSC 3882, 2024 CarswellOnt 10411 I (Ont. S.C.J. [Commercial List], Jul 5, 2024)

R.S.C. 1985, c. C-36, s. 11.52

s 11.52

Currency

11.52

11.52(1)Court may order security or charge to cover certain costs

On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

11.52(2)Priority

The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Amendment History

2005, c. 47, s. 128; 2007, c. 36, s. 66

Currency

Federal English Statutes reflect amendments current to May 22, 2024
Federal English Regulations Current to Gazette Vol. 158:9 (April 24, 2024)

End of Document

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

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

Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): In the Matter of The Body Shop Canada Limited | 2024 ONSC 3882, 2024 CarswellOnt 10411 | (Ont. S.C.J. [Commercial List], Jul 5, 2024)

2010 ONSC 222
Ontario Superior Court of Justice [Commercial List]

Canwest Publishing Inc. / Publications Canwest Inc., Re

2010 CarswellOnt 212, 2010 ONSC 222, [2010] O.J. No. 188, 184 A.C.W.S. (3d) 684, 63 C.B.R. (5th) 115

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 PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

Pepall J.

Judgment: January 18, 2010
Docket: CV-10-8533-00CL

Counsel: Lyndon Barnes, Alex Cobb, Duncan Ault for Applicant, LP Entities
Mario Forte for Special Committee of the Board of Directors
Andrew Kent, Hilary Clarke for Administrative Agent of the Senior Secured Lenders' Syndicate
Peter Griffin for Management Directors
Robin B. Schwill, Natalie Renner for Ad Hoc Committee of 9.25% Senior Subordinated Noteholders
David Byers, Maria Konyukhova for Proposed Monitor, FTI Consulting Canada Inc.

Subject: Insolvency; Corporate and Commercial
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.c Miscellaneous
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.7 Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
CMI, entity of C Corp., obtained protection from creditors in Companies' Creditors Arrangement Act ("CCAA") proceedings in October 2009 — CPI, newspaper entities related to C, sought similar protection — CPI brought application for order pursuant to CCAA and for stay of proceedings and other benefits of order to be extended to CPI — Application granted — CPI was clearly insolvent — Community served by CPI was huge — Granting of order premised on anticipated going concern sale of newspaper business, which would serve interests of CPI and stakeholders and also community at large — Order requested would provide stability and enable CPI to pursue restructuring and preserve enterprise value for stakeholders — Without benefit of stay, CPI would have been required to pay approximately $1.45 billion and would have been unable to continue operating business.
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by creditors
CMI, entity of C Corp., obtained protection from creditors in Companies' Creditors Arrangement Act ("CCAA") proceedings in October 2009 — CPI, newspaper entities related to C, sought similar protection — CPI brought application for order pursuant to

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

CCAA and for stay of proceedings and other benefits of order to be extended to CPI — Application granted — CPI was clearly insolvent — Community served by CPI was huge — Granting of order premised on anticipated going concern sale of newspaper business, which would serve interests of CPI and stakeholders and also community at large — Order requested would provide stability and enable CPI to pursue restructuring and preserve enterprise value for stakeholders — Without benefit of stay, CPI would have been required to pay approximately $1.45 billion and would have been unable to continue operating business — In circumstances, it was appropriate to allow CPI to file and present plan only to secured creditors.

Table of Authorities

Cases considered by *Pepall J.*:

Anvil Range Mining Corp., Re (2002), 2002 CarswellOnt 2254, 34 C.B.R. (4th) 157 (Ont. C.A.) — considered

Anvil Range Mining Corp., Re (2003), 310 N.R. 200 (note), 2003 CarswellOnt 730, 2003 CarswellOnt 731, 180 O.A.C. 399 (note) (S.C.C.) — referred to

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

Grant Forest Products Inc., Re (2009), 2009 CarswellOnt 4699, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) — considered

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

Muscletech Research & Development Inc., Re (2006), 19 C.B.R. (5th) 54, 2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]) — followed

Philip Services Corp., Re (1999), 13 C.B.R. (4th) 159, 1999 CarswellOnt 4673 (Ont. S.C.J. [Commercial List]) — considered

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

Statutes considered:

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

Generally — referred to

s. 4 — considered

s. 5 — considered

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

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

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] — considered

s. 11.4(2) [en. 1997, c. 12, s. 124] — considered

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

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

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

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

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

s. 137(2) — considered

APPLICATION by entity of company already protected under Companies' Creditors Arrangement Act for similar protection.

***Pepall J.*:**

Reasons for Decision

Introduction

1 Canwest Global Communications Corp. ("Canwest Global") is a leading Canadian media company with interests in (i) newspaper publishing and digital media; and (ii) free-to-air television stations and subscription based specialty television channels. Canwest Global, the entities in its Canadian television business (excluding CW Investments Co. and its subsidiaries) and the National Post Company (which prior to October 30, 2009 owned and published the National Post) (collectively, the "CMI Entities"), obtained protection from their creditors in a *Companies' Creditors Arrangement Act* [1] ("CCAA") proceeding on October 6, 2009. [2] Now, the Canwest Global Canadian newspaper entities with the exception of National Post Inc. seek similar protection. Specifically, Canwest Publishing Inc./Publications Canwest Inc. ("CPI"), Canwest Books Inc. ("CBI"), and Canwest (Canada) Inc. ("CCI") apply for an order pursuant to the CCAA. They also seek to have the stay of proceedings and the other benefits of the order extend to Canwest Limited Partnership/Canwest Société en Commandite (the "Limited Partnership"). The Applicants and the Limited Partnership are referred to as the "LP Entities" throughout these reasons. The term "Canwest" will be used to refer to the Canwest enterprise as a whole. It includes the LP Entities and Canwest Global's other subsidiaries which are not applicants in this proceeding.

2 All appearing on this application supported the relief requested with the exception of the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders. That Committee represents certain unsecured creditors whom I will discuss more fully later.

3 I granted the order requested with reasons to follow. These are my reasons.

4 I start with three observations. Firstly, Canwest Global, through its ownership interests in the LP Entities, is the largest publisher of daily English language newspapers in Canada. The LP Entities own and operate 12 daily newspapers across Canada. These newspapers are part of the Canadian heritage and landscape. The oldest, The Gazette, was established in Montreal in 1778. The others are the Vancouver Sun, The Province, the Ottawa Citizen, the Edmonton Journal, the Calgary Herald, The Windsor Star, the Times Colonist, The Star Phoenix, the Leader-Post, the Nanaimo Daily News and the Alberni Valley Times. These newspapers have an estimated average weekly readership that exceeds 4 million. The LP Entities also publish 23 non-daily newspapers and own and operate a number of digital media and online operations. The community served by the LP Entities is huge. In addition, based on August 31, 2009 figures, the LP Entities employ approximately 5,300 employees in Canada with approximately 1,300 of those employees working in Ontario. The granting of the order requested is premised on an anticipated going concern sale of the newspaper business of the LP Entities. This serves not just the interests of the LP Entities and their stakeholders but the Canadian community at large.

