COURT FILE NUMBER	BK NO: 25-2523592
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PROCEEDING	IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF OAN RESOURCES LTD.
DOCUMENT	**BENCH BRIEF OF APPLICANT re: Application for Extension of Stay**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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I. INTRODUCTION

1. This Bench Brief is submitted by OAN Resources Ltd. ("**OAN**") in support of its Application for an Extension of Stay and related relief filed on June 28, 2019 (the "**Application**").

2. OAN is a privately held company, with its registered office in Calgary, Alberta. It carries on business as a producer of oil and gas.[1] On June 14, 2019, OAN filed a Notice of Intention to Make a Proposal (the "**NOI**") under Section 50.4 of the *Bankruptcy and Insolvency Act* ("***BIA***"). OAN has engaged Hardie & Kelly Inc. as its trustee (the "**Proposal Trustee**") for the contemplated proposal ("**Proposal**").[2]

3. Pursuant to Section 50.4 of the *BIA*, OAN has a period of thirty days after filing its NOI to file its Proposal. However, this Court has discretion to extend this period by 45-days (for any individual extension).

4. In its Application, OAN seeks a 45-day extension to file its Proposal since, among other things, it has acted diligently and in good faith, expects that a viable proposal is likely (if afforded a reasonable extension), and no creditor would be materially prejudiced by an extension. Indeed, creditors collectively stand to benefit from a successful restructuring, which can only be achieved if the within NOI proceedings are extended. Simply put, an extension would be in keeping with the objective of the proposal provisions under the *BIA*, namely to save businesses, rather than forcing them into premature liquidation.

5. Additionally, OAN seeks declaratory relief from this Court permitting it to continue paying three critical suppliers. Although the *BIA* does not contain an express "critical supplier" provision, like Section 11.4 of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (the "***CCAA***"),[3] this Court has the inherent jurisdiction to make such an order. Here, a critical supplier declaration is necessary so that OAN continues receiving services vital to its operations, continues generating revenues, and therefore has resources and value to make a viable Proposal.

6. The facts in support of the relief sought by OAN are set out in the Affidavit of David Fricker (President of OAN) sworn on June 28, 2019, and in the First Report of the Proposal Trustee dated July 2, 2019, which have been filed in support of this Application.

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[1] Affidavit of David Fricker, sworn and filed on June 28, 2019 ("**Fricker Affidavit**"), paras. 2-3; First Report of the Proposal Trustee, Hardie & Kelly Inc., filed on July 2, 2019 ("**First Report**"), paras. 4-6.

[2] Fricker Affidavit, para. 9; First Report, para. 1.

[3] *See Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ("*CCAA*"), Section 11.4 [**TAB 1**]

II. LAW AND ARGUMENT

A. This Court Should Extend the Time for OAN's Proposal

7. Under Subsection 50.4(9) of the *BIA*, the Court may extend the time for an insolvent person to file a proposal who has made a notice of intention. Specifically, Subsection 50.4(9) states:

> **Extension of time for filing proposal**
>
> (9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that
>
> (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
>
> (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
>
> (c) no creditor would be materially prejudiced if the extension being applied for were granted.[4] (underlining added)

8. Thus, the Court has the discretion to extend the time for an insolvent person to file a proposal, provided that: (i) the insolvent person is acting diligently and in good faith; (ii) a viable proposal is likely to be forthcoming; and (iii) no creditor would be materially prejudiced.[5] The burden of proof is on the applicant.[6]

9. There are few reported decisions of this Court interpreting Subsection 50.4(9). However, Subsection 50.4(9) was considered in detail by the British Columbia Supreme Court in *Enirgi Group Corp v Andover Mining Corp*.[7] In that case, the British Columbia Court explained:

   (a) the Court should consider the due diligence and good faith of the applicant following the notice of intention (i.e. not the debtor's conduct prior to the notice of intention);[8]

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[4] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("***BIA***"), Section 50.4 [**TAB 2**].

[5] *Castle Rock Research Corp v AGC Investments Ltd*, 2012 ABQB 208 ("***Castle Rock***"), para. 9 [**TAB 3**].

[6] *Ibid* at para 9.

[7] *Enirgi Group Corp v Andover Mining Corp*, 2013 BCSC 1833 ("***Enirgi***") [**TAB 4**].

[8] *Ibid*, paras. 64-65.

(b) a "viable" proposal is one that would be reasonable on its face to a reasonable creditor, and the opposition of any one particular creditor is not determinative;[9]

(c) a viable proposal must be "likely" in the sense that it "might well happen"—a viable proposal need not be a "certainty" if the extension is granted;[10] and

(d) the test under Subsection 50.4(9)(c) is "not prejudice [to creditors] but material prejudice". This is an objective test.[11]

10. In *Enirgi*, the Court granted the debtor an extension to file its proposal, noting that the objective of the *BIA* proposal provisions "is rehabilitation rather than liquidation".[12]

11. In *Castle Rock v Research Corp v AGC Investments Ltd*, Justice Belzil of this Court also granted the debtor an extension under Subsection 50.4(9). In this case, his Lordship found that the burden of proof for an extension was met by the debtor since, among other things, the evidence showed that:[13]

(a) the debtor had continued to operate its business, without debtor in possession financing, after the notice of intention was filed;

(b) the debtor anticipated future business opportunities and cash flow;

(c) the trustee supported the extension, which was a "highly significant" factor;

(d) there was no concern by the trustee that the debtor was acting in bad faith or without due diligence; and

(e) there was no material prejudice to creditors.

12. Indeed, the findings by Justice Belzil in *Castle Rock* are apposite to the within Application.

13. In the instant case, it is just and appropriate for this Court to grant OAN a 45-day extension to file its Proposal since, among other things: (i) OAN has and will continue to carry on its business in the ordinary course;[14] (ii) OAN has interests in cash-flowing assets, and anticipates significant production revenues in the immediate future (i.e. during the extension period);[15] (iii) OAN has acted diligently and in good faith by retaining experienced restructuring advisors and considering options with them;[16] (iv) the Proposal Trustee has concluded that OAN's cash flow forecast is reasonable in the

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[9] *Ibid*, para. 66.

[10] *Ibid*, para. 66.

[11] *Ibid*, para. 76.

[12] *Ibid*, paras. 77-78.

[13] *Castle Rock*, *supra* paras. 8-21 **[TAB 3]**

[14] Fricker Affidavit, para. 11; First Report, para. 8.

[15] Fricker Affidavit, Appendix "E"; First Report, paras. 13-15.

[16] Fricker Affidavit, paras. 9-10; First Report, para. 18.

circumstances, and the Proposal Trustee supports an extension;[17] and (v) there is no evidence before the Court of material prejudice to creditors.[18]

14. In short, the reasonable extension sought by OAN will enable the restructuring process to continue so that value may be maximized, in furtherance of the purpose of the proposal provisions of the *BIA*. Conversely, a bankruptcy would be premature, especially as this is the first extension sought by OAN in these proceedings.

B. This Court Should Approve Payments to OAN's Critical Suppliers

15. Section 11.4 of the *CCAA* states that the Court may declare a person to be a "critical supplier" if the "goods or services that are supplied are critical to the [debtor] company's continued operation".[19] With such a declaration, the Court may grant the supplier a super-priority charge in respect of goods or services provided during the restructuring.[20] The *CCAA* further empowers the Court to authorize payments to critical suppliers for pre-filing debts, in order ensure continuity of vital services.[21] As Justice Romaine succinctly explained in *Sanjel Corp Re*, "critical supplier relief [under the *CCAA*] keeps operations functioning"[22] during a going-concern sale or restructuring.

