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| COURT FILE NUMBER | 2403 15089 |
| COURT | COURT OF KING'S BENCH OF ALBERTA |
| JUDICIAL CENTRE OF | EDMONTON |
| | IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended<br><br>AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF FREEDOM CANNABIS INC. |
| APPLICANT: | FREEDOM CANNABIS INC. |
| DOCUMENT | **BENCH BRIEF OF THE APPLICANT, FREEDOM CANNABIS INC.** |
| ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT | **CHAITONS LLP**<br>5000 Yonge St., Floor 10<br>Toronto, ON M2N 7E9<br>Attn: Harvey Chaiton / Danish Afroz / Laura Culleton<br>Tel: 416-218-1129 / 1137 / 1128<br>Email: harvey@chaitons.com / dafroz@chaitons.com / laurac@chaitons.com<br>File Number: ● |
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## I. OVERVIEW

1. This Brief is submitted on behalf of the Applicant Freedom Cannabis Inc. ("**Freedom**" or the "**Applicant**") in support of an application for an extension of the Initial Stay Period (as defined below) pursuant to an initial order granted August 8, 2024 (the "**Initial Order**") for a further 10 days from the ordered day of expiry.

2. Freedom Cannabis Inc. is a privately owned licensed producer of cannabis products that carries on a multi-faceted business in the Canadian cannabis industry and internationally. The Applicant has been operating in the Canadian legal cannabis section since 2017.

## II. FACTUAL BACKGROUND

3. On August 8, 2024, the Freedom's application for an Initial Order pursuant to the *Companies Creditors Arrangements Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") was heard by this Honourable Court. The Initial Order was granted, imposing a 10-day stay of proceedings from August 8 to 18, 2024 pursuant to Section 11.01 of the CCAA (the "**Initial Stay Period**"), amongst other relief.

4. The current Stay Period expires on August 18, 2024. It is necessary to extend the stay to enable the Applicant and the Monitor to continue stabilize the business of the Applicant and allow for the implementation of a viable plan of compromise under the CCAA.

5. Leading up to the granting of the Initial Order and since, the Monitor and the Applicant have worked diligently and in good faith towards formulating a plan of compromise. Despite the limited time since the granting of the Initial Order, the Applicant, with the assistance of KPMG Inc. in its capacity as Court appointed monitor of these proceedings (the "**Monitor**"), has taken the following steps:

    a. Preparing and analyzing a list of creditors;

    b. Providing the Monitor with access to the books and records of the Applicant;

    c. Continuing to work with the counsel, the Monitor, and the Monitor's counsel generally, and in particular with respect to:

        i. Exploring and considering exit strategies in the context of these proceedings, including contemplation and preparation of a stalking horse bid; and

ii. Preparing cash flow projections and identifying issues with respect to Freeodm's financial conditions; and

d. Continuing the communicate and engage with stakeholders, including its senior secured lender, JL Legacy Inc., employees, contractors, and suppliers;

e. Continuing to make sales and carry on business in the normal course; and

f. Continuing to review the operating expenses, pursuing the collection of accounts receivable, and working towards a negotiated resolution with the Canada Revenue Agency for excise duty arrears.

6. The Monitor's position and cash-flow analysis of the Applicant were set out at the Initial Order application in its Pre-Filing Report (the "**Pre-Filing Report**"). The Pre-Filing report spoke to and recommended the approval of a DIP Facility in a sum not to exceed $3,000,000 (the "**DIP Facility**"), with an initial advance of up to $1,000,000 to assist Freedom during the Initial Stay Period.

7. Pursuant to a First Report of the Monitor, to be filed herein, the Monitor supports and recommends a second DIP advance on the Dip Facility be made to the Applicant in a sum not to exceed $500,000 (the "**Second Advance**").

## III. ISSUES

8. The issue before the Court on this application is whether the Applicant is entitled to an extension of the Stay Period as outlined in the Initial Order.

## IV. LAW AND ARGUMENT

9. It is necessary to extend the Stay Period to allow the Monitor and the Applicant to continue working towards the implementation of a plan of compromise.

