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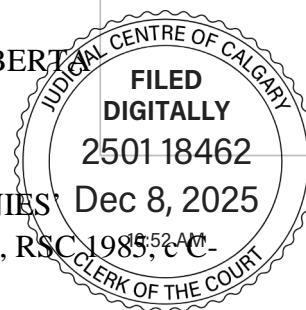
COURT

COURT OF KING'S BENCH OF ALBERTA

JUDICIAL CENTRE

CALGARY

IN THE MATTER OF THE COMPANIES'
CREDITORS ARRANGEMENT ACT, RSC 1985, c.C-
36, as amended



AND IN THE MATTER OF A PLAN OF
COMPROMISE OR ARRANGEMENT OF CANACOL
ENERGY LTD., 2654044 ALBERTA LTD., CANACOL
ENERGY ULC, 2498003 ALBERTA ULC, CANTANA
ENERGY GMBH, CNE OIL & GAS, S.R.L, CANACOL
ENERGY COLOMBIA S.A.S., SHONA HOLDING
GMBH, CNE ENERGY S.A.S., and CNE OIL & GAS
S.A.S.

APPLICANTS

CANACOL ENERGY LTD., 2654044 ALBERTA LTD.,
CANACOL ENERGY ULC, 2498003 ALBERTA ULC,
CANTANA ENERGY GMBH, CNE OIL & GAS, S.R.L,
CANACOL ENERGY COLOMBIA S.A.S., SHONA
HOLDING GMBH, CNE ENERGY S.A.S., and CNE
OIL & GAS S.A.S.

DOCUMENT

BOOK OF AUTHORITIES

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File No. G10088627

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1



CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

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

L.R.C. (1985), ch. C-36

Current to November 20, 2025

À jour au 20 novembre 2025

Last amended on December 12, 2024

Dernière modification le 12 décembre 2024

Single judge may exercise powers, subject to appeal

(2) The powers conferred by this Act on a court may, subject to appeal as provided for in this Act, be exercised by a single judge thereof, and those powers may be exercised in chambers during term or in vacation.

R.S., c. C-25, s. 9.

Form of applications

10 (1) Applications under this Act shall be made by petition or by way of originating summons or notice of motion in accordance with the practice of the court in which the application is made.

Documents that must accompany initial application

(2) An initial application must be accompanied by

- (a)** a statement indicating, on a weekly basis, the projected cash flow of the debtor company;
- (b)** a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and
- (c)** copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

Publication ban

(3) The court may make an order prohibiting the release to the public of any cash-flow statement, or any part of a cash-flow statement, if it is satisfied that the release would unduly prejudice the debtor company and the making of the order would not unduly prejudice the company's creditors, but the court may, in the order, direct that the cash-flow statement or any part of it be made available to any person specified in the order on any terms or conditions that the court considers appropriate.

R.S., 1985, c. C-36, s. 10; 2005, c. 47, s. 127.

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

Un seul juge peut exercer les pouvoirs, sous réserve d'appel

(2) Les pouvoirs conférés au tribunal par la présente loi peuvent être exercés par un seul de ses juges, sous réserve de l'appel prévu par la présente loi. Ces pouvoirs peuvent être exercés en chambre, soit durant une session du tribunal, soit pendant les vacances judiciaires.

S.R., ch. C-25, art. 9.

Forme des demandes

10 (1) Les demandes prévues par la présente loi peuvent être formulées par requête ou par voie d'assignation introductive d'instance ou d'avis de motion conformément à la pratique du tribunal auquel la demande est présentée.

Documents accompagnant la demande initiale

(2) La demande initiale doit être accompagnée :

- a)** d'un état portant, projections à l'appui, sur l'évolution hebdomadaire de l'encaisse de la compagnie débitrice;
- b)** d'un rapport contenant les observations réglementaires de la compagnie débitrice relativement à l'établissement de cet état;
- c)** d'une copie des états financiers, vérifiés ou non, établis au cours de l'année précédant la demande ou, à défaut, d'une copie des états financiers les plus récents.

Interdiction de mettre l'état à la disposition du public

(3) Le tribunal peut, par ordonnance, interdire la communication au public de tout ou partie de l'état de l'évolution de l'encaisse de la compagnie débitrice s'il est convaincu que sa communication causerait un préjudice indu à celle-ci et que sa non-communication ne causerait pas de préjudice indu à ses créanciers. Il peut toutefois préciser dans l'ordonnance que tout ou partie de cet état peut être communiqué, aux conditions qu'il estime indiquées, à la personne qu'il nomme.

L.R. (1985), ch. C-36, art. 10; 2005, ch. 47, art. 127.

Pouvoir général du tribunal

11 Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

L.R. (1985), ch. C-36, art. 11; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

Relief reasonably necessary

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

2019, c. 29, s. 136.

Rights of suppliers

11.01 No order made under section 11 or 11.02 has the effect of

- (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
- (b) requiring the further advance of money or credit.

2005, c. 47, s. 128.

Stays, etc. — initial application

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

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

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);

Redressements normalement nécessaires

11.001 L'ordonnance rendue au titre de l'article 11 en même temps que l'ordonnance rendue au titre du paragraphe 11.02(1) ou pendant la période visée dans l'ordonnance rendue au titre de ce paragraphe relativement à la demande initiale n'est limitée qu'aux redressements normalement nécessaires à la continuation de l'exploitation de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période.

2019, ch. 29, art. 136.

Droits des fournisseurs

11.01 L'ordonnance prévue aux articles 11 ou 11.02 ne peut avoir pour effet :

- a) d'empêcher une personne d'exiger que soient effectués sans délai les paiements relatifs à la fourniture de marchandises ou de services, à l'utilisation de biens loués ou faisant l'objet d'une licence ou à la fourniture de toute autre contrepartie de valeur qui ont lieu après l'ordonnance;
- b) d'exiger le versement de nouvelles avances de fonds ou de nouveaux crédits.

2005, ch. 47, art. 128.

Suspension : demande initiale

11.02 (1) Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de dix jours qu'il estime nécessaire :

- a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;
- b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;
- c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

Suspension : demandes autres qu'initiales

(2) Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire :

- a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime des lois mentionnées à l'alinéa (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.

Restriction

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

2005, c. 47, s. 128, 2007, c. 36, s. 62(F); 2019, c. 29, s. 137.

Stays — directors

11.03 (1) An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

Exception

(2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

Persons deemed to be directors

(3) If all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the company is deemed to be a director for the purposes of this section.

2005, c. 47, s. 128.

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

Preuve

(3) Le tribunal ne rend l'ordonnance que si :

a) le demandeur le convainc que la mesure est opportune;

b) dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue.

Restriction

(4) L'ordonnance qui prévoit l'une des mesures visées aux paragraphes (1) ou (2) ne peut être rendue qu'en vertu du présent article.

2005, ch. 47, art. 128, 2007, ch. 36, art. 62(F); 2019, ch. 29, art. 137.

Suspension — administrateurs

11.03 (1) L'ordonnance prévue à l'article 11.02 peut interdire l'introduction ou la continuation de toute action contre les administrateurs de la compagnie relativement aux réclamations qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de la compagnie dont ils peuvent être, ès qualités, responsables en droit, tant que la transaction ou l'arrangement, le cas échéant, n'a pas été homologué par le tribunal ou rejeté par celui-ci ou les créanciers.

Exclusion

(2) La suspension ne s'applique toutefois pas aux actions contre les administrateurs pour les garanties qu'ils ont données relativement aux obligations de la compagnie ni aux mesures de la nature d'une injonction les visant au sujet de celle-ci.

Présomption : administrateurs

(3) Si tous les administrateurs démissionnent ou sont destitués par les actionnaires sans être remplacés, quiconque dirige ou supervise les activités commerciales et les affaires internes de la compagnie est réputé un administrateur pour l'application du présent article.

2005, ch. 47, art. 128.

Declaration — enforcement of a payment

(4) If there is a dispute as to whether a regulatory body is seeking to enforce its rights as a creditor, the court may, on application by the company and on notice to the regulatory body, make an order declaring both that the regulatory body is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed.

1997, c. 12, s. 124; 2001, c. 9, s. 576; 2005, c. 47, s. 128; 2007, c. 29, s. 106, c. 36, s. 65.

11.11 [Repealed, 2005, c. 47, s. 128]

Interim financing

11.2 (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.

Priority — secured creditors

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

Priority — other orders

(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.

Factors to be considered

(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;

Déclaration : organisme agissant à titre de créancier

(4) En cas de différend sur la question de savoir si l'organisme administratif cherche à faire valoir ses droits à titre de créancier dans le cadre de la mesure prise, le tribunal peut déclarer, par ordonnance, sur demande de la compagnie et sur préavis à l'organisme, que celui-ci agit effectivement à ce titre et que la mesure est suspendue.

1997, ch. 12, art. 124; 2001, ch. 9, art. 576; 2005, ch. 47, art. 128; 2007, ch. 29, art. 106, ch. 36, art. 65.

11.11 [Abrogé, 2005, ch. 47, art. 128]

Financement temporaire

11.2 (1) Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la compagnie sont grevés d'une charge ou sûreté — d'un montant qu'il estime indiqué — en faveur de la personne nommée dans l'ordonnance qui accepte de prêter à la compagnie la somme qu'il approuve compte tenu de l'état de l'évolution de l'encaisse et des besoins de celle-ci. La charge ou sûreté ne peut garantir qu'une obligation postérieure au prononcé de l'ordonnance.