16. Although the proposal division of the *BIA* does not contain express critical supplier provisions, equivalent to the *CCAA*, the purpose of restructurings under the *CCAA* and proposals under the *BIA* is the same: "the objective of the *BIA* is rehabilitation rather than liquidation".[23] It follows that critical supplier declarations may be as appropriate and necessary under *BIA* proceedings, as under the *CCAA*.

17. Furthermore, the *BIA* expressly grants the Court the power to make a super-priority charge over the debtor's property in favour of an interim lender during proposal proceedings.[24] This demonstrates Parliament's intention to ensure the continuity of operations and services, during a *BIA* restructuring, even where doing so may prejudice creditors.

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[17] First Report, paras. 15 and 19.

[18] First Report, para. 19.

[19] *CCAA*, *supra* Section 11.4 [**TAB 1**].

[20] *Ibid.*

[21] *Target Canada Co, Re*, 2015 ONSC 303 ("***Target***"), per Justice Morawetz, paras. 62-65 [**TAB 5**].

[22] *Sanjel Corp, Re*, 2016 ABQB 257 ("***Sanjel***"), para. 65 [**TAB 6**]

[23] *Enirgi*, *supra* para. 77 [**TAB 4**], in which the British Columbia Supreme Court affirmed the principle articulated by Justice Chadwick in *NTW Management Group Ltd, Re*, 1993 CarswellOnt 208 (Crt Just), that "The bankruptcy insolvency legislation and in particular the proposal sections are to give an insolvent company or person, an opportunity of putting forward a plan. The intent of the legislation is towards rehabilitation, not liquidation." (para. 22) [**TAB 7**]

[24] *BIA*, *supra* Section 50.6 [**TAB 2**]

18. Finally, this Court has an inherent jurisdiction to fill "gaps" in the *BIA*, in order "to make explicit what is already implicit in the words of the statute".[25] Indeed, the Court of Appeal for Ontario has (very recently) affirmed in *Third Eye Capital Corporation v Dianor Resources Inc.* that the *BIA* should be afforded a "broad, liberal and purposive interpretation" and that the Court has an "inherent jurisdiction" to fill gaps.[26] As such, even without an express critical supplier provision, this Court is well-equipped to fill gaps in the *BIA* to facilitate a meaningful restructuring.

19. In the instant case, OAN seeks (i) a declaration that three of its suppliers, namely Crimson Oil & Gas Ltd., Highwood Oil Company Ltd. and David Hudgeon (collectively, the "**Critical Suppliers**"), are "critical suppliers" to OAN,[27] and (ii) this Court's authorization to pay the Critical Suppliers amounts necessary for them to continue providing services to OAN (whether relating to pre-NOI or post-NOI debts). Although such payments may, potentially, have the effect of preferring the Critical Suppliers over other creditors, such payments are vital to OAN pursuing a viable Proposal.

20. Specifically, if the Critical Suppliers are not paid, and cease providing services to OAN, its revenue-stream will evaporate and so will a viable Proposal.[28] The Proposal Trustee also supports the relief sought by OAN in respect of its Critical Suppliers.[29]

21. In short, it is just and equitable for this Court to exercise its inherent jurisdiction to permit OAN to pay its Critical Suppliers.

III. CONCLUSION

22. For the reasons set out above, OAN respectfully request that the relief sought in its Application be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 2nd DAY OF JULY 2019

BORDEN LADNER GERVAIS LLP

Per: Josef G.A. Kruger, Q.C.
Solicitors for OAN Resources Ltd.

[25] *Portus Alternative Asset Management Inc, Re*, 2007 CarswellOnt 6774 (SC) ("***Portus***"), at paras 19-22 **[TAB 8]**
[26] *Third Eye Capital Corporation v Dianor Reources Inc.*, 2019 ONCA 508 ("***Dianor***"), para. 31 **[TAB 9]**
[27] Fricker Affidavit, paras. 4-6; First Report, paras. 16-17.
[28] Fricker Affidavit, paras. 4-6, and 15.
[29] First Report, paras. 17 and 20.

TABLE OF AUTHORITIES

TAB	DOCUMENT
1.	*Companies' Creditors Arrangement Act*, RSC 1985, c C-36, Section 11.4
2.	*Bankruptcy and Insolvency Act*, RSC 1985, c B-3, Sections 50.4, 50.6
3.	*Castle Rock Research Corp v AGC Investments Ltd*, 2012 ABQB 208
4.	*Enirgi Group Corp v Andover Mining Corp*, 2013 BCSC 1833
5.	*Target Canada Co, Re*, 2015 ONSC 303
6.	*Sanjel Corp, Re*, 2016 ABQB 257
7.	*NTW Management Group Ltd, Re*, 1993 CarswellOnt 208
8.	*Portus Alternative Asset Management Inc, Re*, 2007 CarswellOnt 6774
9.	*Third Eye Capital Corporation v Dianor Resources Inc*, 2019 ONCA 508

TAB 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

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

An Act to facilitate compromises and arrangements between companies and their creditors

Short Title

Short title

1 This Act may be cited as the *Companies' Creditors Arrangement Act*.

R.S., c. C-25, s. 1.

Interpretation

Definitions

2 (1) In this Act,

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

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

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

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

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

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

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

Loi facilitant les transactions et arrangements entre les compagnies et leurs créanciers

Titre abrégé

Titre abrégé

1 *Loi sur les arrangements avec les créanciers des compagnies*.

S.R., ch. C-25, art. 1.

Définitions et application

Définitions

2 (1) Les définitions qui suivent s'appliquent à la présente loi.

accord de transfert de titres pour obtention de crédit Accord aux termes duquel une compagnie débitrice transfère la propriété d'un bien en vue de garantir le paiement d'une somme ou l'exécution d'une obligation relativement à un contrat financier admissible. (*title transfer credit support agreement*)

actionnaire S'agissant d'une compagnie ou d'une fiducie de revenu assujetties à la présente loi, est assimilée à l'actionnaire la personne ayant un intérêt dans cette compagnie ou détenant des parts de cette fiducie. (*shareholder*)

administrateur S'agissant d'une compagnie autre qu'une fiducie de revenu, toute personne exerçant les fonctions d'administrateur, indépendamment de son titre, et, s'agissant d'une fiducie de revenu, toute personne exerçant les fonctions de fiduciaire, indépendamment de son titre. (*director*)

agent négociateur Syndicat ayant conclu une convention collective pour le compte des employés d'une compagnie. (*bargaining agent*)

biens aéronautiques [Abrogée, 2012, ch. 31, art. 419]

agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

Copy of order

(5) The applicant is to send a copy of the order to every party to the agreement.

1997, c. 12, s. 124; 2005, c. 47, s. 128; 2007, c. 29, s. 107, c. 36, ss. 65, 112.

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

Critical supplier

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

Obligation to supply

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

Security or charge in favour of critical supplier

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

Priority

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

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

Removal of directors

11.5 (1) The court may, on the application of any person interested in the matter, make an order removing from office any director of a debtor company in respect of which an order has been made under this Act if the court is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made in respect of the

les manquements d'ordre pécuniaire relatifs au contrat, autres que ceux découlant du seul fait que la compagnie est insolvable, est visée par une procédure intentée sous le régime de la présente loi ou ne s'est pas conformée à une obligation non pécuniaire.

Copie de l'ordonnance

(5) Le demandeur envoie une copie de l'ordonnance à toutes les parties au contrat.

1997, ch. 12, art. 124; 2005, ch. 47, art. 128; 2007, ch. 29, art. 107, ch. 36, art. 65 et 112.