5 Secondly, the order requested may contain some shortcomings; it may not be perfect. That said, insolvency proceedings typically involve what is feasible, not what is flawless.

6 Lastly, although the builders of this insolvent business are no doubt unhappy with its fate, gratitude is not misplaced by acknowledging their role in its construction.

Background Facts

(i) Financial Difficulties

7 The LP Entities generate the majority of their revenues through the sale of advertising. In the fiscal year ended August 31, 2009, approximately 72% of the LP Entities' consolidated revenue derived from advertising. The LP Entities have been

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

48 Section 11.4 of the CCAA addresses critical suppliers. It states:

> 11.4(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods and services to the company and that the goods or services that are supplied are critical to the company's continued operation.
>
> (2) If the court declares the person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.
>
> (3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied upon the terms of the order.
>
> (4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

49 Mr. Byers, who is counsel for the Monitor, submits that the court has always had discretion to authorize the payment of critical suppliers and that section 11.4 is not intended to address that issue. Rather, it is intended to respond to a post-filing situation where a debtor company wishes to compel a supplier to supply. In those circumstances, the court may declare a person to be a critical supplier and require the person to supply. If the court chooses to compel a person to supply, it must authorize a charge as security for the supplier. Mr. Barnes, who is counsel for the LP Entities, submits that section 11.4 is not so limited. Section 11.4 (1) gives the court general jurisdiction to declare a supplier to be a "critical supplier" where the supplier provides goods or services that are essential to the ongoing business of the debtor company. The permissive as opposed to mandatory language of section 11.4 (2) supports this interpretation.

50 Section 11.4 is not very clear. As a matter of principle, one would expect the purpose of section 11.4 to be twofold: (i) to codify the authority to permit suppliers who are critical to the continued operation of the company to be paid and (ii) to require the granting of a charge in circumstances where the court is compelling a person to supply. If no charge is proposed to be granted, there is no need to give notice to the secured creditors. I am not certain that the distinction between Mr. Byers and Mr. Barnes' interpretation is of any real significance for the purposes of this case. Either section 11.4(1) does not oust the court's inherent jurisdiction to make provision for the payment of critical suppliers where no charge is requested or it provides authority to the court to declare persons to be critical suppliers. Section 11.4(1) requires the person to be a supplier of goods and services that are critical to the companies' operation but does not impose any additional conditions or limitations.

51 The LP Entities do not seek a charge but ask that they be authorized but not required to make payments for the pre-filing provision of goods and services to certain third parties who are critical and integral to their businesses. This includes newsprint and ink suppliers. The LP Entities are dependent upon a continuous and uninterrupted supply of newsprint and ink and they have insufficient inventory on hand to meet their needs. It also includes newspaper distributors who are required to distribute the newspapers of the LP Entities; American Express whose corporate card programme and accounts are used by LP Entities employees for business related expenses; and royalty fees accrued and owing to content providers for the subscription-based online service provided by FPinfomart.ca, one of the businesses of the LP Entities. The LP Entities believe that it would be damaging to both their ongoing operations and their ability to restructure if they are unable to pay their critical suppliers. I am satisfied that the LP Entities may treat these parties and those described in Mr. Strike's affidavit as critical suppliers but none will be paid without the consent of the Monitor.

(f) Administration Charge and Financial Advisor Charge

52 The Applicants also seek a charge in the amount of $3 million to secure the fees of the Monitor, its counsel, the LP Entities' counsel, the Special Committee's financial advisor and counsel to the Special Committee, the CRA and counsel to the CRA. These are professionals whose services are critical to the successful restructuring of the LP Entities' business. This charge is to

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

rank in priority to all other security interests in the LP Entities' assets, with the exception of purchase money security interests and specific statutory encumbrances as provided for in the proposed order. [13] The LP Entities also request a $10 million charge in favour of the Financial Advisor, RBC Dominion Securities Inc. The Financial Advisor is providing investment banking services to the LP Entities and is essential to the solicitation process. This charge would rank in third place, subsequent to the administration charge and the DIP charge.

53 In the past, an administration charge was granted pursuant to the inherent jurisdiction of the court. Section 11.52 of the amended CCAA now provides statutory jurisdiction to grant an administration charge. Section 11.52 states:

> On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the debtor company is subject to a security or charge - in an amount that the court considers appropriate - in respect of the fees and expenses of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

54 I am satisfied that the issue of notice has been appropriately addressed by the LP Entities. As to whether the amounts are appropriate and whether the charges should extend to the proposed beneficiaries, the section does not contain any specific criteria for a court to consider in its assessment. It seems to me that factors that might be considered would include:

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

(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.

This is not an exhaustive list and no doubt other relevant factors will be developed in the jurisprudence.

55 There is no question that the restructuring of the LP Entities is large and highly complex and it is reasonable to expect extensive involvement by professional advisors. Each of the professionals whose fees are to be secured has played a critical role in the LP Entities restructuring activities to date and each will continue to be integral to the solicitation and restructuring process. Furthermore, there is no unwarranted duplication of roles. As to quantum of both proposed charges, I accept the Applicants' submissions that the business of the LP Entities and the tasks associated with their restructuring are of a magnitude and complexity that justify the amounts. I also take some comfort from the fact that the administrative agent for the LP Secured Lenders has agreed to them. In addition, the Monitor supports the charges requested. The quantum of the administration charge appears to be fair and reasonable. As to the quantum of the charge in favour of the Financial Advisor, it is more unusual as it involves an incentive payment but I note that the Monitor conducted its own due diligence and, as mentioned, is supportive of the request. The quantum reflects an appropriate incentive to secure a desirable alternative offer. Based on all of these factors, I concluded that the two charges should be approved.

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

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

Most Recently Cited in: In the Matter of The Body Shop Canada Limited , 2024 ONSC 3882, 2024 CarswellOnt 10411 | (Ont. S.C.J. [Commercial List], Jul 5, 2024)

R.S.C. 1985, c. C-36, s. 11.51

s 11.51

Currency

11.51

11.51(1)Security or charge relating to director's indemnification

On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

11.51(2)Priority

The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

11.51(3)Restriction — indemnification insurance

The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

11.51(4)Negligence, misconduct or fault

The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

Amendment History

2005, c. 47, s. 128; 2007, c. 36, s. 66

Currency

Federal English Statutes reflect amendments current to May 22, 2024
Federal English Regulations Current to Gazette Vol. 158:9 (April 24, 2024)

End of Document

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

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

Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): Indiva Limited et al. | 2024 ONSC 3691, 2024 CarswellOnt 9626 | (Ont. S.C.J. [Commercial List], Jun 21, 2024)

2014 ONSC 6145
Ontario Superior Court of Justice

U.S. Steel Canada Inc., Re

2014 CarswellOnt 16465, 2014 ONSC 6145, [2014] O.J. No. 5547, 20 C.B.R. (6th) 116, 247 A.C.W.S. (3d) 266

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

In the Matter of a Proposed Plan of Compromise or Arrangement with Respect to U.S. Steel Canada Inc.