10. Section 11.02(2) empowers the Court to extend the stay of proceedings on application following the granting of an initial order:

**Stays, etc. — other than initial application**

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

> **(a)** staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
>
> **(b)** restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> **(c)** prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.
>
> **Burden of proof on application**
>
> **(3)** The court shall not make the order unless
>
> **(a)** the applicant satisfies the court that circumstances exist that make the order appropriate; and
>
> **(b)** in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11. As set out in the First Report of the Monitor, to be filed, the Applicant has acted and is continuing to act in good faith and with due diligence.

12. As noted in *Century Services Inc. v. Canada (Attorney General)*,[1] in determining whether the circumstances exist to make an order appropriate, the Court must be satisfied that the order being sought will advance the purpose of the CCAA proceedings:

> [70] The general language of the CCAA should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising CCAA authority. Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

13. The purpose of CCAA proceedings and the CCAA generally was outlined in *Chef Ready Foods Ltd. v. Hongkong Bank of Canada (1990)*[2] as being:

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[1] *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, at para 70 [**TAB 1**].
[2] *Chef Ready Foods Ltd. v. Hongkong Bank of Canada (1990)*, 1990 CanLII 529 (BC CA) at para 10 [**TAB 2**].

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

14. Time is critical in CCAA proceedings, and Freedom calls upon the Court to exercise is supervisory role in these proceedings to allow adequate time for the Applicant to formulate and implement a plan of compromise under the CCAA, including time to prepare financial information, assess the validity of claimed security interests, and resolve ongoing issues with Canada Revenue Agency.

## V. Approval of the Second Advance under the DIP Facility in a sum not to exceed $500,000

15. Pursuant to section 11.2 of the CCAA, the Court has the authority to approve interim financing and grant a priority charge respecting the interim financing.

16. Subsection 11.2(4) sets out the factors to be considered by the Court in deciding whether to grant an interim financing charge pursuant to section 11.2.[3]

17. In the present matter, the following factors and the support of the cash-flow statements of the Monitor, support approving the Second Advance under the DIP Facility:

    a. the DIP Lender is the primary secured creditor of Freedom, and is supportive of the Second Advance;

    b. the proposed DIP Lender has been cooperating and working with Freedom in its efforts to manage its liabilities and restructure;

    c. there is imminent need for financing in order for Freedom to continue its operations through the Initial Stay Extension; and

[3] CCAA s. 11.2 and 11.2(4) [**TAB 3**].

d. there is need for further financing, particularly in respect Freedom's ongoing inventory purchasing, which is essential to its supply and sale operations.

## VI. RELIEF SOUGHT

18. The Applicant submits that for the reasons outlined above, an order extending the Stay Period through to August 28, 2024, and approval of the Second DIP Advance must be granted to further the purpose of the CCAA and to ensure Freedom is able to make a viable plan of compromise under the CCAA.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 9th day of August, 2024.

**CHAITONS LLP**
**SHAREK LOGAN & VAN LEENEN LLP**

**Lawyers for the Applicant**

**LIST OF AUTHORITIES**

*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60

*Chef Ready Foods Ltd. v. Hongkong Bank of Canada (1990)*, 1990 CanLII 529 (BC CA)

*Companies Creditors Arrangements Act*, R.S.C. 1985, c. C-36

# TAB 1

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

2010 SCC 60, 2010 CSC 60
Supreme Court of Canada

Ted Leroy Trucking [Century Services] Ltd., Re

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

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

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

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

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

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

Subject: Estates and Trusts; Goods and Services Tax (GST); Tax — Miscellaneous; Insolvency
**Related Abridgment Classifications**
Tax
I General principles
I.7 Tax claims in bankruptcy proceedings
Tax
III Goods and Services Tax [GST] and Harmonized Sales Tax [HST]
III.12 Collection and remittance
III.12.b GST/HST held in trust
**Headnote**
Tax --- Goods and Services Tax — Collection and remittance — GST held in trust
Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute

  

58 *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

59 Judicial discretion must of course be exercised in furtherance of the *CCAA's* purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> (*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.), at para. 57, *per* Doherty J.A., dissenting)

60 Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 (B.C. C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134 (B.C. C.A. [In Chambers]), at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9 (Alta. Q.B.), at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J. [Commercial List]), at para. 3; *Air Canada, Re* [2003 CarswellOnt 4967 (Ont. S.C.J. [Commercial List])], 2003 CanLII 49366, at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

61 When large companies encounter difficulty, reorganizations become increasingly complex. *CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA*. Without exhaustively cataloguing the various measures taken under the authority of the *CCAA*, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

62 Perhaps the most creative use of *CCAA* authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (Ont. Gen. Div. [Commercial List]); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96 (B.C. C.A.), aff'g (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The *CCAA* has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see Metcalfe & Mansfield). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the *CCAA's* supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

63 Judicial innovation during *CCAA* proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) what are the sources of a court's authority during *CCAA* proceedings? (2) what are the limits of this authority?