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

Fournisseurs essentiels

11.4 (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 toute personne fournisseur essentiel de la compagnie s'il est convaincu que cette personne est un fournisseur de la compagnie et que les marchandises ou les services qu'elle lui fournit sont essentiels à la continuation de son exploitation.

Obligation de fourniture

(2) S'il fait une telle déclaration, le tribunal peut ordonner à la personne déclarée fournisseur essentiel de la compagnie de fournir à celle-ci les marchandises ou services qu'il précise, à des conditions compatibles avec les modalités qui régissaient antérieurement leur fourniture ou aux conditions qu'il estime indiquées.

Charge ou sûreté en faveur du fournisseur essentiel

(3) Le cas échéant, le tribunal déclare dans l'ordonnance que tout ou partie des biens de la compagnie sont grevés d'une charge ou sûreté, en faveur de la personne déclarée fournisseur essentiel, d'un montant correspondant à la valeur des marchandises ou services fournis en application de l'ordonnance.

Priorité

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

1997, ch. 12, art. 124; 2000, ch. 30, art. 156; 2001, ch. 34, art. 33(A); 2005, ch. 47, art. 128; 2007, ch. 36, art. 65.

Révocation des administrateurs

11.5 (1) Sur demande d'un intéressé, le tribunal peut, par ordonnance, révoquer tout administrateur de la compagnie débitrice à l'égard de laquelle une ordonnance a été rendue sous le régime de la présente loi s'il est convaincu que ce dernier, sans raisons valables, compromet ou compromettra vraisemblablement la possibilité de conclure une transaction ou un arrangement viable ou

TAB 2

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

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

L.R.C. (1985), ch. B-3

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Idem

(3) Where the proposed assessed value is less than the amount of the secured creditor's claim, the secured creditor may file with the trustee a proof of claim in the prescribed form, and may vote as an unsecured creditor on all questions relating to the proposal in respect of an amount equal to the difference between the amount of the claim and the proposed assessed value.

Idem

(4) Where a secured creditor is dissatisfied with the proposed assessed value of his security, the secured creditor may apply to the court, within fifteen days after the proposal is sent to the creditors, to have the proposed assessed value revised, and the court may revise the proposed assessed value, in which case the revised value henceforth applies for the purposes of this Part.

Where no secured creditor in a class takes action

(5) Where no secured creditor having a secured claim of a particular class files a proof of secured claim at or before the meeting of creditors, the secured creditors having claims of that class shall be deemed to have voted for the refusal of the proposal.

1992, c. 27, s. 19; 1997, c. 12, s. 31(F).

Excluded secured creditor

50.2 A secured creditor to whom a proposal has not been made in respect of a particular secured claim may not file a proof of secured claim in respect of that claim.

1992, c. 27, s. 19.

Rights in bankruptcy

50.3 On the bankruptcy of an insolvent person who made a proposal to one or more secured creditors in respect of secured claims, any proof of secured claim filed pursuant to section 50.1 ceases to be valid or effective, and sections 112 and 127 to 134 apply in respect of a proof of claim filed by any secured creditor in the bankruptcy.

1992, c. 27, s. 19.

Notice of intention

50.4 (1) Before filing a copy of a proposal with a licensed trustee, an insolvent person may file a notice of intention, in the prescribed form, with the official receiver in the insolvent person's locality, stating

(a) the insolvent person's intention to make a proposal,

Idem

(3) Si la valeur attribuée à la garantie est moindre que le montant de la réclamation du créancier garanti, celui-ci peut déposer auprès du syndic, en la forme prescrite, une preuve de réclamation et peut, à titre de créancier non garanti, voter sur toutes questions relatives à la proposition jusqu'à concurrence d'un montant égal à la différence entre le montant de la réclamation et la valeur attribuée à la garantie.

Idem

(4) S'il n'est pas d'accord avec la valeur attribuée à sa garantie, le créancier garanti peut, dans les quinze jours suivant l'envoi de la proposition aux créanciers, demander au tribunal de réviser l'évaluation proposée. Le tribunal peut procéder à la révision souhaitée, auquel cas la présente partie s'applique par la suite en fonction de la valeur révisée.

Rejet présumé de la proposition

(5) Les créanciers visés au paragraphe (1) qui possèdent une réclamation garantie appartenant à une catégorie particulière sont réputés avoir voté en faveur du rejet de la proposition si aucun d'entre eux n'a déposé une preuve de réclamation garantie avant l'assemblée des créanciers ou lors de celle-ci.

1992, ch. 27, art. 19; 1997, ch. 12, art. 31(F).

Le cas des autres créanciers garantis

50.2 Le créancier garanti à qui aucune proposition n'a été faite relativement à une réclamation garantie en particulier n'est pas admis à produire une preuve de réclamation garantie à cet égard.

1992, ch. 27, art. 19.

Droits en cas de faillite

50.3 En cas de faillite d'une personne insolvable ayant fait une proposition à un ou plusieurs créanciers garantis relativement à des réclamations garanties, les preuves de réclamations garanties déposées aux termes de l'article 50.1 sont sans effet, et les articles 112 et 127 à 134 s'appliquent aux preuves de réclamations déposées par des créanciers garantis dans le cadre de la faillite.

1992, ch. 27, art. 19.

Avis d'intention

50.4 (1) Avant de déposer copie d'une proposition auprès d'un syndic autorisé, la personne insolvable peut, en la forme prescrite, déposer auprès du séquestre officiel de sa localité un avis d'intention énonçant :

a) son intention de faire une proposition;

(b) the name and address of the licensed trustee who has consented, in writing, to act as the trustee under the proposal, and

(c) the names of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books,

and attaching thereto a copy of the consent referred to in paragraph (b).

b) les nom et adresse du syndic autorisé qui a accepté, par écrit, les fonctions de syndic dans le cadre de la proposition;

c) le nom de tout créancier ayant une réclamation s'élevant à au moins deux cent cinquante dollars, ainsi que le montant de celle-ci, connu ou indiqué aux livres du débiteur.

L'avis d'intention est accompagné d'une copie de l'acceptation écrite du syndic.

Certain things to be filed

(2) Within ten days after filing a notice of intention under subsection (1), the insolvent person shall file with the official receiver

(a) a statement (in this section referred to as a "cash-flow statement") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the insolvent person, reviewed for its reasonableness by the trustee under the notice of intention and signed by the trustee and the insolvent person;

(b) a report on the reasonableness of the cash-flow statement, in the prescribed form, prepared and signed by the trustee; and

(c) a report containing prescribed representations by the insolvent person regarding the preparation of the cash-flow statement, in the prescribed form, prepared and signed by the insolvent person.

Documents à déposer

(2) Dans les dix jours suivant le dépôt de l'avis d'intention visé au paragraphe (1), la personne insolvable dépose les documents suivants auprès du séquestre officiel :

a) un état établi par la personne insolvable — appelé « l'état » au présent article — portant, projections au moins mensuelles à l'appui, sur l'évolution de son encaisse, et signé par elle et par le syndic désigné dans l'avis d'intention après que celui-ci en a vérifié le caractère raisonnable;

b) un rapport portant sur le caractère raisonnable de l'état, établi, en la forme prescrite, par le syndic et signé par lui;

c) un rapport contenant les observations — prescrites par les Règles générales — de la personne insolvable relativement à l'établissement de l'état, établi, en la forme prescrite, par celle-ci et signé par elle.

Creditors may obtain statement

(3) Subject to subsection (4), any creditor may obtain a copy of the cash-flow statement on request made to the trustee.