H. Wilton-Siegel J.

Heard: October 8, 2014
Judgment: October 8, 2014
Docket: CV-14-10695-00CL

Counsel: R. Paul Steep, Jamey Gage, Heather Meredith for Applicant
Kevin Zych for Monitor
Michael Barrack, Robert Thornton, Grant Moffat for United States Steel Corporation and the proposed DIP Lender
Gale Rubenstein, Robert J. Chadwick, Logan Willis for Her Majesty the Queen in Right of Ontario and the Superintendent of Financial Services (Ontario)
Ken Rosenberg, Lily Harmer for United Steelworkers International Union and the United Steelworkers Union, Local 8782
Sharon L.C. White for United Steelworkers Union, Local 1005
Shayne Kukulowicz, Larry Ellis for City of Hamilton
Steve Weisz, Arjo Shalviri for Caterpillar Financial Services Limited
S. Michael Citak for Various Trade Creditors
Kathryn Esaw, Patrick Corney for Independent Electricity System Operator
Andrew Hatnay for Certain retirees and, for the proposed representative counsel

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency; Employment
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.a Grant and length of stay
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Interim financing
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.7 Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Miscellaneous
Applicant steel company applied for protection under Companies' Creditors Arrangement Act (CCAA) — Initial order was granted — At comeback motion, applicant sought approval of debtor-in-possession (DIP) loan facility; order as to priority of

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

13 First, notice has been given to all of the secured parties likely to be affected, including USS as the only secured creditor having a general security interest over all the assets of the Applicant. Notice has also been given broadly to all PPSA registrants, various governmental agencies, including environmental agencies and taxing authorities, and to all pension and retirement plan beneficiaries pursuant to the process contemplated by the Notice Procedure Order.

14 Second, the maximum amount of the DIP Loan is appropriate based on the anticipated cash flow requirements of the Applicant, as reflected in its cash flow projections for the entire restructuring period, in order to continue to carry on its business during the restructuring period. The cash flows to January 30, 2015 are the subject of a favourable report of the Monitor in its First Report.

15 Third, the Applicant's business will continue to be managed by the Applicant's management with the assistance of the CRO during the restructuring period. The Applicant's board of directors will continue in place, a majority of whom are independent individuals with significant restructuring and steel-industry experience. The Applicant's parent and largest creditor, USS, is providing support to the Applicant by providing the DIP Loan through a subsidiary. Equally important, the existing operational relationships between the Applicant and USS will continue.

16 Fourth, for the reasons set out above, the DIP Loan will assist in, and enhance, the restructuring process.

17 Fifth, the DIP Lender's Charge does not secure any unsecured pre-filing obligations owed to the DIP lender or its affiliates. It will not prejudice any of the other parties having security interests in property of the Applicant. In particular, the DIP Charge will rank behind the Permitted Priority Liens. Although it will rank ahead of any deemed trust contemplated by the *Pension Benefits Act*, R.S.O. 1990, c. P.8, the DIP Loan contemplates continued payment of the pension contributions required under the Pension Agreement dated as of March 31, 2006, as amended by the Amendment to Pension Agreement dated October 31, 2007 (collectively, the "Stelco Pension Agreement") and Ontario Regulation 99/06 under the *Pension Benefits Act* (the "Stelco Regulation").

18 Based on the foregoing, it is appropriate to grant the DIP Charge having the priority contemplated above. As was the case in *Timminco Ltd., Re*, 2012 ONSC 948 (Ont. S.C.J. [Commercial List]) at paras. 46-47, (Ont. C.A.) [*Timminco*], it is not realistic to conceive of the DIP Loan proceeding in the absence of the DIP Lender's Charge receiving the priority being requested on this motion, nor is it realistic to investigate the possibility of third-party debtor-in-possession financing without a similar priority. The proposed DIP Loan, subject to the benefit of the proposed DIP Lender's Charge, is a necessary pre-condition to continuation of these restructuring proceedings under the CCAA and avoidance of a bankruptcy proceeding. I am satisfied that, in order to further these objectives, it is both necessary and appropriate to invoke the doctrine of paramountcy, as contemplated in *Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.) [*Sun Indalex*] such that the provisions of the CCAA will override the provisions of the *Pension Benefits Act* in respect of the priority of the DIP Lender's Charge.

Administration Charge and Director's Charge

19 The Initial Order provides for an Administration Charge (Part I) to the maximum amount of $6.5 million, a Director's Charge to a maximum amount of $39 million, and an Administration Charge (Part II) to a maximum amount of $5.5 million plus $1 million. On this motion, the Applicant seeks to amend the Initial Order, which was granted on an *ex parte* basis, to provide that the Administration Charge (Part I) and the Director's Charge rank ahead of all other Encumbrances in that order, and the Administration Charge (Part II) ranks ahead of all Encumbrances except the prior-ranking court-ordered charges and the Permitted Priority Liens.

20 The Court's authority to grant a super-priority in respect of the fees and expenses to be covered by the Administration Charge (Part I) and the Administration Charge (Part II) is found in s. 11.52 of the CCAA. Similarly, s. 11.51 of the CCAA provides the authority to grant a similar charge in respect of the fees and expenses of the directors to be secured by the Director's Charge.

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

21 As discussed above, the Applicant has fulfilled the notice requirements in respect of those provisions by serving the motion materials for this Comeback Motion to the parties on the service list and by complying with the requirements of the Notice Procedure Order.

22 It is both commonplace and essential to order a super-priority in respect of charges securing professional fees and disbursements and directors' fees and disbursements in restructurings under the CCAA. I concur in the expression of the necessity of such security as a pre-condition to the success of any possible restructuring, as articulated by Morawetz R.S.J. in *Timminco* at para. 66.

23 In *Canwest*, at para. 54, Pepall J. (as she then was) set out a non-exhaustive list of factors to be considered in approving an administration charge. Morawetz R.S.J. addressed those factors in his endorsement respecting the granting of the Initial Order approving the Administration Charge (Part I) and the Administration Charge (Part II). Similarly, Morawetz R.S.J. also addressed the necessity for, and appropriateness of, approving the Director's Charge in such endorsement.