  

64 The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 (B.C. C.A.), at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (Ont. C.A.), paras. 31-33, *per* Blair J.A.).

65 I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

66 Having examined the pertinent parts of the *CCAA* and the recent history of the legislation, I accept that in most instances the issuance of an order during *CCAA* proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

67 The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the matter ..., subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

68 In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, ... make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

69 The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

70 The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

71 It is well-established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C. C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA's* purposes, the ability to make it is within the discretion of a *CCAA* court.

72 The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

  

# TAB 2

**Most Negative Treatment:** Not followed
**Most Recent Not followed:** Norm's Hauling Ltd., Re | 1991 CarswellSask 38, 6 C.B.R. (3d) 16, 91 Sask. R. 210, [1991] 3 W.W.R. 23, [1991] S.J. No. 53, 25 A.C.W.S. (3d) 57 | (Sask. Q.B., Jan 28, 1991)

1990 CarswellBC 394
British Columbia Court of Appeal

Hongkong Bank of Canada v. Chef Ready Foods Ltd.

1990 CarswellBC 394, [1990] B.C.W.L.D. 2518, [1990] B.C.J. No. 2384, [1991] 2 W.W.R. 136, 23 A.C.W.S. (3d) 976, 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84

# RE CHEF READY FOODS LTD. et al.; CHEF READY FOODS LTD. v. HONGKONG BANK OF CANADA

Carrothers, Cumming and Gibbs JJ.A.

Heard: October 12, 1990
Judgment: October 29, 1990
Docket: Doc. Vancouver CA12944

Counsel: *D.I. Knowles* and *H.M. Ferris*, for appellant bank.
*R.H. Sahrmann* and *L.D. Goldberg*, for respondent debtor.

Subject: Corporate and Commercial; 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
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Proceedings subject to stay
Financial institutions
VI Loans and discounts
VI.6 Loans under s. 427 of Bank Act (S.C. 1991, c. 46, formerly s. 178, R.S.C. 1985, c. B-1)
VI.6.a General principles
**Headnote**
Banking and Banks --- Loans and discounts — Loans under s. 178 of Bank Act (R.S.C. 1985, c. B-1, formerly s.88, R.S.C. 1970, c. B-1)
Banking and Banks --- Loans and discounts — Loans under s. 178 of Bank Act (R.S.C. 1985, c. B-1, formerly s. 88, R.S.C. 1970, c. B-1)
Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Application of Act
Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings
Corporations — Arrangements and compromises — Where conflict between Companies' Creditors Arrangement Act and rights of holder of s. 178 Bank Act security, the broad scope of the Companies' Creditors Arrangement Act is to prevail — Appeal dismissed — Bank Act, R.S.C. 1985, c. B-1 — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

 

The bank held a s. 178 *Bank Act* security on the debtor's accounts receivables. The bank demanded payment of the debt. When the debtor failed to pay, the bank appointed an agent under the general assignment of book debts with instructions to the agent to realize upon the accounts. The debtor filed a petition for relief under the *Companies' Creditors Arrangement Act*. An order was granted pursuant to s. 11 of the *Companies' Creditors Arrangement Act* staying realization upon, or other dealings with, any security on the undertaking, property and assets of the debtor. The bank appealed and sought that the stay order be varied to exclude the s. 178 security.

**Held:**

The appeal was dismissed.

The purpose of the *Companies' Creditors Arrangement Act* was to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company was able to continue in business. The statute did not exempt any creditors of a debtor company from its provisions. The *Companies' Creditors Arrangement Act* did not detract from the title held by the bank, it merely postponed the exercise of the right to seize and sell. Nor did the *Bank Act* exclude the operation of the *Companies' Creditors Arrangement Act*.