Priorité — créanciers garantis

(2) Le tribunal peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

Priorité — autres ordonnances

(3) Il peut également y préciser que la charge ou sûreté n'a priorité sur toute autre charge ou sûreté grevant les biens de la compagnie au titre d'une ordonnance déjà rendue en vertu du paragraphe (1) que sur consentement de la personne en faveur de qui cette ordonnance a été rendue.

Facteurs à prendre en considération

(4) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

- a)** la durée prévue des procédures intentées à l'égard de la compagnie sous le régime de la présente loi;
- b)** la façon dont les affaires financières et autres de la compagnie seront gérées au cours de ces procédures;
- c)** la question de savoir si ses dirigeants ont la confiance de ses créanciers les plus importants;
- d)** la question de savoir si le prêt favorisera la conclusion d'une transaction ou d'un arrangement viable à l'égard de la compagnie;

Tab

2



Province of Alberta

JUDICATURE ACT

ALBERTA RULES OF COURT

Alberta Regulation 124/2010

With amendments up to and including Alberta Regulation 158/2025

Current as of June 25, 2025

Office Consolidation

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- (4) If the count starts on February 29th and ends in a year that is not a leap year, the count ends on February 28th of that year.

AR 124/2010 s13.4;143/2011

Variation of time periods

13.5(1) Unless the Court otherwise orders or a rule otherwise provides, the parties may agree to extend any time period specified in these rules.

(2) The Court may, unless a rule otherwise provides, stay, extend or shorten a time period that is

(a) specified in these rules,

(b) specified in an order or judgment, or

(c) agreed on by the parties.

(3) The order to extend or shorten a time period may be made whether or not the period has expired.

Division 3 Pleadings

Pleadings: general requirements

13.6(1) A pleading must be

(a) succinct, and

(b) divided into consecutively numbered paragraphs, with dates and numbers expressed in numerals unless words or a combination of words and numerals makes the meaning clearer.

(2) A pleading must state any of the following matters that are relevant:

(a) the facts on which a party relies, but not the evidence by which the facts are to be proved;

(b) a matter that defeats, or raises a defence to, a claim of another party;

(c) the remedy claimed, including

(i) the type of damages claimed,

(ii) to the extent known, the amount of general and special damages claimed, or if either or both are not

Tab

3

Century Services Inc. *Appellant*

v.

**Attorney General of Canada on behalf
of Her Majesty The Queen in Right of
Canada** *Respondent***INDEXED AS: CENTURY SERVICES INC. v. CANADA
(ATTORNEY GENERAL)****2010 SCC 60**

File No.: 33239.

2010: May 11; 2010: December 16.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps,
Fish, Abella, Charron, Rothstein and Cromwell JJ.**ON APPEAL FROM THE COURT OF APPEAL FOR
BRITISH COLUMBIA**

Bankruptcy and Insolvency — Priorities — Crown applying on eve of bankruptcy of debtor company to have GST monies held in trust paid to Receiver General of Canada — Whether deemed trust in favour of Crown under Excise Tax Act prevails over provisions of Companies' Creditors Arrangement Act purporting to nullify deemed trusts in favour of Crown — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.3(1) — Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(3).

Bankruptcy and insolvency — Procedure — Whether chambers judge had authority to make order partially lifting stay of proceedings to allow debtor company to make assignment in bankruptcy and to stay Crown's right to enforce GST deemed trust — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Trusts — Express trusts — GST collected but unremitted to Crown — Judge ordering that GST be held by Monitor in trust account — Whether segregation of Crown's GST claim in Monitor's account created an express trust in favour of Crown.

Century Services Inc. *Appelante*

c.

**Procureur général du Canada au
nom de Sa Majesté la Reine du chef du
Canada** *Intimé***RÉPERTORIÉ : CENTURY SERVICES INC. c. CANADA
(PROCUREUR GÉNÉRAL)****2010 CSC 60**

N° du greffe : 33239.

2010 : 11 mai; 2010 : 16 décembre.

Présents : La juge en chef McLachlin et les juges Binnie,
LeBel, Deschamps, Fish, Abella, Charron, Rothstein et
Cromwell.**EN APPEL DE LA COUR D'APPEL DE LA
COLOMBIE-BRITANNIQUE**

Faillite et insolvabilité — Priorités — Demande de la Couronne à la société débitrice, la veille de la faillite, sollicitant le paiement au receveur général du Canada de la somme détenue en fiducie au titre de la TPS — La fiducie réputée établie par la Loi sur la taxe d'accise en faveur de la Couronne l'emporte-t-elle sur les dispositions de la Loi sur les arrangements avec les créanciers des compagnies censées neutraliser ces fiducies? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 18.3(1) — Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15, art. 222(3).

Faillite et insolvabilité — Procédure — Le juge en cabinet avait-il le pouvoir, d'une part, de lever partiellement la suspension des procédures pour permettre à la compagnie débitrice de faire cession de ses biens en faillite et, d'autre part, de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 11.

Fiducies — Fiducies expresses — Somme perçue au titre de la TPS mais non versée à la Couronne — Ordonnance du juge exigeant que la TPS soit détenue par le contrôleur dans son compte en fiducie — Le fait que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte du contrôleur a-t-il créé une fiducie expresse en faveur de la Couronne?

3.3 *Discretionary Power of a Court Supervising a CCAA Reorganization*

[57] Courts frequently observe that “[t]he CCAA is skeletal in nature” and does not “contain a comprehensive code that lays out all that is permitted or barred” (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44, *per* Blair J.A.). Accordingly, “[t]he history of CCAA law has been an evolution of judicial interpretation” (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Ct. (Gen. Div.)), at para. 10, *per* Farley J.).

[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.

(*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, 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

3.3 *Pouvoirs discrétionnaires du tribunal chargé de surveiller une réorganisation fondée sur la LACC*

[57] Les tribunaux font souvent remarquer que [TRADUCTION] « [l]a LACC est par nature schématique » et ne « contient pas un code complet énonçant tout ce qui est permis et tout ce qui est interdit » (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, par. 44, le juge Blair). Par conséquent, [TRADUCTION] « [l]’histoire du droit relatif à la LACC correspond à l’évolution de ce droit au fil de son interprétation par les tribunaux » (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (C. Ont. (Div. gén.)), par. 10, le juge Farley).

[58] Les décisions prises en vertu de la LACC découlent souvent de l’exercice discrétionnaire de certains pouvoirs. C’est principalement au fil de l’exercice par les juridictions commerciales de leurs pouvoirs discrétionnaires, et ce, dans des conditions décrites avec justesse par un praticien comme constituant [TRADUCTION] « la pépinière du contentieux en temps réel », que la LACC a évolué de façon graduelle et s’est adaptée aux besoins commerciaux et sociaux contemporains (voir Jones, p. 484).

[59] L’exercice par les tribunaux de leurs pouvoirs discrétionnaires doit évidemment tendre à la réalisation des objectifs de la LACC. Le caractère réparateur dont j’ai fait état dans mon aperçu historique de la Loi a à maintes reprises été reconnu dans la jurisprudence. Voici l’un des premiers exemples :

[TRADUCTION] La loi est réparatrice au sens le plus pur du terme, en ce qu’elle fournit un moyen d’éviter les effets dévastateurs, — tant sur le plan social qu’économique — de la faillite ou de l’arrêt des activités d’une entreprise, à l’initiation des créanciers, pendant que des efforts sont déployés, sous la surveillance du tribunal, en vue de réorganiser la situation financière de la compagnie débitrice.

(*Elan Corp. c. Comiskey* (1990), 41 O.A.C. 282, par. 57, le juge Doherty, dissident)

[60] Le processus décisionnel des tribunaux sous le régime de la LACC comporte plusieurs aspects. Le tribunal doit d’abord créer les conditions propres à permettre au débiteur de tenter une réorganisation.

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., *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, 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, at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J.), at para. 3; *Air Canada, Re*, 2003 CanLII 49366 (Ont. S.C.J.), 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.

Il peut à cette fin suspendre les mesures d'exécution prises par les créanciers afin que le débiteur puisse continuer d'exploiter son entreprise, préserver le statu quo pendant que le débiteur prépare la transaction ou l'arrangement qu'il présentera aux créanciers et surveiller le processus et le mener jusqu'au point où il sera possible de dire s'il aboutira (voir, p. ex., *Chef Ready Foods Ltd. c. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), p. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, par. 27). Ce faisant, le tribunal doit souvent déterminer les divers intérêts en jeu dans la réorganisation, lesquels peuvent fort bien ne pas se limiter aux seuls intérêts du débiteur et des créanciers, mais englober aussi ceux des employés, des administrateurs, des actionnaires et même de tiers qui font affaire avec la compagnie insolvable (voir, p. ex., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, par. 144, la juge Paperny (maintenant juge de la Cour d'appel); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (C.S.J. Ont.), par. 3; *Air Canada, Re*, 2003 CanLII 49366 (C.S.J. Ont.), par. 13, le juge Farley; Sarra, *Creditor Rights*, p. 181-192 et 217-226). En outre, les tribunaux doivent reconnaître que, à l'occasion, certains aspects de la réorganisation concernent l'intérêt public et qu'il pourrait s'agir d'un facteur devant être pris en compte afin de décider s'il y a lieu d'autoriser une mesure donnée (voir, p. ex., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (C.S.J. Ont.), par. 2, le juge Blair (maintenant juge de la Cour d'appel); Sarra, *Creditor Rights*, p. 195-214).