24 In my opinion, the same factors support the super-priority sought by the Applicant for the Administration Charge (Part I), the Director's Charge and the Administration Charge (Part II). Further, I am satisfied that the requested priority of these charges is necessary to further the objectives of these CCAA proceedings and that it is also necessary and appropriate to invoke the doctrine of paramountcy, as contemplated in *Sun Indalex*, such that the provisions of the CCAA will override the provisions of the *Pension Benefits Act* in respect of the priority of these Charges. I am satisfied that the beneficiaries of the Administration Charge (Part I) and the Administration Charge (Part II) will not likely provide services to the Applicant in these CCAA proceedings without the proposed security for their fees and disbursements. I am also satisfied that their participation in the CCAA proceedings is critical to the Applicant's ability to restructure. Similarly, I accept that the Applicant requires the continued involvement of its directors to pursue its restructuring and that such persons, particularly its independent directors, would not likely continue in this role without the benefit of the proposed security due to the personal exposure associated with the Applicant's financial position.

The KERP

25 The Applicant has identified 28 employees in management and operational roles who it considers critical to the success of its restructuring efforts and continued operations as a going concern. It has developed a key employee retention programme (the "KERP") to retain such employees. The KERP provides for a cash retention payment equal to a percentage of each such employee's annual salary, to be paid upon implementation of a plan of arrangement or completion of a sale, upon an outside date, or upon earlier termination of employment without cause.

26 The maximum amount payable under the KERP is $2,570,378. The Applicant proposes to pay such amount to the Monitor to be held in trust pending payment.

27 The Court's jurisdiction to authorize the KERP is found in its general power under s. 11 of the CCAA to make such order as it sees fit in a proceeding under the CCAA. The following factors identified in case law support approval of the KERP in the present circumstances.

28 First, the evidence supports the conclusion that the continued employment of the employees to whom the KERP applies is important for the stability of the business and to assist in the marketing process. The evidence is that these employees perform important roles in the business and cannot easily be replaced. In addition, certain of the employees have performed a central role in the proceedings under the CCAA and the restructuring process to date.

29 Second, the Applicant advises that the employees identified for the KERP have lengthy histories of employment with the Applicant and specialized knowledge that cannot be replaced by the Applicant given the degree of integration between the Applicant and USS. The evidence strongly suggests that, if the employees were to depart the Applicant, it would be very difficult, if not impossible, to have adequate replacements in view of the Applicant's current circumstances.

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

2021 ONSC 1793
Ontario Superior Court of Justice [Commercial List]

Re Just Energy Corp.

2021 CarswellOnt 3724, 2021 ONSC 1793, 331 A.C.W.S. (3d) 418

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 JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSAL ENERGY CORPORATION, JUST ENERGY FINANCE CANADA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., JUST ENERGY FINANCE HOLDING INC., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGYMASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUSTENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC, HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. AND JUST ENERGY (FINANCE) HUNGARY ZRT. (Applicants)

Koehnen J.

Heard: March 9, 2021
Judgment: March 9, 2021
Docket: CV-21-00658423-00CL

Counsel: Marc Wasserman, Michael De Lellis, Jeremy Dacks, Shawn Irving, Waleed Malik, David Rosenblatt, Justine Erickson, for Applicants
Robert Thornton, Rebecca Kennedy, Rachel Bengino, Puya Fesharaki, Paul Bishop, Jim Robinson, for Proposed Monitor
Scott Bomhof, for Term Loan Lenders
Heather Meredith, James D. Gage, for Credit Facility Lenders
Ryan Jacobs, Jane Dietrich, Michael Wunder, for DIP Lender
Howard Gorman, for Shell
Robert Kennedy, Kenneth Kraft, for BP
Paul Bishop, Jim Robinson — Proposed Monitor
Brian Schartz, Mary Kogut Brawley (US counsel), for Applicants
Chad Nichols, David Botter (U.S. counsel), for DIP Lender
Kelli Norfleet (U.S. counsel), for BP

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
Bankruptcy and insolvency

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

62 In *Re AbitibiBowater Inc*,[15] Gascon J.S.C., as he then was, described the analysis as having the court satisfy itself that the benefits of DIP financing to all creditors, shareholders and employees outweigh the potential prejudice to some creditors.

63 Although the amount of the DIP for the initial 10 day stay is high, it is nevertheless necessary to "keep the lights on." Just Energy is required to pay ERCOT US $96.24 million by the end of today (March 9, 2021) or risk losing its licences. It will have to pay a further $54 million by March 14, 2021. Texas represents approximately 47% of Just Energy's margin. Without its Texas licenses, Just Energy would likely collapse.

64 Just Energy's secured creditors do not oppose the DIP. Although they wish to "reserve their rights" on the comeback hearing, I take that to mean that they may wish to make arguments about the existence or the terms of the DIP from the comeback hearing onward. As noted earlier, they would be hard-pressed to challenge any priority given to the DIP for advances during the 10 day period the absence of any opposition today.

65 The DIP lender is a consortium of Just Energy's largest unsecured lenders. For unsecured lenders to offer a DIP of that size to cover a 10 day stay suggests that they believe their prospects for recovery on their unsecured loan are better with a significant 10 day DIP than without.

66 The loan clearly enhances the prospects of a viable compromise or arrangement. Without the loan, Just Energy cannot continue. Regulators will quickly take steps to suspended licenses. Even with the stay of regulatory proceedings, it would be difficult to allow Just Energy to continue to operate if it has no working capital and no means of purchasing power to sell to customers.

67 Just Energy's business is capital-intensive. It requires the expenditure of large amounts of money to buy power and the subsequent receipt of large amounts from the sale of power. That requires substantial liquidity.

68 In addition, the regulated nature of Just Energy's business can lead to unforeseen liquidity demands that may need to be satisfied to ensure the Applicants' ability to operate as a going concern. The added charges by PUCT and ERCOT are prime examples of that. Those charges must be paid within as short a period as 2 business days. While those charges may ultimately be reversed through the dispute resolution process and while additional collateral that has been required may ultimately be released, those steps will take time to work out. Even if the charges are not reversed, it may well be possible to absorb those price shocks if given the time. Financing Just Energy at least through an interim period allows for greater insight into those possibilities.

69 I am also mindful of the need to keep essential suppliers and regulators comfortable. Even though I am staying provincial regulatory proceedings, I do that knowing that I am treading on public policy territory that Parliament and provincial legislatures have chosen to ascribe to specialized bodies with specialized knowledge. A larger 10 day DIP decreases the risk that I am harming the public policy objectives they have been mandated to pursue than would a smaller DIP.

70 The Monitor points out that, after netting out cash receipts and expenditures, approximately $33,000,000 of the DIP will remain at the end of day 10. One could see that as grounds to pare back the DIP by an equivalent amount I do not think it would be appropriate to do. As noted, the Just Energy business is unpredictable. It requires large amount of liquidity and liquidity buffers to take into account unexpected charges from regulators. The regulators who impose those charges do so to protect other interests. As a result, they cannot simply be dismissed. It strikes me that providing a business of this sort with a buffer is appropriate. The Monitor recommends allowing the buffer to continue. None of the other stakeholders object.