Copies de l'état

(3) Sous réserve du paragraphe (4), tout créancier qui en fait la demande au syndic peut obtenir une copie de l'état.

Exception

(4) The court may order that a cash-flow statement or any part thereof not be released to some or all of the creditors pursuant to subsection (3) where it is satisfied that

(a) such release would unduly prejudice the insolvent person; and

(b) non-release would not unduly prejudice the creditor or creditors in question.

Exception

(4) Le tribunal peut rendre une ordonnance de non-communication de tout ou partie de l'état, s'il est convaincu que sa communication à l'un ou l'autre ou à l'ensemble des créanciers causerait un préjudice indu à la personne insolvable ou encore que sa non-communication ne causerait pas de préjudice indu au créancier ou aux créanciers en question.

Trustee protected

(5) If the trustee acts in good faith and takes reasonable care in reviewing the cash-flow statement, the trustee is not liable for loss or damage to any person resulting from that person's reliance on the cash-flow statement.

Immunité

(5) S'il agit de bonne foi et prend toutes les précautions voulues pour bien réviser l'état, le syndic ne peut être tenu responsable des dommages ou pertes subis par la personne qui s'y fie.

Trustee to notify creditors

(6) Within five days after the filing of a notice of intention under subsection (1), the trustee named in the notice shall send to every known creditor, in the prescribed manner, a copy of the notice including all of the information referred to in paragraphs (1)(a) to (c).

Trustee to monitor and report

(7) Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a notice of intention in respect of an insolvent person

(a) shall, for the purpose of monitoring the insolvent person's business and financial affairs, have access to and examine the insolvent person's property, including his premises, books, records and other financial documents, to the extent necessary to adequately assess the insolvent person's business and financial affairs, from the filing of the notice of intention until a proposal is filed or the insolvent person becomes bankrupt;

(b) shall file a report on the state of the insolvent person's business and financial affairs — containing the prescribed information, if any —

(i) with the official receiver without delay after ascertaining a material adverse change in the insolvent person's projected cash-flow or financial circumstances, and

(ii) with the court at or before the hearing by the court of any application under subsection (9) and at any other time that the court may order; and

(c) shall send a report about the material adverse change to the creditors without delay after ascertaining the change.

Where assignment deemed to have been made

(8) Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

(a) the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;

Notification

(6) Dans les cinq jours suivant le dépôt de l'avis d'intention, le syndic qui y est nommé en fait parvenir à tous les créanciers connus, de la manière prescrite, une copie contenant les renseignements mentionnés aux alinéas (1)a) à c).

Obligation de surveillance

(7) Sous réserve de toute instruction émise par le tribunal aux termes de l'alinéa 47.1(2)a), le syndic désigné dans un avis d'intention se rapportant à une personne insolvable :

a) a, dans le cadre de la surveillance des affaires et des finances de celle-ci et dans la mesure où cela est nécessaire pour lui permettre d'estimer adéquatement les affaires et les finances de la personne insolvable, accès aux biens — locaux, livres, registres et autres documents financiers, notamment — de cette personne, biens qu'il est d'ailleurs tenu d'examiner, et ce depuis le dépôt de l'avis d'intention jusqu'au dépôt de la proposition ou jusqu'à ce que la personne en question devienne un failli;

b) dépose un rapport portant sur l'état des affaires et des finances de la personne insolvable et contenant les renseignements prescrits :

(i) auprès du séquestre officiel dès qu'il note un changement négatif important au chapitre des projections relatives à l'encaisse de la personne insolvable ou au chapitre de la situation financière de celle-ci,

(ii) auprès du tribunal au plus tard lors de l'audition de la demande dont celui-ci est saisi aux termes du paragraphe (9) et aux autres moments déterminés par ordonnance du tribunal;

c) envoie aux créanciers un rapport sur le changement visé au sous-alinéa b)(i) dès qu'il le note.

Cas de cession présumée

(8) Lorsque la personne insolvable omet de se conformer au paragraphe (2) ou encore lorsque le syndic omet de déposer, ainsi que le prévoit le paragraphe 62(1), la proposition auprès du séquestre officiel dans les trente jours suivant le dépôt de l'avis d'intention aux termes du paragraphe (1) ou dans le délai supérieur accordé aux termes du paragraphe (9) :

a) la personne insolvable est, à l'expiration du délai applicable, réputée avoir fait une cession;

(b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

(b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

(c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b.1) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

b) le syndic en fait immédiatement rapport, en la forme prescrite, au séquestre officiel;

b.1) le séquestre officiel délivre, en la forme prescrite, un certificat de cession ayant, pour l'application de la présente loi, le même effet qu'une cession déposée en conformité avec l'article 49;

c) le syndic convoque, dans les cinq jours suivant la délivrance du certificat de cession, une assemblée des créanciers aux termes de l'article 102, assemblée à laquelle les créanciers peuvent, par résolution ordinaire, nonobstant l'article 14, confirmer sa nomination ou lui substituer un autre syndic autorisé.

Extension of time for filing proposal

(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

Prorogation de délai

(9) La personne insolvable peut, avant l'expiration du délai de trente jours — déjà prorogé, le cas échéant, aux termes du présent paragraphe — prévu au paragraphe (8), demander au tribunal de proroger ou de proroger de nouveau ce délai; après avis aux intéressés qu'il peut désigner, le tribunal peut acquiescer à la demande, pourvu qu'aucune prorogation n'excède quarante-cinq jours et que le total des prorogations successives demandées et accordées n'excède pas cinq mois à compter de l'expiration du délai de trente jours, et pourvu qu'il soit convaincu, dans le cas de chacune des demandes, que les conditions suivantes sont réunies :

a) la personne insolvable a agi — et continue d'agir — de bonne foi et avec toute la diligence voulue;

b) elle serait vraisemblablement en mesure de faire une proposition viable si la prorogation demandée était accordée;

c) la prorogation demandée ne saurait causer de préjudice sérieux à l'un ou l'autre des créanciers.

Court may not extend time

(10) Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

Non-application du paragraphe 187(11)

(10) Le paragraphe 187(11) ne s'applique pas aux délais prévus par le paragraphe (9).

Court may terminate period for making proposal

(11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

(a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,

Interruption de délai

(11) À la demande du syndic, d'un créancier ou, le cas échéant, du séquestre intérimaire nommé aux termes de l'article 47.1, le tribunal peut mettre fin, avant son expiration normale, au délai de trente jours — prorogé, le cas échéant — prévu au paragraphe (8), s'il est convaincu que, selon le cas :

a) la personne insolvable n'agit pas — ou n'a pas agi — de bonne foi et avec toute la diligence voulue;

(b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,

(c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or

(d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

1992, c. 27, s. 19; 1997, c. 12, s. 32; 2004, c. 25, s. 33(F); 2005, c. 47, s. 35; 2007, c. 36, s. 17; 2017, c. 26, s. 6(E).

b) elle ne sera vraisemblablement pas en mesure de faire une proposition viable avant l'expiration du délai;

c) elle ne sera vraisemblablement pas en mesure de faire, avant l'expiration du délai, une proposition qui sera acceptée des créanciers;

d) le rejet de la demande causerait un préjudice sérieux à l'ensemble des créanciers.

Si le tribunal acquiesce à la demande qui lui est présentée, les alinéas (8)a) à c) s'appliquent alors comme si le délai avait expiré normalement.

1992, ch. 27, art. 19; 1997, ch. 12, art. 32; 2004, ch. 25, art. 33(F); 2005, ch. 47, art. 35; 2007, ch. 36, art. 17; 2017, ch. 26, art. 6(A).