[61] Quand de grandes entreprises éprouvent des difficultés, les réorganisations deviennent très complexes. Les tribunaux chargés d'appliquer la LACC ont ainsi été appelés à innover dans l'exercice de leur compétence et ne se sont pas limités à suspendre les procédures engagées contre le débiteur afin de lui permettre de procéder à une réorganisation. On leur a demandé de sanctionner des mesures non expressément prévues par la LACC. Sans dresser la liste complète des diverses mesures qui ont été prises par des tribunaux en vertu de la LACC, il est néanmoins utile d'en donner brièvement quelques exemples, pour bien illustrer la marge de manœuvre que la loi accorde à ceux-ci.

Tab

4

CITATION: Target Canada Co. (Re), 2015 ONSC 303
COURT FILE NO.: CV-15-10832-00CL
DATE: 2015-01-16

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF TARGET CANADA CO., TARGET CANADA
HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA
PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO)
CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA
PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC.

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *Tracy Sandler* and *Jeremy Dacks*, for the Target Canada Co., Target Canada
Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp.,
Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target
Canada Pharmacy (SK) Corp., and Target Canada Property LLC (the
“Applicants”)

Jay Swartz, for the Target Corporation

Alan Mark, *Melaney Wagner*, and *Jesse Mighton*, for the Proposed Monitor,
Alvarez and Marsal Canada ULC (“Alvarez”)

Terry O’Sullivan, for The Honourable J. Ground, Trustee of the Proposed
Employee Trust

Susan Philpott, for the Proposed Employee Representative Counsel for employees
of the Applicants

HEARD and ENDORSED: January 15, 2015

REASONS: January 16, 2015

ENDORSEMENT

[1] Target Canada Co. (“TCC”) and the other applicants listed above (the “Applicants”) seek relief under the *Companies’ Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the “CCAA”). While the limited partnerships listed in Schedule “A” to the draft Order (the “Partnerships”) are not applicants in this proceeding, the Applicants seek to have a stay of

employee retention plan (the “KERP”) to provide essential employees who agree to continue their employment and to contribute their services and expertise to the Target Canada Entities during the orderly wind-down;

- c) Create a level playing field to ensure that all affected stakeholders are treated as fairly and equitably as the circumstances allow; and
- d) Avoid the significant maneuvering among creditors and other stakeholders that could be detrimental to all stakeholders, in the absence of a court-supervised proceeding.

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

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

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

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

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

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

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

Tab

5

CITATION: Hudson's Bay Company, Re, 2025 ONSC 1897
COURT FILE NO.: CV-25-00738613-00CL
DATE: 20250326

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
HUDSON'S BAY COMPANY ULC COMPAGNIE DE LA BAIE D'HUDSON SRI, HBC
CANADA PARENT HOLDINGS INC., HBC CANADA PARENT HOLDINGS 2 INC., HBC
BAY HOLDINGS I INC., HBC BAY HOLDINGS II ULC, THE BAY HOLDINGS ULC, HBC
CENTERPOINT GP INC., HBC YSS 1 LP INC., HBC YSS 2 LP INC., HBC HOLDINGS GP
INC., SNOSPMIS LIMITED, 2472596 ONTARIO INC., and 2472598 ONTARIO INC.,
Applicants

BEFORE: Peter J. Osborne J.

COUNSEL: *Ashley Taylor, Elizabeth Pillon, Maria Konyukhova, Britnney Ketwaroo, Philip Yang and Nick Avis*, for the Applicants
Davis Bish, for Cadillac Fairview
Evan Cobb, for Bank of America
Linc Rogers and Caitlin McIntyre for Restore Capital LLC
Chad Kopach, for EY in the Receivership of Woodbine Mall Holdings Inc.
Lou Brzezinski, Alexandra Teodorescu and Nadav Amar, for TK Elevator (Canada) Ltd.
Haddon Murray, for Cominar Real Estate Investment Trust & Chanel ULC
Matthew Gottlieb, Andrew Winton and Annecy Pang, for KingSett Capital Inc.
Sean Zweig, Michael Shakra and Thomas Gray, for the Court-appointed Monitor
Trevor Courtis and Heather Meredith, for Bank of Montreal and Desjardins Financial Security Life Assurance Company
Gilles Benchaya and Mandy Wu, for Restore Capital LLC and Bank of America
James D. Bunting, for Ivanhoe Cambridge Inc.
Robert J. Chadwick, Joseph Pasquariello and Andrew Harmes, for RioCan Real Estate Investment Trust
Tushara Weerasooriya, Jeffrey Levine and Guneev Bhinder, for B.H. Multi Com Corporation, B.H. Multi Color Corporation & Richline Group Canada Inc.
Gregg Galardi, US Counsel for File Agent (Restore Capital LLC) as DIP Lender
Isaac Belland, for LVMH Moët Hennessy Louis Vuitton SA
Jake Harris, for the DIP Lenders

19. A continued stay of proceedings is clearly necessary here to stabilize the activities and operations of the Applicants while the SISP, Lease Monetization and proposed Liquidation processes are underway. Such stabilization is necessary in order to maximize the chances of recovery for stakeholders.

20. The revised cash flow forecasts prepared by the Applicants in consultation with the Monitor reflect that the Applicants should have sufficient liquidity to fund operations and these proceedings through the proposed stay extension period.

21. The Monitor fully supports the proposed stay extension, and no party opposes the extension today.

22. Accordingly, the stay of proceedings is extended to and including May, 15, 2025.

JV Entity Rent Payments

23. As reflected in the Updated Cash Flow Forecast, the Company is expected to have sufficient liquidity to pay a monthly aggregate amount of \$7 million plus applicable taxes to the JV Entities. Accordingly, the Applicants seek, with the consent and agreement of the JV Entities and the JV counterparty, RioCan, to modify the stay of proceedings with respect to the payment of rent owing to the JV Entities to permit the partial payments. They also seek approval of a corresponding JV Rent Charge to secure post-filing rent not paid by the Company to the JV Entities.

24. As described in my Initial Order Endorsement dated March 10, 2025, I extended the stay of proceedings for the 10-day period pending the comeback hearing to the defined Non-Applicant Stay Parties, including the RioCan-Hudson's Bay JV, in part. The proportion of rent payable by the Applicants to the JV Entities that was payable to landlords under the Head Leases would continue to be paid. This relief was reviewable at the comeback hearing, at which time I would determine, with the benefit of submissions (if any) from RioCan, whether the stay of proceedings, even if continued generally, should continue to apply to the JV Entities.

25. At the commencement of the comeback hearing, the Applicants submitted that the partial stay of proceedings should continue to apply to the JV Entities, pursuant to the exercise of my discretion authorized in section 11 of the *CCAA*. The Applicants relied on the decision of this Court in *Xplore, Inc. (Re)*, 2024 ONSC 4593, at paras. 55-56, as a relevant example of circumstances in which the Court required certain suppliers to the debtor (in that case satellite providers) to continue supplying services to the debtor without being paid post-filing payments to which they were contractually entitled.

26. In that case, Kimmel, J. noted that section 11.01 of the *CCAA* does not specify that suppliers must be paid at the contractual rates post-filing. While the relief granted in that case applied to suppliers of satellite services, the Applicants here submitted that the rationale applies equally to landlords such as the JV Entities. They further submitted that even if the relief sought here was

Tab

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Court of King's Bench of Alberta

Citation: Delta 9 Cannabis Inc (Re), 2025 ABKB 52

Date: 20250129
Docket: 2401 09668
Registry: Calgary

In the Matter of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as Amended

In the Matter of the Compromise or Arrangement of Delta 9 Cannabis Inc., Delta 9 Logistics Inc., Delta 9 Bio-Tech Inc., Delta 9 Lifestyle Cannabis Clinic Inc., and Delta 9 Cannabis Store Inc.

Reasons for Decision
of the
Honourable Justice M.A. Marion

I. Introduction and Background

[1] “Delta 9”, comprised of Delta 9 Cannabis Inc (**Delta 9 Parent**), Delta 9 Logistics Inc, Delta 9 Lifestyle Cannabis Clinic Inc, Delta 9 Cannabis Store Inc and Delta 9 Bio-Tech Inc (**Bio-Tech**), is a vertically integrated group of companies in the business of cannabis cultivation, processing, extraction, wholesale distribution, retail sales and business to business sales.

[2] In recent years, Delta 9 has suffered losses due to a number of factors, including intense competition; over-supply of cannabis products leading to significant price compression; illicit supply of cannabis; burdensome regulatory costs; significant capital required for new product development; increased financing costs due to changing capital market investor sentiment driving investment away from the cannabis sector; and higher interest rates. By March 2024, Delta 9 was in breach of covenants owed to its secured creditor and, in May 2024, it received a demand and notice of intention to enforce security under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (*BIA*).

[3] Delta 9 then sought relief under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended (*CCAA*). On July 15, 2024, the Court granted an initial order (**Initial Order**) under the *CCAA* providing, among other things, a stay of proceedings against Delta 9 (**Stay**).

[4] On July 24, 2024, on the “comeback” application with respect to the Initial Order, the Court granted an Amended and Restated Initial Order (**ARIO**), a Claims Procedure Order and an order approving a sale and investment solicitation process (**SISP**) with respect to Bio-Tech (**Bio-Tech SISP Order**). The ARIO approved, among other things, the appointment of a Chief Restructuring

Parent, the Chief Restructuring Officer, the Plan Sponsor, SNDL, CRA and the Monitor (and their various consultants, advisors, counsel and representatives);

- (f) the Plan Releases are a key component of the Plan, and a condition of Plan implementation which (as discussed above) benefits the debtors and the Affected Creditors and other stakeholders. The Plan Releases ensure that all stakeholders have certainty and finality about their liabilities at the conclusion of the Plan Entities' restructuring;
- (g) the terms of the Plan Releases were expressly included in Article 9 of the Plan which was provided to the Affected Creditors; and
- (h) the Plan Releases are fair, reasonable and not overly broad. The Plan confirms that the Plan Releases do not apply to (1) unaffected claims (as defined in the Plan); (2) obligations to Affected Creditors under the Plan or under any court order made in these CCAA proceedings; (3) SNDL's claim related to the SNDL Dispute; (4) claims finally determined to be based on breach of trust (whether common law or statutory), fraud, wilful misconduct or gross negligence; or (5) claims against directors referred to in section 5.1(2) of the CCAA.