In contrast to ss. 178 and 179 of the *Bank Act*, which focussed on the competing rights and duties of the borrower and the lender, the *Companies' Creditors Arrangement Act* served the interests of a broad constituency of investors, creditors and employees. To grant a bank holding a s. 178 *Bank Act* security immunity from the *Companies' Creditors Arrangement Act* would render the protection afforded that constituency illusory and frustrate the public policy objectives of the *Companies' Creditors Arrangement Act*. Realization by the bank on its security would destroy the company as a going concern.

**Table of Authorities**

**Cases considered:**

*Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, [1990] 2 W.W.R. 193, 46 B.L.R. 161, 9 P.P.S.A.C. 177, 65 D.L.R. (4th) 361, 104 N.R. 110, 82 Sask. R. 120 — *considered*

*Feifer and Frame Manufacturing Corp., Re*, [1947] Que. K.B. 348, 28 C.B.R. 124 (C.A.) — *referred to*

*Flintoff v. Royal Bank*, [1964] S.C.R. 631, 7 C.B.R. (N.S.) 78, 49 W.W.R. 301, 47 D.L.R. (2d) 141 — *referred to*

*Meridian Developments Inc. v. Toronto-Dominion Bank*, 52 C.B.R. (N.S.) 109, [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 53 A.R. 39 (Q.B.) — *referred to*

*Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*, 72 C.B.R. (N.S.) 20, [1989] 2 W.W.R. 566, 64 Alta. L.R. (2d) 139 (Q.B.) — *referred to*

*Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*, 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363, 34 B.C.L.R. (2d) 122 (C.A.) — *referred to*

*Wynden Canada Inc. v. Gaz Métropolitain Inc.* (1982), 44 C.B.R. (N.S.) 285 (C.S. Que.) [affirmed 45 C.B.R. (N.S.) 11 (Que. C.A.)] — *referred to*

**Statutes considered:**

Bank Act, R.S.C. 1985, c. B-1 —

s. 178, as am. R.S.C. 1985 (3rd Supp.), c. 25, s. 26

s. 179

Bankruptcy Act, R.S.C. 1927, c. 11.

Companies' Creditors Arrangement Act, S.C. 1932-33, c. 36.

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

s. 8

s. 11

Company Act, R.S.B.C. 1979, c. 59.

Limitation of Civil Rights Act, The, R.S.S. 1978, c. L-16 —

  

ss. 19-36

Winding-up Act, R.S.C. 1927, c. 213.

**Words and phrases considered:**

**SECURITY**

In the exercise of their functions under the C.C.A.A. [*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36] Canadian courts have shown themselves partial to a standard of liberal construction which will further the policy objectives.

The trend which emerges from this sampling [of cases] will be given effect here by holding that where the word "security" occurs in the C.C.A.A., it includes a s. 178 security [under the *Bank Act*, R.S.C. 1985, c. B-1] and, where the word creditor occurs, it includes a bank holding s. 178 security. To the extent that there may be conflict between the two statutes, therefore, the broad scope of the C.C.A.A. prevails.

Appeal from order of Maczko J. dated August 30, 1990, granting stay pursuant to s. 11 of *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [reported 4 C.B.R. (3d) 307].

**The judgment of the Court was delivered by *Gibbs J.A.*:**

1 The sole issue on this appeal is whether a stay order made by a chambers Judge under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, is a bar to realization by the Hongkong Bank of Canada (the "bank") on security granted to it under s. 178 of the *Bank Act*, R.S.C. 1985, c. B-1.

2 The facts relevant to resolution of the issue are not in dispute. The respondent Chef Ready Foods Ltd. ("Chef Ready") is in the business of manufacturing and wholesaling fresh and frozen pizza products. The appellant bank provided credit and other banking services to Chef Ready. As part of the security for its indebtedness Chef Ready executed the appropriate documentation and filed the appropriate notices under s. 178 of the *Bank Act*. Accordingly, the bank holds what is commonly referred to as "section 178 security."

3 Chef Ready encountered financial difficulties. On August 22, 1990, following upon some fruitless negotiations, the bank, through its solicitors, demanded payment from Chef Ready. The debt then stood at $365,318.69 with interest accruing thereafter at $150.43 per day. Chef Ready did not pay.