Trustee to help prepare proposal

50.5 The trustee under a notice of intention shall, between the filing of the notice of intention and the filing of a proposal, advise on and participate in the preparation of the proposal, including negotiations thereon.

1992, c. 27, s. 19.

Préparation de la proposition

50.5 Le syndic désigné dans un avis d'intention doit, entre le dépôt de l'avis d'intention et celui de la proposition, participer, notamment comme conseiller, à la préparation de celle-ci, y compris aux négociations pertinentes.

1992, ch. 27, art. 19.

Order — interim financing

50.6 (1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) 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 debtor'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 debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

Financement temporaire

50.6 (1) Sur demande du débiteur à l'égard duquel a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1), 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 du débiteur 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 au débiteur la somme qu'il approuve compte tenu de l'état — visé à l'alinéa 50(6)a) ou 50.4(2)a), selon le cas — portant sur l'évolution de l'encaisse et des besoins de celui-ci. La charge ou sûreté ne peut garantir qu'une obligation postérieure au prononcé de l'ordonnance.

Individuals

(2) In the case of an individual,

(a) they may not make an application under subsection (1) unless they are carrying on a business; and

(b) only property acquired for or used in relation to the business may be subject to a security or charge.

Personne physique

(2) Toutefois, lorsque le débiteur est une personne physique, il ne peut présenter la demande que s'il exploite une entreprise et, le cas échéant, seuls les biens acquis ou utilisés dans le cadre de l'exploitation de l'entreprise peuvent être grevés.

Priority

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

Priorité — créanciers garantis

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

Priority — previous orders

(4) 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

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

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

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

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

(d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;

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

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

(g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

2005, c. 47, s. 36; 2007, c. 36, s. 18.

Priorité — autres ordonnances

(4) Il peut également y préciser que la charge ou sûreté n'a priorité sur toute autre charge ou sûreté grevant les biens du débiteur 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

(5) 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 du débiteur sous le régime de la présente loi;

b) la façon dont les affaires financières et autres du débiteur 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 présentation d'une proposition viable à l'égard du débiteur;

e) la nature et la valeur des biens du débiteur;

f) la question de savoir si la charge ou sûreté causera un préjudice sérieux à l'un ou l'autre des créanciers du débiteur;

g) le rapport du syndic visé aux alinéas 50(6)b) ou 50.4(2)b), selon le cas.

2005, ch. 47, art. 36; 2007, ch. 36, art. 18.

Calling of meeting of creditors

51 (1) The trustee shall call a meeting of the creditors, to be held within twenty-one days after the filing of the proposal with the official receiver under subsection 62(1), by sending in the prescribed manner to every known creditor and to the official receiver, at least ten days before the meeting,

(a) a notice of the date, time and place of the meeting;

(b) a condensed statement of the assets and liabilities;

(c) a list of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books;

(d) a copy of the proposal;

(e) the prescribed forms, in blank, of

(i) proof of claim,

Convocation d'une assemblée des créanciers

51 (1) Le syndic convoque immédiatement une assemblée des créanciers — qui doit avoir lieu dans les vingt et un jours suivant le dépôt de la proposition auprès du séquestre officiel aux termes du paragraphe 62(1) — en adressant, de la manière prescrite, à chaque créancier connu et au séquestre officiel, au moins dix jours avant l'assemblée, les documents suivants :

a) un avis des date, heure et lieu de l'assemblée;

b) un état succinct des avoirs et obligations;

c) une liste des créanciers que vise la proposition, avec des réclamations se chiffrant à deux cent cinquante dollars ou plus, et des montants de leurs réclamations, connus ou indiqués aux livres du débiteur;

d) une copie de la proposition;

e) si elles n'ont pas déjà été envoyées, les formules prescrites — en blanc — devant servir à l'établissement d'une procuration, d'une preuve de réclamation ou,

(ii) in the case of a secured creditor to whom the proposal was made, proof of secured claim, and

(iii) proxy,

if not already sent; and

(f) a voting letter as prescribed.

dans le cas d'un créancier garanti à qui la proposition a été faite, d'une preuve de réclamation garantie;

f) une formule prescrite de votation.

In case of a prior meeting

(2) Where a meeting of his creditors at which a statement or list of the debtor's assets, liabilities and creditors was presented was held before the trustee is required by this section to convene a meeting to consider the proposal and at the time when the debtor requires the convening of the meeting the condition of the debtor's estate remains substantially the same as at the time of the former meeting, the trustee may omit observance of the provisions of paragraphs (1)(b) and (c).

En cas d'une assemblée antérieure

(2) Lorsqu'il est tenu une assemblée des créanciers à laquelle a été présenté un état ou une liste de l'actif, du passif et des créanciers du débiteur, avant que le syndic soit ainsi requis de convoquer une assemblée aux termes du présent article pour étudier la proposition, et que, à la date à laquelle le débiteur requiert la convocation de cette assemblée, l'état de l'actif du débiteur reste sensiblement le même qu'à l'époque de l'assemblée précédente, le syndic n'est pas tenu d'observer les alinéas (1)b) et c).

Chair of first meeting

(3) The official receiver, or the nominee thereof, shall be the chair of the meeting referred to in subsection (1) and shall decide any questions or disputes arising at the meeting, and any creditor may appeal any such decision to the court.

R.S., 1985, c. B-3, s. 51; 1992, c. 1, s. 20, c. 27, s. 20; 1999, c. 31, s. 19(F); 2005, c. 47, s. 123(E).

Président de la première assemblée

(3) Le séquestre officiel, ou la personne qu'il désigne, préside l'assemblée des créanciers visée au paragraphe (1) et décide des questions posées ou des contestations soulevées à l'assemblée; tout créancier peut appeler d'une telle décision devant le tribunal.

L.R. (1985), ch. B-3, art. 51; 1992, ch. 1, art. 20, ch. 27, art. 20; 1999, ch. 31, art. 19(F); 2005, ch. 47, art. 123(A).

Adjournment of meeting for further investigation and examination

52 Where the creditors by ordinary resolution at the meeting at which a proposal is being considered so require, the meeting shall be adjourned to such time and place as may be fixed by the chair

(a) to enable a further appraisal and investigation of the affairs and property of the debtor to be made; or

(b) for the examination under oath of the debtor or of such other person as may be believed to have knowledge of the affairs or property of the debtor, and the testimony of the debtor or such other person, if transcribed, shall be placed before the adjourned meeting or may be read in court on the application for the approval of the proposal.

R.S., 1985, c. B-3, s. 52; 2005, c. 47, s. 123(E).

Ajournement d'une assemblée pour investigation et examen supplémentaires

52 Lorsque les créanciers l'exigent au moyen d'une résolution ordinaire lors de l'assemblée à laquelle une proposition est étudiée, l'assemblée est ajournée aux date, heure et lieu que peut déterminer le président, aux fins de, selon le cas :

a) permettre que soient effectuées une évaluation et une investigation plus approfondies concernant les affaires et biens du débiteur;

b) interroger sous serment le débiteur ou toute autre personne censée avoir connaissance des affaires ou des biens du débiteur, et le témoignage de ce dernier ou de cette autre personne, s'il est transcrit, est présenté à l'assemblée ajournée, ou il peut être lu devant le tribunal lors de la demande d'approbation de la proposition.

L.R. (1985), ch. B-3, art. 52; 2005, ch. 47, art. 123(A).