[40] For the above reasons, I find that Plan is fair, reasonable and consistent with the CCAA's remedial purpose.

B. Stay Extension Application

1. Legal Framework for Stay Extension Application

[41] The Court may make an order extending a stay, restraint and prohibition of proceedings for any period the Court considers necessary, provided the applicant satisfies the Court that circumstances exist that make the order appropriate, and the applicant has acted (and is acting) in good faith and with due diligence: *CCAA*, sections 11.02(2) and (3). The burden of proof is on the applicant: *Mantle Materials Group, Ltd (Re)*, 2024 ABKB 19 at para 35. Appropriateness of an extension is assessed by inquiring into whether the order sought advances the policy objectives underlying the CCAA: *Re Canada North Group Inc*, 2017 ABQB 508 at para 34, citing *Century Services* at paras 15, 70, 71.

2. Should the Court Grant the Stay Extension?

[42] No party opposed the further Stay extension application. I am satisfied that Delta 9 and the Plan Sponsor have, since my last extension order, acted in good faith and with due diligence. This finding is supported by the Monitor's reports. Further, having found that the Plan is fair, reasonable and consistent with the CCAA's remedial purposes, I find that an extension is necessary in the circumstances to allow for Plan implementation and the determination of the SNDL Dispute in February 2025, among other things.

[43] The form of proposed stay extension order, extending the Stay until February 28, 2025, is granted.

Tab

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CITATION: *In Re Hudson's Bay Company*, 2025 ONSC 1530
COURT FILE NO.: CV-25-00738613-00CL
DATE: 20250310

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
HUDSON'S BAY COMPANY ULC COMPAGNIE DE LA BAIE D'HUDSON SRI, HBC
CANADA PARENT HOLDINGS INC., HBC CANADA PARENT HOLDINGS 2 INC., HBC
BAY HOLDINGS I INC., HBC BAY HOLDINGS II ULC, THE BAY HOLDINGS ULC, HBC
CENTERPOINT GP INC., HBC YSS 1 LP INC., HBC YSS 2 LP INC., HBC HOLDINGS GP
INC., SNOSPMIS LIMITED, 2472596 ONTARIO INC., and 2472598 ONTARIO INC.,
Applicants

BEFORE: Peter J. Osborne J.

COUNSEL: *Ashley Taylor, Maria Konyukhova, Philip Yang and Brittney Ketwaroo*, for the
Applicants
Sean Zweig and Preet Gill for Alvarez & Marsal Canada Inc., the Proposed
Monitor
Linc Rogers and Caitlin McIntyre for Restore Capital LLC, Proposed DIP Lender
Evan Cobb for Bank of America
David Rosenblatt for Pathlight Capital LP

HEARD: March 7, 2025

REASONS FOR JUDGMENT

OSBORNE J.

1. It is hard not to have a sense of melancholy when considering the Application before me. Hudson's Bay is the oldest company in North America and a very prominent Canadian department store. It was founded in 1670. Now, approximately 355 years later, it is insolvent and seeks protection from its creditors.

2. At the conclusion of the initial hearing of this Application on Friday, I granted the requested relief with reasons to follow. These are those reasons.

reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period: s. 11.2(5).

86. It is important that an applicant meet the criteria in section 11.2(1) as well as those in section 11.2(4). See *CanWest Publishing Inc., Re*, 2010 ONSC 222 (“*CanWest IP*”) at paras. 42-44.

87. When considering the s. 11.2(4) factors, the Court “must determine which proposal is most appropriate and most importantly, which will best serve the interests of the stakeholders of the [Applicants] as a whole by enhancing the prospects of a successful restructuring.” The Court is to make an “independent determination” when selecting a DIP proposal, having regard to the factors in subsection 11.2(4): *Crystallex (Re)*, 2012 ONCA 404 at para 85.

88. The terms of the DIP Facility, in the principal amount of \$16 million, are reflected in the Junior DIP Term Sheet dated as of March 7, 2025. The Company is the Borrower, and various affiliates are Guarantors. The Agent is Restore Capital, LLC on behalf of a syndicate of lenders as set out in the materials. The Applicants are seeking on this initial Application a corresponding DIP Charge, which would rank according to the waterfall priority set out in the proposed Initial Order.

89. I am satisfied that the DIP Facility and DIP Charge are appropriate here. The Applicants are facing an urgent and immediate liquidity crisis. They are unable to pay rent, current commitments to suppliers, and they will be unable to fund payroll within a matter of days. A loss of employees or material contracts could have significant negative impacts on the business of the Applicants.

90. The proposed DIP facility does not contain any commitment fee, and the proposed exit fee is comparable to DIP Facilities of a similar size. In the view of the Proposed Monitor, while the proposed interest rate is on the higher end of the range for comparable DIP facilities of similar size (CORRA+11.5%, or approximately 14.5%), it is reasonable relative to the existing FILO Credit Facility rate (CORRA+9.75%, or approximately 12.75%), and in my view is reflective of both the challenges and risks associated with a bricks and mortar retail operation in Canada today and the challenges facing these Applicants in particular.

91. The cash flow projections demonstrate that debtor-in-possession financing is urgently required to fund the needed liquidity to preserve the value in going-concern operations of the business. The DIP Lenders require the DIP Charge as a condition of the DIP Facility.

92. The Applicants believe, and the Proposed Monitor supports the view, that the DIP Facility represents the best interim financing that is available in the circumstances, and further that the economic terms of the DIP Facility are reasonable in the circumstances. It was selected following discussions with multiple potential lenders.

93. I accept the submission. The DIP Lender is an existing pre-filing secured creditor. Notice has been given to secured creditors that are proposed to be primed by the DIP Charge as required

Tab

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CITATION: Tacora Resources Inc. (Re), 2023 ONSC 6126
COURT FILE NO.: CV-23-00707394-00CL
DATE: 20231030

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TACORA RESOURCES INC.**

BEFORE: KIMMEL J.

COUNSEL: *Ashley Taylor, Eliot Kolers, Lee Nicholson, Natasha Rambaran and RJ Reid*, for the Applicant, Tacora Resources Inc.

Alan Merskey, Jane Dietrich and Ryan Jacobs, for the Monitor (FTI Consulting Canada Inc.)

Robert Chadwick, Caroline Descours, Peter Kolla and Carlie Fox, for Cargill, Incorporated and Cargill International Trading Pte Ltd.

Richard Swan, Sean Zweig and Alexander Payne, for the Ad Hoc Group of Senior Noteholders and the Indenture Trustee

Natasha MacParland, for Crossingbridge Advisors, LLC

Joe Thorne, for 1128349 B.C. Ltd.

HEARD: October 24, 2023

ENDORSEMENT – COME-BACK HEARING
(ARIO AND SOLICITATION ORDER)

The Come-Back Motion

[1] The court made an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") in respect of Tacora Resources Inc. ("Tacora" or the "company") on October 10, 2023 (the "Initial Order"). The come-back hearing was originally scheduled for October 19, 2023, but was adjourned to October 24, 2023 by order dated October 13, 2023 to afford the company and the participating stakeholders additional time to address certain issues of disagreement among them, and in particular their disagreement over the terms and source of debtor in possession ("DIP") financing that the company needs to carry out its intended restructuring efforts.

[2] The court's October 13, 2023 order adjourning the come-back hearing also extended the expiry of the stay of proceedings provided for in the Initial Order from October 20, 2023 to October 27, 2023 (the "Stay Period"). A further stay extension order was granted on October 27, 2023

[103] That said, the court is encouraged by the prospect that there could be a better DIP proposal for the company. If so, the repayment and replacement or disclaimer of the Cargill DIP Facility remain open for consideration by the company in the future. As the company, the Monitor and Cargill have pointed out, the question of whether the Offtake Agreement can be disclaimed or replaced remains an issue for another day. But at the very least, it is acknowledged that there is the possibility for this to happen in the context of a transaction or restructuring arising out of the Solicitation Process (including a credit bid from the AHG submitted in that process) or in the context of the repayment and replacement of the Cargill DIP Facility. The cost of Cargill's exit fee under the Cargill DIP Facility is the cost of the stability and the timely implementation that the company requires now.

b) The CCAA Requirements For Approval of the Cargill DIP Facility and DIP Charge

[104] The court's authority to grant the requested priority DIP charge for the Cargill DIP Facility is found in s. 11.2 of the CCAA, and must be considered in light of the factors in s. 11.2(4) of the CCAA, which provide as follows:

- (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.

[105] These factors may be equally applicable in deciding who shall be the DIP lender and on what terms DIP financing ought to be provided. See *Great Basin Gold Ltd., Re*, 2012 BCSC 1459, 94 C.B.R. (5th) 228, at para. 14. These factors and how they are satisfied in this case are reviewed in the Monitor's Pre-Filing report and the company's affidavits and they need not each be reviewed in this endorsement.

[106] The AHG's challenges to the s. 11.2(4) criteria regarding the need for governance changes during the CCAA process and the AHG's loss of confidence in existing management, flow from the criticisms of the DIP Process previously discussed. They are not borne out on the record. This section of the endorsement focuses on the primary challenge of the AHG, namely its contention that it will be materially prejudiced as a result of the proposed Cargill DIP Facility and priming Charge.