71 In the foregoing circumstances, I am satisfied that the DIP should be approved as requested.

D. Should Regulatory Actions be Stayed?

72 Just Energy is subject to a wide variety of provincial and state regulators in Canada and the United States. By way of example, in Canada five different provincial regulators have issued licenses to 16 different Just Energy entities allowing them to sell gas and electricity. Power cannot be sold to new customers or delivered to existing customers without these licenses.

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

73 Concerns about a licensee's solvency can lead provincial regulators to suspend or cancel licenses or impose more onerous terms on license holders. Such steps can include prohibitions on sales to new customers, termination of the ability to sell to existing customers and the forced transfer of customers to other suppliers. This would cause a licensee to instantly lose revenue streams and threaten their long-term viability. Regulators have the power to impose such terms in extremely short order.

74 The filing of this *CCAA* application could lead to such adverse steps by regulators.

75 As part of the proposed Initial Order, the Applicants seek to stay provincial and foreign regulators from, among other things, terminating the licenses granted to any Just Energy entity.

76 With the benefit of the DIP Facility, the Applicants intend to continue paying amounts owing to their contractual counterparties (primarily utilities) in the ordinary course. Just Energy is concerned that even if it continues making such payments, regulators may still try to terminate its licenses or impose other conditions.

77 In my view it is appropriate to stay the conduct of provincial regulators in Canada.

78 Section 11.1 of the CCAA provides:

> 11.1 (1) In this section, regulatory body means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.
>
> (2) Subject to subsection (3), no order made under section 11.02 affects a regulatory body's investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.
>
> (3) On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion
>
> > (a) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and
> >
> > (b) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

79 More plainly put, the *CCAA* automatically stays enforcement of any payments of money ordered by the regulator. It does not, however, automatically stay other steps that a regulator may take against a regulated entity. The court may nevertheless stay such other steps if it is of the view that the failure to stay those other steps means that a viable compromise or arrangement could not be made, provided that the additional stay is not contrary to the public interest.

80 In the circumstances of this case, it is, in my view, appropriate to stay the exercise of other regulatory powers against Just Energy at least for the interim 10 day period.

81 As noted earlier, Just Energy's liquidity crisis arises because of controversial steps taken by PUCT and ERCOT which steps Just Energy is in the process of challenging.

82 It would appear to me to be unjust to take regulatory steps that might shut down entire business when the financial concerns that prompt those steps may turn out to be unjustified if PUCT and ERCOT adjust some or all of the price increases they imposed during the storm. Even if PUCT and ERCOT are unable or unwilling to adjust their price increases, it may be appropriate for regulators to consider whether Just Energy should be shut down because of a temporary liquidity crisis and whether Just Energy should be given a window of opportunity to work out its liquidity crunch. That will obviously need to be measured against the objectives the regulator was created to further. It strikes me, however, that the circumstances of this

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

case warrant at least a 10 day period to allow all parties to assess the issue with the benefit of more reflection than the instant application of a regulatory policy may afford.

83 One of the primary goals of regulators is to ensure that providers of electrical power are paid and that customers receive electrical power on competitive business terms. A stay does not offend these policy objectives. The goal of the stay and the financing associated with it is to be able to continue to pay providers of power to Just Energy and to continue to service Just Energy customers according to their existing contracts. The DIP financing and the charge in favour of essential suppliers will ensure that this remains the case.

84 Section 11.1 (3) of the CCAA allows the court to stay action by regulators on notice to the regulator. Regulators have not been given notice of today's hearing. I am nevertheless inclined to grant the relief sought.

85 Providing notice would have potentially allowed regulators to cancel or suspend Just Energy's licenses before the hearing occurred. If such suspensions or cancellations were ultimately set aside, they would still have caused substantial disruption to the marketplace as a whole and to Just Energy in particular. Just one of the many regulators to whom Just Energy is subject could cause material disruption.

86 Cancellation or suspension of licenses would, for example, mean that upstream suppliers of gas and electricity to Just Energy would have their contracts terminated. Any new power supplier to whom Just Energy's customers would be transferred would have their own source of power supply. That would create more market disruption than would a stay.

87 In this light, the granting a 10 day stay against regulatory conduct is consistent with the remedial purpose of the *CCAA* which is to avoid social and economic losses resulting from the liquidation of an insolvent company. To permit the immediate termination of Just Energy's licenses would not avoid social and economic losses but amplify them by extending them beyond Just Energy to its upstream suppliers.

88 I am also mindful of the admonition of the Supreme Court of Canada in *Century Services* to the effect that general language in the *CCAA* should not be read as being restricted by the availability of more specific orders. Although the *CCAA* contains specific provisions relating to regulatory stays which require notice to the regulator, the general power to make such orders as are appropriate should not, in my view, be restricted by the notice requirement when the relief sought relates only to a 10 day temporary stay, when providing notice could undermine the entire scheme of the *CCAA* and when there are adequate financing mechanisms in place to ensure that the regulators' policy objectives are not undermined during the 10 day period.

89 A foreign regulator is not a "regulatory body" within the plain meaning of section 11.1(1) of the CCAA. As such, foreign regulators do not benefit from the same exemption from the stay as a Canadian regulator. A foreign regulator is therefore presumptively subject to the Stay, with respect to matters that fall within the jurisdiction of the Canadian *CCAA* Court. Canadian courts have held that a foreign regulator is precluded by the stay from taking steps in Canada in relation to matters that are within the *CCAA* court's jurisdiction. [16]

90 This result is consistent with the language of the model CCAA order which stays, among other things, all rights and remedies of any "governmental body or agency"

91 Whether and to what extent the stay should apply to American regulators will be for an American court to determine. To give effect to that stay in the United States, Just Energy intends to commence chapter 15 proceedings immediately for such a determination.

E. Should Supplier Charges and Prefiling Payments be Authorized?

92 Just Energy seeks a charge in favour of what it has referred to as commodity suppliers and ISO Service Providers. Commodity suppliers are those who provide gas and electricity to Just Energy. ISO Service Providers are often commodity suppliers as well but also provide additional services to Just Energy such as working capital and credit support. By way of example, as noted earlier, ERCOT sends invoices to service providers like Just Energy. Those invoices must be paid within

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

two days. In certain cases, Just Energy uses and ISO Service Provider to act as the front facing entity to the regulator. In those cases, ERCOT sends its invoice to the ISO Service Provider who is obliged to pay within two days. The ISO Service Provider then looks to Just Energy for payment but gives Just Energy extended time to pay, say for example 30 days. In effect, the ISO Service Provider is providing Just Energy with working capital and liquidity.