Creditor may assent or dissent

53 Any creditor who has proved a claim, whether secured or unsecured, may indicate assent to or dissent from the proposal in the prescribed manner to the trustee prior to the meeting, and any assent or dissent, if

Accord ou désaccord du créancier

53 Tout créancier qui a prouvé une réclamation — garantie ou non — peut, de la manière prescrite, indiquer au syndic, avant l'assemblée, s'il approuve ou désapprouve la proposition; si cette approbation ou

TAB 3

Court of Queen's Bench of Alberta

Citation: Castle Rock Research Corporation (Re), 2012 ABQB 208

Date: 20120329
Docket: BK03 115587
Registry: Edmonton

In the Matter of the Notice of Intention to make a proposal filed by Castle Rock Research Corporation

Under the provisions of the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-3 as amended

Between:

Castle Rock Research Corporation

Applicant

- and -

A.G.C. Investments Ltd. And Osman Auction Inc.

Respondents

And Between:

A.G.C. Investments Ltd.

Applicants
(Cross-Application)

- and-

Castle Rock Research Corporations and BDO Canada Limited in its capacity as Trustee under the Notice of Intention to make a proposal

Respondents
(Cross-Application)

Reasons for Judgment
of the
Honourable Mr. Justice R. Paul Belzil

The Applications

[1] Castle Rock Research Corporation seeks an order for extending the time within which it must file a Proposal to Creditors. Its main creditor A.G.C. Investments Ltd. has filed a cross-application seeking an order declaring that the time for Castle Rock to file a Proposal to Creditors has expired.

Factual Background

[2] Castle Rock filed a Notice of Intention (NOI) to make a proposal to its creditors on February 15, 2012 pursuant to section 50.4(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-3 as amended (*BIA*).

[3] On February 28, 2012 Burrows, J. issued an order naming BDO Canada Ltd. as the Interim Receiver of Castle Rock.

[4] Pursuant to section 50.4(8) Castle Rock is required to file a proposal to its creditors within 30 days of the filing of a Notice of Intention to make a proposal unless this time is extended pursuant to section 50.4(9). On March 16, 2012 Veit, J. issued a Consent Order extending the deadline for filing of the proposal to March 23, 2012.

[5] On March 20, 2012 the Interim Receiver filed a Second Report. Paragraphs 6 to 10 of which read as follows:

> 6. That since filing the Trustee's Report of March 9, 2012, the Trustee has been provided weekly Monitoring Reports in adherence with the Monitoring Program initiated by the Trustee;
>
> 7. That the Debtor and management have been co-operative in addressing queries in relation to the Monitoring Reports which have satisfied the Trustee;
>
> 8. That while the Trustee has expressed to the Debtor concerns over the financial reporting system utilized by the Debtor, management indicates that they are

prepared to take the necessary steps to implement a suitable financial reporting system;

9. That since filing of the Trustee's Report on March 9, 2012, the Trustee is in receipt of a Business Plan dated March 6, 2012 which provides detailed information about the Company Plan including Profile, Products and Services, Marketing Plan and the Future Direction of the Company. The Trustee has not had an opportunity to review and assess that Business Plan; and

10. That it is the Trustee's opinion that the Debtor is acting in good faith and with due diligence and that the Debtor will be able to make a viable Proposal if an additional extension were granted.

[6] The application and cross-application were heard by me on March 22, 2012. Counsel for BDO confirmed that its opinion contained in the Second Report remains unchanged. Counsel for Osman Auction Inc. supports the Castle Rock Application.

[7] I undertook to render a decision on March 28 and with the consent of all parties, extended the deadline for filing of the proposal to 4:30 p.m. that day.

Discussion

[8] It is common ground that the Court may grant an extension for the filing of a Proposal to Creditors not exceeding 45 days if three requirements outlined in section 50.4(9) are satisfied:

a. The insolvent person has acted, and is acting, in good faith and with due diligence;

b. The insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

c. No creditor would be materially prejudice if the extension being applied for were granted.

[9] It is also common ground that Castle Rock bears the burden of establishing its entitlement to an extension.

[10] As part of its Application, Gautam Rao, President and CEO of Castle Rock swore an affidavit on March 9, 2012 in which he deposed that since the filing of Castle Rock's NOI, it has continued to operate in the ordinary course of business without the necessity for debtor in possession financing.

[11] He further deposed that Castle Rock does not anticipate the need for further financing in the course of the proposal proceedings.

[12] In the course of argument, counsel for Castle Rock provided two License Agreements both dated February 24, 2012. The first provides for payments to Castle Rock of $600,000.00 together with royalty payments and the second 1.5 million dollars together with royalty payments.

[13] In his affidavit Rao also deposed to other pending business opportunities which were not specified and that senior staff within the company are supportive.

[14] Finally, he deposed that the company is proceeding in good faith, with due diligence and that no creditor will be prejudiced if an extension were granted.

[15] Andrew Clark, the President of A.G.C., deposed in an affidavit that Castle Rock is being mismanaged and that funds are being transferred to a related company in India. He also deposed that no proposal would be acceptable to A.G.C.

[16] Clark was questioned on his affidavit and acknowledged that the existence of the related company in India was known to him and indeed the India company is referred to in Castle Rock's financial statements.

[17] It is highly significant that the Trustee supports this request for the extension. BDO was appointed by Court Order and as such is acting as an Officer of the Court.

[18] It has expressed no concern that Castle Rock is acting in bad faith or without due diligence and if it is suspected that this was the case, it would be duty bound to report this to the Court. The Second Report asserts that Castle Rock will make a proposal.

[19] A.G.C. argues that it is suffering material prejudice because Castle Rock is transferring funds to its related company in India.

[20] As noted above, this was well known to Clark before he invested in Castle Rock and therefore this cannot constitute material prejudice.

Conclusion

[21] I find that Castle Rock has met the burden of establishing that an extension of time for the filing of the proposal to creditors should be granted. The cross-application by A.G.C. is dismissed. Counsel may speak to the terms of the Order granting the extension, including costs.

Heard on the 22nd day of March, 2012.
Dated at the City of Edmonton, Alberta this 28th day of March, 2012.

R. Paul Belzil
J.C.Q.B.A.

Appearances:

Michael McCabe, Q.C.
Reynolds Mirth Richards Farmer LLP
for the Applicant

Darren Bieganek, Q.C.
Duncan & Craig LLP
for the Respondent

Rick Reeson, Q.C.
Miller Thomson
Independent Counsel for BDO

TAB 4

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Andover Mining Corp. (Re),* 2013 BCSC 1833

Date: 20131004
Docket: B131136
Registry: Vancouver

In the Supreme Court of British Columbia in Bankruptcy and Insolvency

In the Matter of the notice of Intention to Make a Proposal of

Andover Mining Corp.

And in the matter of

The Application by Enirgi Group Corporation under ss. 50.4(11) and 47.1(1)(b) of the B*ankruptcy and Insolvency Act*, R.S.C. 1985, c. B-5

Between:

Enirgi Group Corporation

Creditor

And

Andover Mining Corp.

Insolvent Person

Before: The Honourable Mr. Justice Steeves

Reasons for Judgment

Counsel for the Creditor:	D.R. Brown M. Nied
Counsel for the Insolvent Person:	M.R. Davies
Place and Date of Trial/Hearing:	Vancouver, B.C. September 24, 2013
Place and Date of Judgment:	Vancouver, BC. October 4, 2013

Introduction

[1] Enirgi Group Corporation ("Enirgi") holds three promissory notes (by means of assignment) with a total value of $6.5 million against Andover Mining Corp. ("Andover"). One of the notes, in the amount of $2.5 million, was due on October 1, 2012 and it has not been paid. In August 2013 Andover filed an intention to file a proposal under s. 50.4(1) of the *Bankruptcy and Insolvency Act* R.S.C. 1985 c. B-3 ("*BIA*"). That proposal expires on October 4, 2013.