4 On August 27, 1990, the bank commenced proceedings upon debenture security which it held and upon guarantees by the principals of Chef Ready. Also on August 27, 1990, the bank appointed an agent under a general assignment of book debts which it held, with instructions to the agent to realize upon the accounts. In the meantime, on August 23, 1990, so as to qualify under the *Companies' Creditors Arrangement Act* (the "C.C.A.A."), Chef Ready had granted a trust deed to a trustee and issued an unsecured $50 bond. On August 28, 1990, the day after the bank commenced its debenture and guarantee proceedings, Chef Ready filed a petition seeking various forms of relief under the C.C.A.A. On the same day Chef Ready filed an application, ex parte, as they were entitled to do under the C.C.A.A., for an order to be issued that day granting the relief claimed in the petition.

5 The application was heard in chambers in the afternoon of August 28, 1990 and the following day. The bank learned "on the grapevine" of the application and appeared on the hearing and was given standing to make submissions. It also filed affidavit evidence which appears to have been taken into account by the chambers Judge. The affidavit evidence had appended to it, inter alia, the s. 178 security documentation. On August 30, 1990, the chambers Judge granted the order and delivered oral reasons at the end of which he said:

> I therefore conclude that the *Companies' Creditors Arrangement Act* is an overriding statute which gives the court power to stay all proceedings including the right of the bank to collect the accounts receivable.

 

6 The reasons refer specifically to the accounts receivable because the bank was then poised ready to take possession of those accounts and collect the amounts owing. Its right to do so arose under the general assignment of book debts and under cl. 4 of the s. 178 security instrument:

> 4. If the Customer shall sell the property or any part thereof, the proceeds of any such sale, including cash, bills, notes, evidence of title, and securities, and the indebtedness of any purchaser in connection with such sales shall be the property of the Bank to be forthwith paid or transferred to the Bank, and until so paid or transferred to be held by the Customer on behalf of and in trust for the Bank. Execution by the Customer and acceptance by the Bank of an assignment of book debts shall be deemed to be in furtherance of this declaration and not an acknowledgement by the Bank of any right or title on the part of the Customer to such book debts.

7 The formal order made by the chambers Judge contains a paragraph which stays realization upon or otherwise dealing with any securing on "the undertaking, property and assets" of Chef Ready:

> THIS COURT FURTHER ORDERS THAT all proceedings taken or that might be taken by any of the Petitioners' creditors or any other person, firm or corporation under the *Bankruptcy Act* (Canada) or the *Winding-up Act* (Canada) shall be stayed until further Order of this Court upon 2 days notice to the Petitioners and that further proceedings in any action, suit or proceeding commenced by any person, firm or corporation against any of the Petitioners be stayed until the further Order of this Court upon 2 days notice to the Petitioners, that no action, suit or other proceeding may be proceeded with or commenced against any of the Petitioners by any person, firm or corporation except with leave of this Court upon 2 days notice to the Petitioners and subject to such terms as this Court may impose and that *the right of any person, firm or corporation to realize upon or otherwise deal with any property, right or security held by that person, firm or corporation on the undertaking, property and assets of the Petitioners be and the same is postponed*.

[Emphasis added.]

8 The jurisdiction in the Court to make such a stay order is found in s. 11 of the C.C.A.A.:

> 11. Notwithstanding anything in the *Bankruptcy Act* or the *Winding-up Act*, whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,
>
> (a) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy Act* and the *Winding-up Act* or either of them;
>
> (b) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and
>
> (c) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

9 The question of whether a step, not involving any court or litigation process, taken to realize upon the accounts receivable is a "suit, action or other proceeding ... against the company" is not before the Court on this appeal. The bank does not put its case forward on that footing. Its contention is more general in nature. It is that s. 178 security is beyond the reach of the C.C.A.A.; put another way, that whatever the scope of the C.C.A.A., it does not go so far as to impede or qualify, or give jurisdiction to make orders which will impede or qualify, the rights of realization of a holder of s. 178 security. Consistent with that position, by way of relief on the appeal the bank asks only that the stay order be varied to free up the s. 178 security:

> **(Nature of Order Sought)**
>
> An order that the appeal of the Appellant be allowed and an order be made the Order of the Judge in the Court below be set aside insofar as it restrains the Appellant from exercising its rights under its section 178 security ...