93 Just Energy has received advice to the effect that these arrangements amount to Eligible Financial Contracts under the *CCAA*. This poses a challenge because Eligible Financial Contracts are not subject to the prohibition on the exercise of termination rights under the *CCAA*. [17] Since the parties to Eligible Financial Contracts cannot be prevented from terminating, Just Energy is of the view that counterparties to those contracts must be given incentives to continue to provide power supply and financial services. The proposed incentive takes the form of a charge in favour of those counterparties that continue to provide commodities or services to Just Energy.

94 Shell and BP, the two largest commodity and ISO Service Providers, have already entered into such arrangements. The proposed order would allow any other commodity provider or ISO Service Provider to enter into a similar arrangement with Just Energy and benefit from a similar charge.

95 No one has challenged that analysis for today's purposes and no one opposes the proposed charges. Given the possibility of mischief in the absence of such charges and given that the relief today is sought for only 10 days, in my view it would be preferable to offer the protection of the charges as requested.

96 I note that in certain circumstances, the court can compel commodity and service providers to continue supplying a *CCAA* debtor. I am, however, somewhat reluctant to use those provisions given that the suppliers and service providers in question are part of a highly regulated, interwoven industry. Compelling a supplier in such an industry to continue to provide supply or services may well infringe on the regulators' objective of maintaining a financially sound electrical market. Given the urgency with which the application arose, it is preferable to provide financial incentives to such parties and not risk imperiling the financial stability of other regulated actors by forcing them to supply.

97 This court has already observed in the past that the availability of critical supplier provisions under the *CCAA* does not oust the court's jurisdiction under section 11 to make any other order it considers appropriate. [18]

98 The proposed charges would rank either *pari passu* with the DIP or immediately below it, depending on the nature of the transaction. Although Just Energy's secured creditors were present at today's hearing, they did not object to the proposed charges.

99 Certain prefiling obligations such as tax arrears could result in directors of Just Energy being held personally liable. The company seeks authorization to make prefiling payments with that sort of critical character that are integral to its ability to operate. In the absence of any objection, that relief is granted.

F. Should Set off Rights to Be Stayed?

100 As part of the stay, Just Energy seeks an order precluding financial institutions from exercising any "sweep" remedies under their arrangements with Just Energy.

101 The concern is that the financial institutions would empty Just Energy's accounts by reason of a claim to a right of set off. Exercise of such rights would effectively undermine any reorganization by depriving Just Energy of working capital and thereby impairing its business.

102 Although s. 21 of the CCAA preserves rights of set-off, the Court may defer the exercise of those rights. Section 21 does not exempt set-off rights from the stay. This differs from other provisions of the *CCAA*, which provide that certain rights are immune from the stay. [19] As Savage J.A. of the British Columbia Court of Appeal observed, the broad discretion accorded to the *CCAA* Court to make orders in furtherance of the objectives of the statute must, as a matter of logic, extend to set-off. [20]

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

Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): Indiva Limited et al. | 2024 ONSC 3691, 2024 CarswellOnt 9626 | (Ont. S.C.J. [Commercial List], Jun 21, 2024)

2023 BCSC 1450
British Columbia Supreme Court

Tantalus Labs Ltd. (Re)

2023 CarswellBC 2465, 2023 BCSC 1450, 2023 A.C.W.S. 3384, 9 C.B.R. (7th) 169

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 as Amended

And In the Matter of the Notice of Intention to Make a Proposal of Tantalus Labs Ltd.

Fitzpatrick J., In Chambers

Heard: July 10, 2023
Judgment: July 10, 2023
Docket: Vancouver B230269, Estate No.: 11-2960200

Counsel: W.E.J. Skelly, for Tantalus Labs Ltd.
P.J. Reardon, for Proposal Trustee, Ernst & Young Inc.
E. Watson, for Sungrown Mortgage Corporation
A. Sabzevari, for Canada Revenue Agency

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.2 Orders
Headnote
Bankruptcy and insolvency --- Practice and procedure in courts — Orders — Miscellaneous
Debtor company commenced proposal proceeding under applicable bankruptcy law — Company sought relief related to Canada Revenue Agency (CRA) potentially taking action against company — Company brought application on urgent basis — Order accordingly — Relief sought by company was adjourned to subsequent hearing — Urgency and interests at risk, allowed court to make status quo order — Further hearing was to be scheduled, as soon as possible after subject hearing — Proposal trustee was to supervise any ordinary sales during this time period — Inventory was to be brought before court for consideration and possible approval — This course of action would protect stakeholders including CRA — CRA was stayed from taking actions against company until further hearing.
Table of Authorities
Cases considered by *Fitzpatrick J., In Chambers*:
Arrangement relatif à Rising Phoenix International Inc. (2022), 2022 QCCS 1670, 2022 CarswellQue 7985 (C.S. Que.) — referred to
Canada (Minister of Citizenship and Immigration) v. Vavilov (2019), 2019 SCC 65, 2019 CSC 65, 2019 CarswellNat 7883, 2019 CarswellNat 7884, 59 Admin. L.R. (6th) 1, 441 D.L.R. (4th) 1, 69 Imm. L.R. (4th) 1, [2019] 4 S.C.R. 653, [2019] 4 R.C.S. 653 (S.C.C.) — referred to
Fantasy Construction Ltd., Re (2007), 2007 ABQB 502, 2007 CarswellAlta 1049, 35 C.B.R. (5th) 86, 78 Alta. L.R. (4th) 121, [2007] 12 W.W.R. 327, 66 Admin. L.R. (4th) 247, (sub nom. *Fantasy Construction Ltd. (Bankrupt), Re)* 420 A.R. 120 (Alta. Q.B.) — referred to

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

Mignault-Perrault (Succession) c. Hudson (Ville) (2010), 2010 QCCA 2108, 2010 CarswellQue 12411 (C.A. Que.) — referred to

Peace River Hydro Partners v. Petrowest Corp. (2022), 2022 SCC 41, 2022 CSC 41, 2022 CarswellBC 3142, 2022 CarswellBC 3143, [2022] 12 W.W.R. 371, 34 B.L.R. (6th) 165, 3 C.B.R. (7th) 163, 475 D.L.R. (4th) 1, 68 B.C.L.R. (6th) 1, 29 C.L.R. (5th) 203 (S.C.C.) — referred to

Strickland v. Canada (Attorney General) (2015), 2015 SCC 37, 2015 CSC 37, 2015 CarswellNat 2457, 2015 CarswellNat 2458, 386 D.L.R. (4th) 1, 87 Admin. L.R. (5th) 60, 473 N.R. 328, [2015] 2 S.C.R. 713 (S.C.C.) — referred to

Tantalus Labs Ltd. (Re) (2023), 2023 BCSC 1291, 2023 CarswellBC 2155 (B.C. S.C.) — referred to

Statutes considered:

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

Generally — referred to

s. 69.6(4) [en. 2007, c. 36, s. 37] — referred to

s. 183 — referred to

s. 183(1) — referred to

s. 183(1)(c) — referred to

Cannabis Act, S.C. 2018, c. 16

Generally — referred to

Excise Act, 2001, S.C. 2002, c. 22

Generally — referred to

Regulations considered:

Excise Act, 2001, S.C. 2002, c. 22

Regulations Respecting Excise Licences and Registrations, SOR/2003-115

Generally — referred to

s. 2(2)(c)(e) — referred to

s. 2(2)(c)(i) — referred to

APPLICATION by debtor company for relief on urgent basis related to Canada Revenue Agency (CRA) actions against company.