[120] This is a thorn in the AHG's side because they made it known to the company that they intend to make a credit bid and might be interested in acting as a stalking horse bidder. While not in the original AHG DIP, the redline version of the AHG DIP Proposal submitted on October 8, 2023 indicates a new provision expressly allowing the AHG to make a stalking horse bid in the Solicitation Process. However, from the company's perspective and the perspective of the creditors as a whole (not the interests of a creditor who might also wish to be a potential purchaser), at the time that the Cargill DIP Facility was considered and approved, there had not been any advanced discussions regarding a stalking horse agreement. Under the Cargill DIP Facility, all parties will be able to participate fully in the solicitation process. In the meantime, should a stalking horse agreement be determined to be favourable, the company maintains the flexibility to refinance (repay and replace) the Cargill DIP Facility at any time.

[121] The terms of the Cargill DIP Financing do not materially prejudice the AHG in their capacity as creditors, either from the perspective of the priming of their existing security (which is less than it would be under their own AHG Financing Proposal) or from the perspective of the overall implications of the Offtake EOD and its practical implications for the restructuring process. The restriction on stalking horse agreements may be prejudicial to the AHG in their capacity as a prospective "credit bidder," but that is not of paramount concern to the interests of the stakeholders generally and is not a material prejudice to the AHG in their capacity as creditors of Tacora arising as a result of the Cargill DIP Facility and DIP Charge within the meaning of s. 11.2(4)(f) of the CCAA.

[122] In *Great Basin* (at para. 15), the court noted that when approving DIP financing it "must determine which proposal is most appropriate and most importantly, which will best serve the interests of the stakeholders of the [Applicants] as a whole by enhancing the prospects of a successful restructuring". The company notes that certain provisions of the AHG DIP Proposal were considered and identified by the company to be restrictive and to provide advantages to the AHG, such as their ability to submit a "topping credit bid" (up to the amount of their total debt) after the completion of the Solicitation Process if the successful bid does not result in full payment of the AHG's pre-filing secured debt. In other words, the AHG would have a "last look" following the final bid deadline even if the AHG did not participate in the Solicitation Process.

[123] The company had a concern that this "last look" could have a chilling effect on prospective purchasers who would be put to the time and expense of the due diligence to make a bid. Another concern identified was that such a clause could cause any interested bidder to have discussions with the AHG regarding a transaction rather than the company, its advisors, and the Monitor, which could result in a loss of control and fairness in the process.

[124] Further, the AHG DIP Proposal would require the company to appoint two (2) new directors from a slate of five (5) directors put forward by the AHG, if requested. In *Quest University, (Re)*, 2020 BCSC 318, 77 C.B.R. (6th) 117 the court recognized that a creditor's attempt to seek control through board appointments in connection with DIP financing was "unreasonable and inappropriate in the circumstances and it may significantly disadvantage other interests in this proceeding". Like the present situation, the creditor in *Quest University* had indicated an interest in purchasing the debtor's property.

[125] On balance, I find the reasons and conclusions of the company, the Monitor and Greenhill that the Cargill DIP Facility is more favourable to the company and will better serve its stakeholders than the AGH DIP Proposal would, to be well founded.

[126] In terms of some of the other factors under s. 11.2(4) of the CCAA, the Cargill DIP Facility amount lines up with the company's cash flow forecasts for the Stay Period and provides the funding for the company's anticipated business and financial affairs that are to be managed during the CCAA proceedings. The company needs the Cargill DIP Facility to commence its Solicitation Process which is intended to enhance the prospects of a viable compromise or arrangement being made in respect of the company. The Monitor recommends the approval of the Cargill DIP Facility. I am satisfied, having considered the relevant factors, that the requirements under the CCAA for the court to approve the Cargill DIP Facility and DIP Charge have been satisfied.

c) Alleged Ulterior Objectives of Cargill

[127] Courts are required to carefully and closely scrutinize financing proposals that may advance the interests of one particular stakeholder (see *Quest University*, at paras. 97–99) and “be constantly vigilant against such strategies” (see *Great Basin*, at paras. 179–81).

[128] Both Cargill and the AHG have their own commercial interests that will inevitably influence their conduct in these CCAA Proceedings.

[129] A proposed extension of DIP financing was not approved in *Essar Steel Algoma Inc. et al, Re*, 2017 ONSC 3331, 48 C.B.R. (6th) 264, because of concerns that the DIP lenders were “imposing terms to assist their position as Term Lenders” who were party to a restructuring agreement, and that “their interests are now too closely aligned with what has been proposed and that the provision of DIP lending is now being too negatively affected” (see paras. 19–24). A DIP lender wearing various hats can give rise to concerns about the potential for mischief in the management and operation of the business for its own interest with less than due regard for the interests of the other secured creditors. See *Conexus Credit Union 2006 v. Voyager Retirement II Genpar Inc.*, 2021 SKQB 273, 94 C.B.R. (6th) 190.

[130] Cargill does wear various hats in this case but none of its activities to date have given rise to any foundation for the suggestion that it will (or will have the ability under the Cargill DIP Facility to) exert control over the business of the company or the Solicitation Process in a way that will give less regard to the interests of the other secured creditors.

[131] The AHG accuses Cargill of manipulating the process to “stave off” the CCAA filing on September 12, 2023 (that would have sought approval of the AHG DIP) and appears to be suggesting that the negotiations for a consensual restructuring were a ruse to give Cargill time to put in a DIP proposal of its own to protect its Offtake Agreement. There is no evidentiary foundation for this theory.

[132] It is further alleged by the AHG that the Cargill DIP Facility is being used for the improper purpose of protecting the Offtake Agreement. It is suggested that this conclusion can be reasonably inferred, as the court did in *Quest University* (at paras. 99–100).

Tab

9

CITATION: Re Crystallex International Corporation, 2012 ONSC 2125
COURT FILE NO.: CV-11-9532-00CL
DATE: 20120416

**SUPERIOR COURT OF JUSTICE - ONTARIO
COMMERCIAL LIST**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
CRYSTALLEX INTERNATIONAL CORPORATION

BEFORE: Newbould J.

COUNSEL: Markus Koehnen, Andrew J.F. Kent and Jeffrey Levine, for Crystallex
International Corporation

Richard B. Swan, S. Richard Orzy and Emrys Davis, for Computershare Trust
Company of Canada

David R. Byers and Maria Konyukhova, for Ernst & Young Inc., Monitor

Shayne Kukulowicz, for Tenor Special Situations Fund LP

John T. Porter, for Juan Antonio Reyes

Robert Frank, for Forbes & Manhattan Inc. and Aberdeen International Inc.

DATE HEARD: April 5, 2012

ENDORSEMENT

[1] Crystallex moves for four orders, the first being an order approving DIP financing pursuant to a credit agreement between Crystallex and Tenor Special Situation I, LLC (“Tenor”), the second being an order extending the stay referred to in paragraph 16 of the Initial Order dated

(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.

[33] Crystallex relies on the business judgment rule to support the decision of its board of directors to accept the Tenor DIP facility. It is clear that the business judgment rule can apply to a debtor in CCAA proceedings. In *Re Stelco*, (2009), 9 C.B.R. (5th) 135 (Ont. C.A.), Blair J.A. stated in that CCAA proceeding:

65. ...It is well-established that judges supervising restructuring proceedings - and courts in general - will be very hesitant to second-guess the business decisions of directors and management. As the Supreme Court of Canada said in *Peoples, supra*, at para. 67:

Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making ...

[34] The noteholders point to *Kerr v. Danier Leather Inc.*, [2007] 3 S.C.R. 331 per Binnie J. at para. 54 in which he stated that the business judgment rule could not be used to qualify or undermine the duty of disclosure required by the *Securities Act* and *Bennett v. Bennett Environmental Inc.* 2009 ONCA 198 per Lang. J.A. in which she held that whether a director could be indemnified depended on the application of section 123(4) of the CBCA and not the business judgment rule.

[35] I accept that in considering whether security under a DIP loan should be ordered, a court cannot ignore the factors directed to be considered in section 11.2 (4) of the CCAA and could not

order such security if a consideration of those factors led to an opposite conclusion. But in my view those factors are not the only factors that can be considered, as section 11.2(4) directs a court to consider the listed factors “among other things”. One of the considerations that in my view can be taken into account is the exercise or lack thereof of business judgment by the board of directors of a debtor corporation in considering DIP financing.

(i) Consideration of the Tenor DIP facility

[36] In this case, the Crystallex board took legal advice from its solicitors McMillan LLP and financial advice from Mr. Skatoff. I am satisfied that they carefully considered the relevant matters leading to the decision to accept the terms of the Tenor DIP financing, including giving consideration to the noteholders’ proposed DIP financing of \$10 million to October, 2012, and that they acted on an informed basis and in good faith with a view to the best interests of Crystallex and its stakeholders. See the affidavits of Mr. Fung at paras. 52 to 67 and the reply affidavit of Mr. van’t Hof at paras. 9 to 12. That being said, I must consider the contentions of the parties and the factors as set out in section 11.2 (4).

[37] The noteholders have made a number of objections to the Tenor DIP financing.

[38] They contend that Crystallex should have sought sufficient financing to pay the noteholders in full, as was attempted prior to the CCAA filing. The evidence indicates, however, that Mr. Skatoff attempted to do so with the market but the message he received back consistently was that the market had no interest in paying out existing noteholders at 100 cents on the dollar in a context where the notes were trading at a significant discount to par. Mr. Mattoni himself said on cross-examination that he did not believe it would be possible to raise sufficient money on the market to pay out the noteholders, as did the noteholder’s financial expert witness Mr. Glenn Sauntry.