[2] This is a decision about two applications related to those notes.

[3] Andover seeks an order pursuant to s. 50.4(9) of the *BIA* for an extension of time for the filing of a proposal for a period of 45 days. According to Andover it has acted, and is acting, in good faith and with due diligence. Further, it would likely be able to make a viable proposal if the extension was granted and no creditor would be materially prejudiced if the extension was granted. Andover also submits that it has significantly more assets than debts and Enirgi has persistently been disruptive of the affairs of Andover as part of a campaign to target the assets of Andover.

[4] The second application is by Enirgi pursuant to s. 50.4(11) of the *BIA*. It seeks declarations that Andover's attempt to file a proposal is immediately terminated, a previous stay of proceedings is lifted, Andover is deemed bankrupt and a trustee in bankruptcy is appointed. The primary basis for Enirgi's application is the submission that Andover will not be able to make a proposal before the expiration of the period in question that will be accepted by Enirgi. Enirgi disputes that Andover has significantly more assets than debts. It also submits that it has a veto over any proposal by Andover because it is the largest creditor, it has lost faith in Andover's ability to manage its assets and it is concerned that Andover is restructuring its affairs to dissipate its assets. In the alternative, if there is to be an extension of Andover's proposal, Enirgi submits that a receiver should be appointed pursuant to s. 47.1 of the *BIA* to ensure transparency and fairness.

[5] Each party submits that its application should supersede the application of the other party. There are also disputes between the parties about a number of factual issues set out in affidavit evidence.

Background

[6] Andover is an advanced mineral exploration company incorporated under the laws of British Columbia in 2003. Its shares have been listed for trading on the TSX Venture Exchange since 2006. As of September 6, 2013 approximately 12,000,000 shares of Andover were issued and outstanding with more than 398 shareholders. Andover had a market capitalization of about $9 million, as of September 14, 2013; its payroll is $2,441 per month. According to publicly available audited financial statements, as of March 31, 2013, Andover had $42.5 million of assets and $9.1 million of liabilities.

[7] Andover has two main assets. It owns 83.5% of Chief Consolidated Mining Company ("Chief") that owns extensive amounts of land and mining equipment in Utah, U.S.A. Andover also owns 100% of the shares of Andover Alaska Inc. ("Alaska"), a company with large land holdings and mineral claims in Alaska, U.S.A. Affidavit evidence from Andover is that it has the prospect of significant and imminent cash flow from more than one project. This is discussed below.

[8] Enirgi is a natural resources development company incorporated under the laws of Canada.

[9] In 2011 and 2012 Andover issued non-interest bearing, unsecured promissory notes to Sentient Global Resources Fund IV ("Sentient"). The first note was dated September 23, 2011 with a principal of $2.5 million and a maturity date of October 1, 2012. The second note was dated April 30, 2012 with a principal of $2.5 million and a maturity date of May 1, 2014. The third note was dated August 31, 2012, the principal was $1.5 million and the maturity date was September 1, 2014.

[10] In September 2012 there were discussions between Andover, Enirgi and Chief in regards to a potential joint venture, with the possibility that Enirgi would take

majority ownership of Andover. A memorandum of understanding was executed and Enirgi commenced a process of due diligence. According to Enirgi, the due diligence revealed a complex joint venture agreement between Chief and another company. Ultimately, in March 2013, the parties were not able to agree on terms that were commercially acceptable to Enirgi. On March 27, 2013 Sentient assigned the above three promissory notes to Enirgi including all of the rights and obligations of Sentient under the terms of the notes. These notes are the subject of the current applications. According to Enirgi, it made a reasonable business decision to cease discussions with Enirgi, it became the assignee of the three promissory notes and it then sought repayment of the first promissory note.

[11] Andover had not paid the first promissory note at this time, March 2013 (and it had not been paid up to the date of the hearing of these applications). According to Andover, the reason it was not paid on the due date was because there was an expectation that Sentient and then Enirgi would become a partner of Andover in the joint venture (or something more significant) and discussions on this were taking place as late as January 2013. The expectation of all parties, according to Andover, was that any agreement would have included cancellation of the first promissory note. Andover says Enirgi knew this and agreed to it.

[12] By letter dated April 5, 2013 Enirgi advised Andover of the assignment of the notes from Sentient to it and that the full amount of the first note (with a maturity date of October 1, 2012) remained outstanding. The letter also expressly put Andover on notice that demand for repayment could occur at any time. According to Andover, Enirgi's demand was made at a meeting in Toronto in May 2013. Andover describes the demand from Enirgi as a "shock" because Andover believed Enirgi acquired the notes from Sentient as part of a process to become a partner with Andover. Because of the short demand period, three days, Andover had no ability to meet the demand. This was the beginning of Enirgi becoming "very aggressive", according to Andover.

[13] In a letter dated May 28, 2013 Andover advised Enirgi that it was making its best efforts to secure funding to repay the first promissory note. On May 30, 2013

Enirgi again demanded repayment of the first promissory note. In a letter of that date Enirgi advised Andover that failure to pay would be considered default and the second and third notes would become immediately due and payable. Enirgi takes the position that, by application of the wording of the other two notes, they are now due and owing. As above, the total for all three notes is $6.5 million and the due date for the second and third notes are May 1, 2014 and September 1, 2014, respectively. Whether Enirgi is correct in its interpretation of the notes and, therefore, all three notes are now due and owing is not an issue to be decided at this time.

[14] At the end of May 2013 Andover received $1.7 million as a result of a private placement. Enirgi objects to the fact that Andover did not make prior public disclosure of Enirgi's demand letter prior to closing the private placement. Andover did not use the funds from the private placement to repay the first note. There is a dispute between the parties as to how the $1.7 million was used.

[15] In a letter dated May 31, 2013 Andover advised Enirgi that it was expecting to receive funds from Chief greater than the amount of the first promissory note. The letter also offered a written undertaking to pay the first promissory note no later than September 3, 2013. On June 3, 2013 Enirgi demanded repayment of the first note, for the third time.

[16] Enirgi commenced this action on June 4, 2013 seeking to recover the total amount of the three promissory notes. At the end of July 2013 Andover filed affidavit evidence that it was engaged at the time in negotiations with third parties to raise funding to pay the $2.5 million of the first promissory note. This payment was expected to occur on or before August 22, 2013. On August 8, 2013 the parties agreed to a Consent Order in the following terms:

> . . .
>
> BY CONSENT the Defendant [Andover] is required to pay the Plaintiff [Enirgi] the amount of CAD $2,604,000 on August 22, 2013 and if that amount is not paid by the Defendant to the Plaintiff as of August 22, 2013 this order shall for all purposes be of the same effect as a judgment of This Honourable Court for the payment of CAD $2,604,000 by the Defendant to the Plaintiff;

. . .

[17] Andover says it agreed to the Consent Order because it expected to receive the funds to pay the Order. However, Enirgi obstructed the negotiations that were ongoing for the loan. Enirgi says that Andover's actions were misleading. These and other disputes between the parties are discussed below.