  

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

11 There is nothing in the C.C.A.A. which exempts any creditors of a debtor company from its provisions. The all-encompassing scope of the Act qua creditors is even underscored by s. 8, which negates any contracting out provisions in a security instrument. And Chef Ready emphasizes the obvious, that if it had been intended that s. 178 security or the holders of s. 178 security be exempt from the C.C.A.A. it would have been a simple matter to say so. But that does not dispose of the issue. There is the *Bank Act* to consider.

12 There is nothing in the Loans and Security division of the *Bank Act* either, where s. 178 is found, which specifically excludes direct or indirect impact by the C.C.A.A. Nonetheless, the bank's position, in essence, is that there is a notional cordon sanitaire around s. 178 and other sections associated with it such that neither the C.C.A.A. nor orders made under it can penetrate. In support of its position, the bank relies heavily upon the recent unanimous judgment of the Supreme Court of Canada in *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, [1990] 2 W.W.R. 193, 46 B.L.R. 161, 9 P.P.S.A.C. 177, 65 D.L.R. (4th) 361, 104 N.R. 110, 82 Sask. R. 120, and to a lesser degree upon an earlier unanimous Supreme Court of Canada judgment in *Flintoft v. Royal Bank*, [1964] S.C.R. 631, 7 C.B.R. (N.S.) 78, 49 W.W.R. 301, 47 D.L.R. (2d) 141.

13 The principal issue in *Hall* was whether ss. 19 to 36 of the Saskatchewan *Limitation of Civil Rights Act*, R.S.S. 1978, c. L-16 applied to a security taken under ss. 178 and 179 of the *Bank Act*. The Court held that it was beyond the competence of the Saskatchewan Legislature "to superadd conditions governing realization over and above those found within the confines of the *Bank Act*" (p. 154 [S.C.R.]). In the course of arriving at its decision, the Court considered the property interest acquired by a bank under s. 178 security, the legislative history leading up to the present ss. 178 and 179, the purposes intended to be achieved by the legislation, and the rights of a bank holding s. 178 security. All of those considerations have application to the issue here, and the judgment merits reading in full to appreciate the relevance of all of its parts. However, a few extracts will serve to illustrate the bank's reliance:

14 Page 134:

> ... a bank taking security under section 178 effectively acquires legal title to the borrower's interest in the present and after-acquired property assigned to it by the borrower ...

15 Pages 139-140:

> ... the Parliament of Canada has enacted these sections not so much for the benefit of banks as for the benefit of manufacturers.
>
> . . . . .
>
> These sections of the *Bank Act* have become an integral part of bank lending activities and are a means of providing support in many fields of endeavour to an extent which otherwise would not be practical from the standpoint of prudent banking ...

16 Page 143:

> ... The bank obtains and may assert its right to the goods and their proceeds against the world, except as only Parliament itself may reduce or modify these rights.

  

17 Pages 143-144:

> the rights, duties and obligations of creditor and debtor are to be determined solely by reference to the *Bank Act*.

18 Page 152:

> The essence of that regime [ss. 178 and 179], it hardly needs repeating, is to assign to the bank, on the taking out of the security, right and title to the goods in question, and to confer, on default of the debtor, an *immediate* right to seize and sell those goods.

19 Page 154:

> [I]t was Parliament's manifest legislative purpose that the sole realization scheme applicable to the s. 178 security interest be that contained in the *Bank Act* itself.

20 Page 155:

> Parliament, under its power to regulate banking, has enacted a complete code that at once defines and provides for the realization of a security interest.

21 It is the insular theme which runs through these propositions that the bank seizes upon to support its claim for immunity. But, it must be asked, in what respect does the preservation of the status quo qua creditors under the C.C.A.A. for a temporary period infringe upon the rights of the bank under ss. 178 and 179? It does not detract from the bank's title; it does not distort the mechanics of realization of the security in the sense of the steps to be taken; it does not prevent immediate crystallization of *the right* to seize and sell; it does not breach the "complete code." All that it does is postpone the exercise of the right to seize and sell. And here the bank had already allowed at least 5 days to expire between the accrual of the right and the taking of a step to exercise. It follows from this analysis that there is no apparent bar in the *Bank Act* to the application of the C.C.A.A. to s. 178 security and the bank's rights in respect of it.