Tab

10

Her Majesty The Queen in Right of Canada
Appellant

v.

**Canada North Group Inc.,
Canada North Camps Inc.,
Campcorp Structures Ltd.,
DJ Catering Ltd.,
816956 Alberta Ltd.,
1371047 Alberta Ltd.,
1919209 Alberta Ltd.,
Ernst & Young Inc. in its capacity as
monitor and
Business Development Bank of Canada**
Respondents

and

**Insolvency Institute of Canada and
Canadian Association of Insolvency and
Restructuring Professionals** *Interveners*

**INDEXED AS: CANADA v. CANADA NORTH
GROUP INC.**

2021 SCC 30

File No.: 38871.

2020: December 1; 2021: July 28.

Present: Wagner C.J. and Abella, Moldaver,
Karakatsanis, Côté, Brown, Rowe, Martin and
Kasirer JJ.

**ON APPEAL FROM THE COURT OF APPEAL OF
ALBERTA**

Bankruptcy and insolvency — Priority — Source deductions — Priming charges — Employee source deductions not remitted to Crown by companies in receivership — Judge supervising restructuring proceedings under Companies' Creditors Arrangement Act ordering priming charges over debtor companies' assets in favour of interim lender, monitor and directors — Order giving priority to priming charges over claims of secured creditors and providing that they are not to be limited or impaired in any way by provisions of any federal or

Sa Majesté la Reine du chef du Canada
Appelante

c.

**Canada North Group Inc.,
Canada North Camps Inc.,
Campcorp Structures Ltd.,
DJ Catering Ltd.,
816956 Alberta Ltd.,
1371047 Alberta Ltd.,
1919209 Alberta Ltd.,
Ernst & Young Inc. en sa qualité de
contrôleur et
Banque de développement du Canada**
Intimées

et

**Institut d'insolvabilité du Canada et
Association canadienne des professionnels
de l'insolvabilité et de la réorganisation**
Intervenants

**RÉPERTORIÉ : CANADA c. CANADA NORTH
GROUP INC.**

2021 CSC 30

N° du greffe : 38871.

2020 : 1^{er} décembre; 2021 : 28 juillet.

Présents : Le juge en chef Wagner et les juges Abella,
Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin et
Kasirer.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Faillite et insolvabilité — Priorité — Retenues à la source — Charges super prioritaires — Retenues à la source des employés non versées à la Couronne par les compagnies mises sous séquestre — Juge chargé de surveiller la procédure de restructuration intentée sous le régime de la Loi sur les arrangements avec les créanciers des compagnies ordonnant que les actifs des compagnies soient grevés de charges super prioritaires en faveur du prêteur temporaire, du contrôleur et des administrateurs — Ordonnance accordant aux charges super

against tautology means that we must presume that Parliament included the specific additional words in s. 224(1.3) because they “have a specific role to play in advancing the legislative purpose” (*Placer Dome*, at para. 45, quoting R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 159). Applying the presumption against tautology demonstrates that Parliament intended interpretive weight to be placed on the examples.

[66] To come back to *Caisse populaire Desjardins de l’Est de Drummond*, I agree with Rothstein J. that the definition of “security interest” in s. 224(1.3) of the *ITA* is expansive such that it “does not require that the agreement between the creditor and debtor take any particular form” (para. 15). However, I am of the view that there is a key restriction in this expansive definition. The definition focuses on interests created either by consensual agreement or by operation of law, and these types of interests are usually designed to protect the rights of a single creditor, usually to the detriment of other creditors. In that case, the Court was considering whether a right to compensation conferred on a single creditor by a contract entered into between that creditor and the debtor was a security interest within the meaning of s. 224(1.3). The situation at issue in that case was completely different than the one at issue in the present case. Indeed, in the present case, the interest of the participants in the restructuring is created by a court order, not by an agreement or by operation of law. As I have said above, when a judge orders a super-priority charge in *CCAA* proceedings, it is quite a different type of interest as the *CCAA* restructuring process benefits all creditors and not one in particular.

[67] Finally, if Parliament had wanted to include court-ordered super-priority charges in the definition of “security interest”, it would have said so specifically. Parliament must be taken to have legislated with the operation of the *CCAA* in mind. In the words of Professor Sullivan, “[t]he legislature is presumed to know its own statute book and to draft

qui garantit le paiement d’une obligation ». Selon la présomption d’absence de tautologie, il nous faut présumer que le législateur a inséré certains termes précis au par. 224(1.3) parce qu’ils « joue[nt] un rôle précis dans la réalisation de l’objectif du législateur » (*Placer Dome*, par. 45, citant R. Sullivan, *Driedger on the Construction of Statutes* (3^e éd. 1994), p. 159). L’application de la présomption d’absence de tautologie démontre que le législateur voulait que l’on attribue une valeur interprétative aux exemples.

[66] Pour revenir à l’arrêt *Caisse populaire Desjardins de l’Est de Drummond*, je conviens avec le juge Rothstein que la définition de « garantie » figurant au par. 224(1.3) de la *LIR* est large de sorte qu’elle « n’exige pas que l’entente entre le créancier et le débiteur revête une forme particulière » (par. 15). Mais si large soit-elle, elle contient à mon sens une limite importante. La définition est axée sur les intérêts créés par accord consensuel ou par application de la loi, et ces types d’intérêts visent habituellement à protéger les droits d’un seul créancier, en général au détriment des autres créanciers. Dans cette affaire, la Cour se demandait si un droit de compensation accordé à un seul créancier au moyen d’une convention intervenue entre ce créancier et la débitrice était une garantie au sens du par. 224(1.3). La situation en cause dans cette affaire était tout à fait différente de celle en l’espèce. En effet, dans la présente affaire, l’intérêt des participants à la restructuration est créé par ordonnance judiciaire, et non par accord ou par application de la loi. Comme je l’ai dit précédemment, lorsqu’un juge ordonne une charge super prioritaire dans une procédure intentée sous le régime de la *LACC*, il s’agit d’un type d’intérêt très différent, car le processus de restructuration prévu par cette loi bénéficie à tous les créanciers, et non à un seul en particulier.

[67] Enfin, si le législateur avait voulu inclure les charges super prioritaires d’origine judiciaire dans la définition de « garantie », il l’aurait dit expressément. Il faut tenir pour acquis que le législateur a légiféré en tenant compte de l’application de la *LACC*. Pour citer la professeure Sullivan, [TRADUCTION] « [l]e législateur est présumé connaître ses propres lois et

each new provision with regard to the structures, conventions, and habits of expression as well as the substantive law embodied in existing legislation” (Sullivan (2014), at p. 422 (footnote omitted)). Given that, in *Indalex*, this Court has already found that granting super-priority charges is critical as “a key aspect of the debtor’s ability to attempt a workout”, one would expect Parliament to use clearer language where such a definition could jeopardize the operation of another one of its Acts. I am therefore in total disagreement with my colleagues Justices Brown and Rowe that “nothing in the definition of security interest in the *ITA* precludes the inclusion of an interest that is designed to operate to the benefit of all creditors” (para. 210). To the contrary, everything hints at priming charges being excluded from the definition of security interest.

[68] In conclusion, a court-ordered super-priority charge under the *CCAA* is not a security interest within the meaning of s. 224(1.3) of the *ITA*. As a result, there is no conflict between s. 227(4.1) of the *ITA* and the Initial Order made in this case. I therefore respectfully disagree with my colleague Justice Moldaver’s suggestion that there may be a conflict between s. 11 of the *CCAA* and the *ITA* (para. 258). The Initial Order’s super-priority charges prevail over the deemed trust.

C. *Was It Necessary for the Initial Order to Subordinate Her Majesty’s Claim Protected by a Deemed Trust in This Case?*

[69] Finally, I must now identify the provision in which the Initial Order here should be grounded. While the initial order under consideration in *Indalex* was based on the court’s equitable jurisdiction, in most instances, orders in *CCAA* proceedings should be considered an exercise of statutory power (*Century Services*, at paras. 65-66).

[70] As discussed above, a supervising court’s authority to order super-priority charges is grounded

rédiger chaque nouvelle disposition en tenant compte des structures, des conventions et des formules d’expression, de même que du droit substantif exprimé dans la législation existante » (Sullivan (2014), p. 422 (note en bas de page omise)). Puisque, dans l’arrêt *Indalex*, notre Cour a déjà statué que l’octroi d’une charge super prioritaire « constitue un élément clé de la capacité du débiteur de tenter de conclure un arrangement », on s’attendrait à ce que le législateur utilise des termes plus clairs dans les cas où une telle définition pourrait compromettre l’application d’une autre de ses propres lois. Je suis donc en total désaccord avec mes collègues les juges Brown et Rowe quand ils affirment que « rien dans la définition de “garantie” qui figure dans la *LIR* ne permet d’exclure une garantie conçue pour fonctionner au profit de tous les créanciers » (par. 210). Au contraire, tout tend à démontrer que les charges super prioritaires sont exclues de la définition de « garantie ».

[68] En conclusion, une charge super prioritaire ordonnée par un tribunal en vertu de la *LACC* n’est pas une garantie au sens du par. 224(1.3) de la *LIR*. Il n’y a donc pas de conflit entre le par. 227(4.1) de la *LIR* et l’ordonnance initiale rendue en l’espèce. Avec égards, je ne souscris pas à l’idée de mon collègue le juge Moldaver suivant laquelle il y a peut-être un conflit entre l’art. 11 de la *LACC* et la *LIR* (par. 258). Les charges super prioritaires constituées aux termes de l’ordonnance initiale l’emportent sur la fiducie réputée.