***Fitzpatrick J., In Chambers*:**

1 This application has been brought before the Court today by the debtor, Tantalus Labs Ltd. ("Tantalus"), on a very urgent basis.

2 On June 28, 2023, Tantalus commenced this proposal proceeding under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [*BIA*]. The present issue concerns certain cannabis inventory owned by Tantalus.

3 In its notice of application filed July 7, 2023, Tantalus applied for a substantial number of orders relating to the Canada Revenue Agency (CRA). The relief sought was crafted toward attempting to stop certain actions by the CRA in relation to the inventory or, perhaps more accurately, requiring CRA to take certain steps that were available to it in relation to the inventory.

Factual Background

4 Tantalus is in the business of producing, distributing and selling retail and wholesale cannabis products in Canada. Its major secured creditor is The Sungrown Mortgage Corporation ("Sungrown") who is owed in excess of $5 million. Sungrown holds registered security against Tantalus' production facilities in Maple Ridge and also, Tantalus' personal property.

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

5 Upon Tantalus filing its notice of intention to make a proposal (NOI), Ernst & Young Inc. was appointed as the Proposal Trustee.

6 I am advised that Tantalus' does not anticipate a going concern outcome arising from these NOI proceedings and that a liquidation is the most realistic scenario. In that vein, Tantalus and Sungrown are hoping to achieve an orderly liquidation of Tantalus' assets within the course of these NOI proceedings.

7 Tantalus' relationship with the CRA arises from certain licences held by Tantalus. Tantalus holds a cannabis licence issued by Health Canada pursuant to the Cannabis Act, S.C. 2018, c. 16 that allows it to cultivate, process and sell cannabis. More particular to the issue before the Court, Tantalus holds a cannabis excise licence issued by the CRA pursuant to the Excise Act, 2001, S.C. 2002, c. 22 (the "Excise License"). The Excise Licence allows Tantalus to sell cannabis inventory pursuant to the provisions of the *Excise Act*.

8 The significant fact that gives rise to this urgent application is that the Excise Licence is due to expire today. More background facts with respect to the CRA will put that circumstance into perspective.

9 Tantalus owes the CRA a large amount of money with respect to excise tax accruing from February 2021. The current amount outstanding is approximately $4.4 million. Tantalus and the CRA have been engaged in various discussions since 2021 regarding payment plans to reduce or eliminate the arrears. The current payment plan agreed to by the parties was accepted on June 12, 2023 and required that Tantalus make its first payment of $35,000 on June 30, 2023 (the "Payment Plan").

10 On June 16, 2023, in conjunction with the Payment Plan, the CRA renewed the Excise License to July 10, 2023. In doing so, the CRA stated to Tantalus that, if it wished to renew the Excise License, it must continue to meet the requirements under the *Excise Act* and the Regulations Respecting Excise Licences and Registrations, SOR/2003-0115 (the "*Regulation*"). One requirement under ss. 2(2)(c)(i) and (e) of the Regulation is that a corporation must:

> . . . have sufficient financial resources to conduct their business in a responsible manner;

11 On June 12, 2023, the Payment Plan was overtaken by the fact that Sungrown made demand for payment and issued a notice of intention to enforce its security against Tantalus' assets.

12 On June 16, 2023, the CRA also advised Tantalus that, in order to demonstrate that it had "sufficient financial resources to conduct [its] business in a responsible manner", Tantalus was required to fully comply with all terms and conditions of the Payment Plan.

13 On June 28, 2023, the NOI was filed and the 30-day stay is now in effect until July 28, 2023. On June 30, 2023, Tantalus did not make the payment to the CRA given the need to maintain the status *quo* with respect to its pre-filing indebtedness under the NOI proceeding.

14 On July 7, 2023, the CRA wrote to Tantalus and advised that it did not meet the requirements for a renewal of the Excise License based on the above "sufficient financial resources" provision in the Regulation. Specifically, the CRA pointed to Tantalus' failure to comply with earlier payment plans and its filing of the NOI as an "Insolvent Person".

15 Tantalus has a large amount of inventory at this time, including substantial bulk inventory. Earlier today, I granted Tantalus' application and approved a sale of that bulk inventory on an urgent basis or "fire sale" basis: *Tantalus Labs Ltd. (Re)*, 2023 BCSC 1291.

16 The remaining difficulty vis-à-vis the CRA arises from the fact that Tantalus still holds a large amount of packaged inventory. I am told that this inventory has an approximate value of $2 million if ordinary course sales could be arranged over the next 30 days or so; however, Tantalus requires an excise license under the *Excise Act* to complete those sales. The failure of the CRA to renew the Excise Licence has the prospect of Tantalus being unable sell that packaged inventory with the result that no recovery will be made from those assets for the benefit of stakeholders.

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

17 Indeed, the CRA has at this point threatened to take steps to attend at the Tantalus' premises after today or have the RCMP do so, in order to destroy the packaged inventory and the stamps that are associated with the cannabis products.

Discussion

18 As a result of this urgent situation, what stands in the balance is Tantalus' intention to preserve the substantial value of its packaged inventory for the benefit of all stakeholders.

19 The relief sought by Tantalus in its notice of application included: declaring the CRA in breach of the stay of proceedings under s. 69.6(4) of the BIA; declaring the CRA is estopped from destroying the cannabis stamps and inventory until July 28, 2023; declaring the Excise License is extended until July 28, 2023; and granting Tantalus the ability to sell its inventory out of the ordinary course of business in the absence of the Excise License but subject to the approval of the Proposal Trustee.

20 I consider the CRA's decision to refuse to renew the Excise License even for a short period of time to be inexplicable, given that the CRA is itself one of the substantial stakeholders who stands to benefit from a proper and orderly disposition of the inventory, given its substantial unsecured debt.

21 Leaving that aside, the CRA has raised substantial issues in its application materials concerning the jurisdictional basis upon which the Court might be prepared to grant the relief sought by Tantalus in the *BIA* proceedings.

22 Tantalus and CRA are both agreed that a more fulsome hearing must be convened to address the matter with proper consideration of the relevant authorities. The parties have referred to a substantial list of authorities in their application materials and throughout the course of their submissions today.

23 Tantalus' counsel has referred to *Re Fantasy Construction Ltd. (Bankrupt)*, 2007 ABQB 502; *Strickland v. Canada (Attorney General)*, 2015 SCC 37; and *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41. Tantalus and Sungrown, who supports Tantalus, have referred me to s. 183 of the BIA.