22 Having regard to the broad public policy objectives of the C.C.A.A., there is good reason why s. 178 security should not be excluded from its provisions. The C.C.A.A. was enacted by Parliament in 1933 when the nation and the world were in the grip of an economic depression. When a company became insolvent, liquidation followed because that was the consequence of the only insolvency legislation which then existed — the *Bankruptcy Act*, R.S.C. 1927, c. 11, and the *Winding-up Act*, R.S.C. 1927, c. 213. Almost inevitably, liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A., to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business. These excerpts from an article by Stanley E. Edwards (1947) 25 Can. Bar Rev. 587, entitled "Reorganizations Under the Companies' Creditors Arrangement Act," explain very well the historic and continuing purposes of the Act (p. 592):

> It is important in applying the C.C.A.A. to keep in mind its purpose and several fundamental principles which may serve to accomplish that purpose. Its object, as one Ontario judge has stated in a number of cases, is to keep a company going despite insolvency. Hon. C.H. Cahan when he introduced the bill into the House of Commons indicated that it was designed to permit a corporation, through reorganization, to continue its business, and thereby to prevent its organization being disrupted and its goodwill lost. It may be that the main value of the assets of a company is derived from their being fitted together into one system and that individually they are worth little. The trade connections associated with the system and held by the manage ment may also be valuable. In the case of a large company it is probable that no buyer can be found who would be able and willing to buy the enterprise as a whole and pay its going concern value. The alternative to reorganization then is often a sale of the property piecemeal for an amount which would yield little satisfaction to the creditors and none at all to the shareholders.

23 Page 590:

  

> There are a number of conditions and tendencies in this country which underline the importance of this statute. There has been over the last few years a rapid and continuous growth of industry, primarily manufacturing. The tendency here, as in other expanding private enterprise countries, is for the average size of corporations to increase faster than the number of them, and for much of the new wealth to be concentrated in the hands of existing companies or their successors. The results of permitting dissolutions of companies without giving the parties an adequate opportunity to reorganize them would therefore likely be more serious in the future than they have been in the past.
>
> Because of the country's relatively small population, however, Canadian industry is and will probably continue to be very much dependent on world markets and consequently vulnerable to world depressions. If there should be such a depression it will become particularly important that an adequate reorganization procedure should be in existence, so that the Canadian economy will not be permanently injured by discontinuance of its industries, so that whatever going concern value the insolvent companies have will not be lost through dismemberment and sale of their assets, so that their employees will not be thrown out of work, and so that large numbers of investors will not be deprived of their claims and their opportunity to share in the fruits of the future activities of the corporations. While we hope that the dismal prospect will not materialize, it is nevertheless a possibility which must be recognized. But whether it does or not, the growing importance of large companies in Canada will make it important that adequate provision be made for reorganization of insolvent corporations.

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

25 In the exercise of their functions under the C.C.A.A. Canadian courts have shown themselves partial to a standard of liberal construction which will further the policy objectives. See such cases as *Meridian Developments Inc. v. Toronto-Dominion Bank; Meridian Developments Inc. v. Nu-West Ltd.*, 52 C.B.R. (N.S.) 109, [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 53 A.R. 39 (Q.B.); *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*, 73 C.B.R. (N.S.) 195, 34 B.C.L.R. (2d) 122, [1989] 3 W.W.R. 363 (C.A.); *Re Feifer and Frame Manufacturing Corp.*, [1947] Que. K.B. 348, 28 C.B.R. 124 (C.A.); *Wynden Canada Inc. v. Gaz Métropolitain Inc.* (1982), 44 C.B.R. (N.S.) 285 (C.S. Que.); and *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*, 72 C.B.R. (N.S.) 20, [1989] 2 W.W.R. 566, 64 Alta. L.R. (2d) 149 (Q.B.). The trend demonstrated by these cases is entirely consistent with the object and purpose of the C.C.A.A.

26 The trend which emerges from this sampling will be given effect here by holding that where the word "security" occurs in the C.C.A.A., it includes s. 178 security and, where the word creditor occurs, it includes a bank holding s. 178 security. To the extent that there may be conflict between the two statutes, therefore, the broad scope of the C.C.A.A. prevails.

27 For these reasons the disposition by the chambers Judge of the application made by Chef Ready will be upheld. It follows that the appeal is dismissed.

*Appeal dismissed.*

**End of Document**

TAB 3

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



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

 

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**