C. *Était-il nécessaire que l’ordonnance initiale subordonne la réclamation de Sa Majesté protégée par une fiducie réputée en l’espèce?*

[69] Enfin, je dois maintenant déterminer sur quelle disposition l’ordonnance initiale devrait reposer. Bien que l’ordonnance examinée dans l’arrêt *Indalex* était fondée sur la compétence du tribunal en equity, dans la plupart des cas, les ordonnances rendues dans le cadre des procédures engagées sous le régime de la *LACC* devraient être considérées comme découlant de l’exercice d’un pouvoir conféré par la loi (*Century Services*, par. 65-66).

[70] Comme nous l’avons vu plus haut, le pouvoir du tribunal de surveillance d’ordonner des charges

Tab

11

CITATION: Springer Aerospace Holdings Limited, 2022 ONSC 6581
COURT FILE NO.: CV-22-00690657-00CL
DATE: 20221124

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED (the “CCAA”)

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SPRINGER AEROSPACE HOLDINGS LIMITED AND 1138969 ONTARIO INC.

BEFORE: Penny, J.

COUNSEL: *Sharon Kour, Caitlin Fell and Joel Turgeon*, Counsel for the Applicants

Miranda Spence and Matilda Lici, Counsel for Proposed Monitor, MNP

Haddon Murray and Katherine Yurkovich, Counsel for Caisse Desjardins Ontario Credit Union Inc.

Vern DaRe, Counsel for the Proposed DIP Lender

HEARD: November 23, 2022

ENDORSEMENT

Overview and Issues

- [1] This is an application for relief under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36. It is made by 1138969 Ontario Inc. (o/a Springer Aerospace) (which I will refer to as “Springer”) and its sole shareholder, Springer Aerospace Holdings Limited (referred to as “Holdco”). Following the hearing, I granted the initial order with reasons to follow. These are the reasons.
- [2] Springer operates one of the largest aircraft maintenance, repair and overhaul businesses in Canada, dating back to 1972. Springer is one of the only “one-stop-shops” for aircraft maintenance in Canada. It is located in Echo Bay, near Sault Ste. Marie, Ontario. Springer employs about 100 people. It is the second largest employer in the region. The loss of employment and income for 100 households in a town of 1,600 residents would have serious implications in the local area. Springer is the only aerospace business in Northern Ontario, such that it is unlikely that the company’s employees would find similar employment in the area. Springer provides maintenance services to most of the airlines

The Charges

The DIP

- [15] Section 11.2(4) of the CCAA establishes a non-exhaustive list of criteria that the court must consider in deciding whether to grant a DIP lender's charge: the period during which the Applicants are expected to be subject to CCAA proceedings, how the Applicants' business and financial affairs are to be managed during the proceedings, whether the Applicants' management has the confidence of its major creditors, whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the Applicants, the nature and value of the Applicants' property, whether any creditor would be materially prejudiced as a result of the security or charge, and whether the monitor supports the charge. **DIP financing may be approved even if it potentially prejudices some creditors, as long as the prejudice is outweighed by the benefit to all stakeholders.**
- [16] While management no longer enjoys the confidence of Desjardins, I am satisfied, at this stage of the application for an initial order, that the factors, considered as a whole, favour the grant of the relief sought. In particular, where the funding is sought on an interim basis, the Court must consider if the terms of the loan are limited to what is reasonably necessary for the continued operations of the company.
- [17] The initial proposed DIP loan and charge is \$600,000. The Applicants need liquidity to continue their operations during the restructuring period. According to the cash flows, the Applicants need to draw on the DIP loan to meet their payroll obligations this week. The proposed amount is roughly tailored to the initial 10 days. A first charge is a condition of advancing the DIP loan. The terms of the DIP loan term sheet are typical for such facilities approved in similar matters before the Commercial List. The DIP lender's charge will not secure any obligations existing before the initial order is made, satisfying the terms set out in s. 11.2(1) of the CCAA. The Monitor supports the approval of the DIP loan and the DIP lenders charge in the circumstances.

Administration Charge

- [18] The Court has jurisdiction to grant an administration charge under s. 11.52 of the CCAA. I am to consider: the size and complexity of the business being restructured, the proposed role of the beneficiaries of the charge, whether there is an unwarranted duplication of roles, whether the quantum of the proposed charge appears to be fair and reasonable, the position of the secured creditors likely to be affected by the charge, and the position of the Monitor.
- [19] The success of the Applicants' restructuring is dependent on the involvement of the Monitor and legal counsel. Those roles are not duplicative. While estimating the quantum of an administration charge is "an inexact exercise", the quantum of the administration charge sought is commensurate with the complexity of the Applicants' business and anticipated restructuring. The Applicants have incurred fees leading to this Application and are forecast to incur further fees in connection with the restructuring, including to prepare for the comeback hearing, communicating with employees and stakeholders following the

initial filing, and complying with statutory notices, mailings and communications. It is appropriate for the Court to grant the initial administration charge sought of \$80,000.

The Directors' Charge

- [20] The Applicants currently have no director and officer liability insurance. Obtaining director and officer insurance at this stage is unlikely to be within the realm of reasonable possibility.
- [21] To ensure the stability of the business during the restructuring period, the Applicants need the ongoing assistance of their directors and officers, who have considerable institutional knowledge and specialized expertise. The proposed directors' charge is for the maximum amount of \$165,000, which is equivalent to approximately two weeks of the Applicants' payroll, including source deductions. That is the only reasonably anticipated potential exposure of directors and officers for the initial 10-day period of these CCAA proceedings. The proposed directors' charge provides assurance to employees that directors' liability for unpaid wages and vacation pay will be satisfied.
- [22] The directors' charge does not prime Desjardins' security and Desjardins suffers no prejudice. The proposed directors' charge secures only obligations and liabilities incurred after the commencement of the proceedings and does not apply to liability incurred as a result of gross negligence or wilful misconduct, which satisfies the requirements of s. 11.51(1) and 11.51(4) of the CCAA.
- [23] Finally, the Monitor supports the Applicants' request for the directors' charge.
- [24] The directors' charge is approved in the amount of \$165,000.

Pre-filing Amounts Owed to Key Suppliers

- [25] Courts have often granted orders under s. 11 of the CCAA allowing applicants to pay pre-filing amounts to critical suppliers with the consent of the monitor. In doing so, courts have considered: whether the goods and services concerned are integral to the business, the applicants' need for the uninterrupted supply of the goods or services, the monitor's support and willingness to work with the applicants to ensure that payments to suppliers in respect of pre-filing liabilities are appropriate, and the effect on the applicants' ongoing operations and ability to restructure if they were unable to make pre-filing payments to their critical suppliers.
- [26] Given Springer's location in Northern Ontario and the specialized nature of the aerospace business, Springer has limited vendors who are able to supply the specific products and services that Springer requires. Any interruption of supply would have a material adverse effect on the business. Springer is particularly vulnerable to interruptions as it does not stockpile significant inventory of parts and supplies in the ordinary course.
- [27] It is appropriate that the Applicants be entitled but not required to pay, with the consent of the Monitor, amounts owing for goods or services supplied to the Applicants prior to the

date of the initial order, if these payments are necessary to avoid disruption to the operations of the Applicants' business during these proceedings.

Appointment of MNP as Monitor

[28] The Applicants propose to have MNP appointed as the Monitor. MNP is a "trustee" within the meaning of subsection 2(1) of the BIA, is established and qualified, and has consented to act as Monitor. The involvement of MNP as the court-appointed Monitor will lend stability and assurance to Springer's stakeholders. MNP is not subject to any of the restrictions set out in s. 11.7(2) of the CCAA.

The Sealing Order

[29] The confidential affidavit filed in this application contains appraisals of the Applicants' property appended as exhibits. This is sensitive information, the confidentiality of which must be preserved until a plan of compromise or other restructuring is completed. This is to preserve the ability of the Applicants and the Monitor to maximize value during the restructuring process.

[30] This court has jurisdiction to make the sealing orders sought under s. 137(2) of the *Courts of Justice Act*. There is a public interest in maximizing recovery in an insolvency that goes beyond each individual case. The relief sought meets the test in *Sherman Estate* and is appropriate in the circumstances.

Comeback Hearing

[31] The comeback hearing shall take place on December 2, 2022 at 11:00 AM

Penny, J.

Date: November 24, 2022

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CITATION: Cinram International Inc. (Re), 2012 ONSC 3767
COURT FILE NO.: CV-12-9767-00CL
DATE: 20120626

**SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CINRAM INTERNATIONAL INC., CINRAM INTERNATIONAL INCOME FUND, CII TRUST AND THE COMPANIES LISTED IN SCHEDULE “A”, Applicants

BEFORE: MORAWETZ J.

COUNSEL: Robert J. Chadwick, Melaney Wagner and Caroline Descours, for the Applicants

Steven Golick, for Warner Electra-Atlantic Corp.

Steven Weisz, for Pre-Petition First Lien Agent, Pre-Petition Second Lien Agent and DIP Agent

Tracy Sandler, for Twentieth Century Fox Film Corporation

David Byers, for the Proposed Monitor, FTI Consulting Inc.