24 In its application response, the CRA has referred to various authorities, all in aid of the CRA's position that any challenge to its decision not to renew the Excise Licence must be brought before the Federal Court by way of judicial review with regard to the established principles, such as set out in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 SCR 653.

25 Tantalus disagrees that a judicial review is required and states that, in any event, this Court has jurisdiction under the *BIA* to address the matter, at least on an interim basis.

26 Having considered the matter, I am satisfied that Tantalus has established that the granting of relief is appropriate, on an interim basis. I conclude that this Court has the ability to maintain the status *quo* to preserve the substantial value in Tantalus' remaining inventory for the benefit of all stakeholders, including the CRA. The very unusual and extraordinary circumstances that exist at this time dictate that Tantalus be allowed a short period of time in order for it and the CRA to prepare for a more fulsome hearing of the issues.

27 In terms of jurisdiction, I rely on s. 183(1)(c) of the BIA, which provides this court will such jurisdiction in law and in equity that enable me to exercise original, auxiliary and ancillary jurisdiction in bankruptcy matters.

28 In addition, I rely on the comments of the court in Arrangement relatif à Rising Phoenix International Inc. 2022 QCCS 1670 [Rising Phoenix], a decision referred to by CRA. In that case, pursuant to its jurisdiction under the *CCAA*, the Quebec court refused to order federal and Quebec authorities to extend student's residency and study permits or declare that those permits were renewed for a certain period of time. Those students attended at the debtor company's private colleges in Quebec.

29 In *Rising Phoenix*, the federal and Quebec authorities argued that the court did not have jurisdiction to grant *mandamus* orders with respect to the renewal of the student's permits. Justice Collier agreed with this argument but he also stated:

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

> [16] It is only in exceptional cases that the above rule doesn't apply, such as in cases where the public decision-maker enjoys little discretion, has already exercised their discretion, or is unlikely to exercise their discretion reasonably or in a timely fashion. [FN removed] . . .

30 In making the above statement, Justice Collier relied on the decision in Mignault Perrault (Succession de) c. Hudson (Ville d') 2010 QCCA 2108 [Mignault]. I should add that this decision was issued in French and I am relying on an unofficial translation.

31 In *Mignault*, the applicants sought a declaration that they had the right to proceed with demolition of a building and they sought an order of *mandamus* to require the respondent to issue a demolition permit, which had been earlier refused. The trial judge declined to grant the orders sought and the applicants appealed.

32 As to the ability of the court to issue *mandamus* against the public authority, the Quebec appeal court stated:

> [4] The rule of principle applicable here states that it is not for the courts to order public bodies to act in a specific direction since a court of justice cannot, without serious reasons, substitute its decision for that of the body to which the legislator has given a specific mandate. In the case of *mandamus*, the application of this principle means that if it is possible by this remedy to compel the public administration or a court to exercise its jurisdiction, even when it comes to the exercise of a discretionary power, one cannot ask that this discretionary power be exercised in a specific direction.
>
> [5] It is only exceptionally that our court has disregarded this rule and ordered the organization to issue the permit sought even if the issuance of the latter was based on a discretionary power conferred by law. This will be the case if in particular the order for the return of the file to the body is unnecessary or inappropriate because, depending on the facts of the case, the discretion is restricted or it has in fact been exercised, the body has exhausted its jurisdiction, the body is unlikely to act in accordance with the rules of natural justice, or the return will cause undue delay. These are exceptional cases.
>
> [Emphasis added.]

33 I consider that this is an exceptional case for the reasons I have already outlined above. There is considerable urgency and significant interests are at risk. Therefore, I am exercising my jurisdiction under s. 183(1) of the BIA to grant what the parties have described as a status *quo* order. I do so for the following reasons.

34 Firstly, the parties have agreed that, in the face of the CRA's opposition, they will schedule a further court hearing on July 27, 2023, which is within a short period of time. During that short period of time, the Proposal Trustee will supervise any ordinary-course sales, and any out-of-the-ordinary course sales of inventory will be brought before the Court for consideration and possible approval under the *BIA* provisions.

35 Secondly, in addition to Tantalus' evidence, the material before me includes the First Report of the Trustee dated July 7, 2023. In that Report, the Trustee confirms that Tantalus has sufficient cash flow to fund operations through the NOI proceedings, a sale of its assets and a winddown of its operations and to do so in a responsible manner. At para. 53 of the Report, the Trustee rejects the CRA's view that the filing of the NOI means that Tantalus does not meet the requirement in the Regulation to qualify for a renewal of the Excise License:

> . . . It appears to the Proposal Trustee that the Company does maintain sufficient financial resources to conduct its business in a responsible manner. The Proposal Trustee, through discussions with its counsel, is of the opinion that the mere filing of the NOI should not lead the CRA to conclude that the Company does not have sufficient financial resources to conduct its business in a responsible manner.

36 On a preliminary basis, I agree that the cash flow supports that Tantalus is able to operate properly during the course of the NOI proceedings in the sense of meeting its financial obligations.

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

37 Importantly, the cash flow projections provide that the CRA will be paid any excise tax that is required to be paid under the *Excise Act* as a result of any sales of inventory during the NOI proceedings, which includes the 17-day delay that I have mentioned above. Accordingly, there seems to be little, if any, prejudice to the CRA as a result of my order. This does not, of course, mean that the CRA will be paid its prior debt during this period of time; however, that is the situation for all of Tantalus' creditors while these NOI proceedings are underway.

38 Finally, I rely on the fact that any further sales that might be arranged during this short period of time will result in realizing and preserving value from Tantalus' remaining inventory for the benefit of all stakeholders, including the CRA. In that respect, the preservation of value may possibly mean that Tantalus will be in a position to make some payment to its unsecured creditors, including as was owing to the CRA as of the NOI filing.

39 Accordingly, in light of these extraordinary circumstances, including the urgency that I have discussed above, I exercise my discretion and grant the amended relief sought by Tantalus, as follows:

2. The status *quo* in respect of the cannabis excise licence (the "Excise Licence") in the within Notice of Intention to Make Proposal proceedings (the "Proposal Proceedings") shall be maintained and renewed to July 27, 2023;

3. The status *quo* shall include the following:

a. CRA shall be stayed from taking any actions against Tantalus with respect to the cannabis stamps and cannabis inventory;

b. Tantalus shall be permitted to continue selling its cannabis inventory in the ordinary course under the Excise Licence, which Tantalus validly held at the time of the commencement of the Proposal Proceedings.

4. The Proposal Trustee shall approve every sale of the cannabis inventory in the ordinary course of business.

40 The relief in Tantalus' notice of application is adjourned to July 27, 2023 at 10:00 a.m.

Order accordingly; relief adjourned to subsequent hearing.

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

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