**HEARD &
ENDORSED: JUNE 25, 2012**

REASONS: JUNE 26, 2012

ENDORSEMENT

[1] Cinram International Inc. (“CII”), Cinram International Income Fund (“Cinram Fund”), CII Trust and the Companies listed in Schedule “A” (collectively, the “Applicants”) brought this application seeking an initial order (the “Initial Order”) pursuant to the *Companies’ Creditors Arrangement Act* (“CCAA”). The Applicants also request that the court exercise its jurisdiction to extend a stay of proceedings and other benefits under the Initial Order to Cinram International Limited Partnership (“Cinram LP”, collectively with the Applicants, the “CCAA Parties”).

- (a) the lenders demanding payment in full for money owing under the Credit Agreements;
- (b) potential termination of contracts by key suppliers; and
- (c) potential termination of contracts by customers.

[22] As indicated in the cash flow forecast, the Applicants do not have sufficient funds available to meet their immediate cash requirements as a result of their current liquidity challenges. Mr. Bell states in his affidavit that the Applicants require access to Debtor-In-Possession (“DIP”) Financing in the amount of \$15 millions to continue operations while they implement their restructuring, including the Proposed Transaction. Cinram has negotiated a DIP Credit Agreement with the lenders forming the Steering Committee (the “DIP Lenders”) through J.P. Morgan Chase Bank, NA as Administrative Agent (the “DIP Agent”) whereby the DIP Lenders agree to provide the DIP Financing in the form of a term loan in the amount of \$15 million.

[23] The Applicants also indicate that during the course of the CCAA proceedings, the CCAA Parties intend to generally make payments to ensure their ongoing business operations for the benefit of their stakeholders, including obligations incurred prior to, on, or after the commencement of these proceedings relating to:

- (a) the active employment of employees in the ordinary course;
- (b) suppliers and service providers the CCAA Parties and the Monitor have determined to be critical to the continued operation of the Cinram business;
- (c) certain customer programs in place pursuant to existing contracts or arrangements with customers; and
- (d) inter-company payments among the CCAA Parties in respect of, among other things, shared services.

[24] Mr. Bell states that the ability to make these payments relating to critical suppliers and customer programs is subject to a consultation and approval process agreed to among the Monitor, the DIP Agent and the CCAA Parties.

[25] The Applicants also request an Administration Charge for the benefit of the Monitor and Moelis and Company, LLC (“Moelis”), an investment bank engaged to assist Cinram in a comprehensive and thorough review of its strategic alternatives.

[26] In addition, the directors (and in the case of Cinram Fund and CII Trust, the Trustees, referred to collectively with the directors as the “Directors/Trustees”) requested a Director’s Charge to provide certainty with respect to potential personal liability if they continue in their current capacities. Mr. Bell states that in order to complete a successful restructuring, including the Proposed Transaction, the Applicants require the active and committed involvement of their

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CITATION: McEwan Enterprises Inc., 2021 ONSC 6453
COURT FILE NO.: CV-21-00669445-00CL
DATE: 2021-10-01

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF MCEWAN ENTERPRISES INC.

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *Robert J. Chadwick, Caroline Descours, and Trish Barrett* for the Applicant

Sean Zweig and Joshua Foster, for the Monitor

Virginie Gauthier, for The Cadillac Fairview Corporation Limited

HEARD and DETERMINED: September 28, 2021

REASONS RELEASED: October 1, 2021

ENDORSEMENT

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

A. OVERVIEW

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

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

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

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

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

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

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

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

32. I am also satisfied that the Court has the jurisdiction to permit payment of pre-filing obligations in a CCAA proceeding, including where such payments are critical to the ongoing operations of a debtor company or the maintenance of its customer, supplier and employee relationships. (See: *Canwest Global Communications Corp., Re* (2009), 59 C.B.R. (5th) 72 (Ont. Sup. Ct. J. [Commercial List]) at paras. 41, 43; *Cinram International Inc., Re*, 2012 ONSC 3767 at para. 37 and Sch. C at paras. 66-71; and *Performance Sports Group Ltd., Re*, 2016 ONSC 6800 at para. 24 [*Performance Sports*]).

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

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

35. I am satisfied that pursuant to Section 23(1)(a) of the CCAA, the Court has the jurisdiction to grant an order not requiring compliance with the applicable notice provisions and/or varying

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CITATION: JTI-Macdonald Corp., Re, 2019 ONSC 1625
COURT FILE NO.: CV-19-615862-00CL
DATE: 2019/03/12

SUPERIOR COURT OF JUSTICE – ONTARIO

- COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JTI-MACDONALD CORP.

Applicant

BEFORE: Hainey J.

COUNSEL: *Robert I. Thornton, Leanne M. Williams, Rachel Bengino and Mitch Grossell*, for the Applicant

Scott A. Bomhof and Adam M. Slavens, for Respondents JT Canada LLC, and PWC, in its capacity as Receiver of JTI-MacDonald TM

Pamela L.J.Huff, Linc A. Rogers and Christopher Burr, for the Proposed Monitor, Deloitte Restructuring Inc.

HEARD: March 8, 2019

ENDORSEMENT

Background

[1] On March 8, 2019 JTI-Macdonald Corp. (“JTIM” or “Applicant”) sought an Initial Order pursuant to *The Companies Creditors Arrangement Act* (“CCAA”). I granted the Initial Order and endorsed the record as follows:

I am satisfied that this application should be granted today on the terms of the attached Initial Order. There shall be a sealing order on the terms of para. 59 of the Initial Order. I will provide written reasons for my decision to grant this order in due course. The comeback motion referred to in para. 50 shall be on April 4, 2019 at 10 a.m. in this Court.

[2] These are my Reasons.

Facts

- (d) the administrative charge will rank in priority to the directors' charge and the tax charge. The only secured creditors that will be affected by the administrative charge are JTIM's parent companies and certain other secured related party suppliers, each of which support the granting of the administrative charge; and
- (e) the Proposed Monitor believes that the amount of the administration charge is reasonable

Directors' Charge

[22] I am satisfied that the directors' charge should be approved to ensure the ongoing stability of JTIM's business during the CCAA proceedings. The directors and officers have a great deal of institutional knowledge and experience and JTIM requires their continued management of its business. To ensure that the officers and directors remain with JTIM during the CCAA proceedings they require the protection of the directors' charge. The proposed charge of \$4.1 million will only be available to the extent that the directors' and officers' insurance is not available if a claim is made against them. The Proposed Monitor is of the view that the directors' charge is reasonable and appropriate.

Tax Charge

[23] JTIM is also seeking a third-ranking super-priority charge in the amount of \$127 million in favour of the Canadian federal, provincial and territorial authorities that are entitled to receive payments and collect money from JTIM with respect to sales taxes and excise taxes and duties. I am satisfied that this tax charge should be granted so that JTIM's directors and officers do not become personally liable for these taxes. Further, the Proposed Monitor is of the view that the tax charge is reasonable and appropriate.

Is it appropriate to allow the payment of certain pre-filing and post-filing amounts?

[24] In *Cinram International Inc., Re*, 2012 ONSC 3767 Morawetz J. (as he then was) concluded at Para. 68 that the court should consider the following factors in deciding whether to authorize the payment of pre-filing obligations:

- (a) whether the goods and services were integral to the business of the applicants;
- (b) the debtors' need for the uninterrupted supply of the goods or services;
- (c) the Monitor's support and willingness to work with the applicants to ensure that payments to suppliers in respect of pre-filing liabilities were appropriate; and
- (d) the effect on the debtors' ongoing operations and ability to restructure if they were unable to make pre-filing payments to their critical suppliers.

[25] JTIM's business is expected to remain cash-flow positive during these CCAA proceedings so that it will have sufficient cash to meet its pre-filing and post-filing

obligations. JTIM's operations depend on timely and continuous supply from its suppliers. Maintaining its operations as a going concern is in the best interests of all of JTIM's stakeholders. The Proposed Monitor supports JTIM's intentions to pay its employees, trade creditors, royalty payments, interest, payments, previous obligations and other disbursements in the ordinary course of its business. I agree and adopt the Proposed Monitor's reasons for supporting these pre-filing and post-filing payments as set out at paras. 65-72 of the Report of the Proposed Monitor dated March 8, 2019.

Should Blue Tree Advisors be appointed as CRO?

[26] According to JTIM, it requires the proposed Chief Restructuring Officer, William Aziz, to successfully complete its contemplated restructuring plan. Mr. Aziz has the experience and necessary skills to oversee and assist JTIM with its complex negotiations during the CCAA proceedings. With the assistance of the CRO, JTIM's management can focus on the company's operations which should maximize value for its stakeholders.

[27] I am satisfied that Mr. Aziz should be appointed as CRO pursuant to the terms of the CRO Engagement Letter which the Monitor supports.

[28] JTIM requests an order sealing the unredacted copy of the CRO Engagement Letter. Section 137(2) of the *Courts of Justice Act* gives the Court jurisdiction to order that a document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record.

[29] The CRO Engagement Letter sets out the commercial terms of the CRO's engagement. This is commercially sensitive information. In my view JTIM's request for a sealing order meets the test set out in the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 because it will protect a commercial interest and the salutary effects of sealing the CRO's Engagement Letter outweighs any deleterious effects since this is the type of information that a private company outside of a CCAA proceeding would treat as confidential.

Should JTIM be authorized to continue its appeal to the Supreme Court of Canada?

[30] At para. 75 of its Factum, JTIM submits as follows:

75. In this case, the Applicant is cash flow positive and has successful business operations. Its insolvency is primarily due to the QCA Judgment. The Applicant wishes to exercise its right to appeal the QCA Judgment, while staying enforcement thereof and while considering its options for a viable solution for the benefit of all of its stakeholders.

[31] In my view, based on this submission it is reasonable to permit JTIM to continue its leave to appeal application to the Supreme Court of Canada.

Conclusion