[18] According to Enirgi, Andover avoided having to meet its obligations pursuant to the first promissory note and the August Consent Order and this resulted in Enirgi losing confidence in Andover. Disclosure of information from the trustee was sought by Enirgi but, according to their submission, only very limited information was provided with regards to Andover's prospects and intentions. For example, Enirgi characterizes a September 6, 2013 letter from Andover as unresponsive and inconsistent with previous statements made by Andover. Enirgi also takes issue with a cash flow statement prepared by the trustee and it is submitted by Enirgi that subsequent requests for disclosure were also not complied with. Enirgi responds, in part, by saying that, as a result of a sophisticated tracking system, Andover has information available to it at a level of detail that is not normally available.

[19] As well, on September 4, 2013, Enirgi sent Andover a proof of claim and requested that Andover approve the claim. The claim was for payment of all three promissory notes as well as court order interest with respect to the first promissory note. In a letter dated September 12, 2013 the trustee acknowledged Enirgi's proof of claim but denied that the second and third promissory notes were due and payable. Further, according to the trustee, the proof of claim should be amended accordingly or it would be denied.

[20] On August 22, 2013 Andover filed a notice of intention to make a proposal under s. 50.4(1) of the *BIA* and a trustee was appointed. It would have been open to Enirgi to enforce the judgment described in the August 8, 2013 Consent Order the following day, August 23, 2013. The notice listed all of the creditors of Andover and the total is $7,476,961.43. Enirgi is listed as the largest single creditor of Andover with a claim of $6.5 million.

[21] During the hearing of these applications on September 24, 2013 counsel for Andover presented an affidavit filed the same day. Attached to the affidavits were two short emails and a letter from the president of Ophir Minerals LLC ("Ophir") in Payson Utah, U.S.A. The letter states:

> The following is a letter stating the intentions of Ophir Minerals LLC and Andover Ventures.. In an attempt to help secure the future of Andover Ventures, Al McKee, CEO of Ophir Minerals LLC, is in the process of securing a three dollar million loan ($3,000,000) privately. This loan will be provided to Gordon Blankstein, Operating Manager for Andover Ventures. This loan will be considered prepayment of royalties due to Andover Ventures through mining operations of Ophir Mineral LLC.; The repayment of the loan will be deducted from the royalties to be paid. The purpose of the loan is to assist in the future financial security between the two companies to ensure future business operations.
>
> [Reproduced as written].

[22] Andover relies on this letter as a basis for meeting its obligation to pay the first promissory note in the amount of $2.5 million. Enirgi points to the use of "in the process" in the letter and submits that the letter is of little weight.

[23] At the conclusion of argument I was advised by counsel that Andover's proposal expired that day, September 24, 2013. I extended the proposal to October 4, 2013.

Analysis

Review of the evidence

[24] There are some significant differences between the parties about the facts in this case. Some of these are portrayed by one party as evidence of bad faith on the part of the other party. These are primarily set out in original and reply affidavits from Gordon Blankstein, the CEO of Andover, and Robert Scargill, the North American Managing Director of Enirgi. There are the usual difficulties preferring one version of events over another on the basis of affidavit evidence. A full trial would be necessary to fully and conclusively decide these issues and this matter was set down for two hours, presumably because of the need to hear at least the application by Andover on the day its proposal expired.

[25] It is not in dispute that Enirgi holds three promissory notes (by means of assignment) with a total value of $6.5 million against Andover. One of the notes, in the amount of $2.5 million was due on October 1, 2012 and it has not been paid for the reasons discussed below. Enirgi's right to have the other two notes paid out is in dispute since they are due in 2014; that dispute is not part of the subject applications. All three notes are unsecured, non-interest bearing instruments.

[26] In April or May 2013 Enirgi demanded payment of the first note ($2.5 million). Enirgi made a second demand in May 2013 and a third in June 2013.

[27] In June 2013 Enirgi commenced this action and in August 2013 Andover filed a notice of intention to file a proposal pursuant to s. 50.4(1) of the *BIA.* A trustee was appointed. A Consent Order of this court, dated August 8, 2013, stated that Andover was to pay an amount of $2,604,000 to Enirgi on August 22, 2013.

[28] Andover has not paid the $2.5 million due on the first promissory note (or the amount of $2,604,000) for the reasons discussed below.

[29] I set out some of the factual differences between the parties as reflected in the affidavit evidence and my conclusions on that evidence as follows:

(a) Mr. Blankstein, on behalf of Andover, deposes that in May 2013 Enirgi issued an Insider Report advising the public of its demand on the first promissory note. According to Mr. Blankstein there "was no apparent legal basis to do so" and the directors of Andover "considered this a move to deflate Andover's share value and curtail its ability to raise funds."

In reply Mr. Scargill, with Enirgi, deposes that it "did not issue an insider report or otherwise advise the public that it had made demand on the first note at or about the time it made such demand on May 23, 2013." Further, "the first public announcement of the fact of the demand was made by Andover on June 5, 2013 only after Enirgi had commenced legal proceedings."

The result is that I am asked to prefer one person's affidavit evidence over another: either Enirgi issued an insider's report with the information of its demand, as deposed by Mr. Blankstein, or it did not, as deposed to by Mr. Scargill. However, since there is no evidence of an insider report with the statement in question I am unable to agree with Andover that such a report exists.

(b) There were negotiations between Andover and Enirgi (and Chief) in October 2012 about a potential joint venture. A memorandum of understanding was signed but, following due diligence by Enirgi, there was no agreement on the joint venture.

According to Mr. Blankstein the prospect of these negotiations being successful (as well as previous negotiations to a similar end with Sentient) was the main reason that the first note was not paid. It was anticipated, by Andover at least, that any joint venture agreement would include purchase of stock in Andover and cancellation of the first note. There were "verbal assurances" from Sentient and Enirgi that there was no intention to make demand on the note and it was intended to convert the note as part of a venture agreement. Further, according to Andover, the demand on the first note was the beginning of a very aggressive campaign by Enirgi to ultimately get access to the assets of Andover, assets which were and are worth significantly more than the first note or all three notes.

In his affidavit evidence Mr. Scargill agrees that there were negotiations as described by Mr. Blankstein. However, they ended when he (Mr. Scargill) asked Mr. Blankstein to consider all or majority ownership by Enirgi in Andover. This was the "only possible involvement" by Enirgi in Andover, according to Mr. Scargill. He asked Mr. Blankstein to consider "what sort of transaction" that he and Andover might be interested in "but no transaction was ever proposed by Mr. Blankstein outside of a sale by him and his family of their equity ownership stake." Since there was "no realistic likelihood" of a

transaction, Enirgi decided to cease its efforts and turn its attention on being repaid for the first note.

It is clear that negotiations between Andover and Enirgi did not work out. It is also clear that Andover was surprised that the three promissory notes were assigned from Sentient to Enirgi. The evidence does not suggest that either party was more responsible than the other for the lack of an agreement (assuming there is some legal significance to that issue).

Mr. Scargill does not deny or mention the point raised by Mr. Blankstein that Enirgi agreed not to demand payment of the first note. Therefore, I conclude that there was at least acquiescence between the parties at the time of their negotiations that cancellation of the first promissory note would be part of any agreement. This conclusion also explains why payment on a note worth $2.5 million and due in October 2012 was not demanded by Sentient and then Enirgi until after the negotiations failed.

In any event, the negotiations did fail and any commitment not to demand payment on the note ended. There is no evidence of any collateral agreement that amended the terms of payment and, therefore, the terms of the notes applied. That was obviously a shock to Andover's cash flow but it was permitted under the terms of the note, including the short period to make payment.

(c) As above, I am not determining the issue of whether the second and third promissory notes are now due and payable because the first note was not paid.

A related matter is that Enirgi says that one of the deficiencies by Andover in disclosure of information relates to the Proof of Claim sent by Enirgi to Andover in September 2013. It required the trustee of Andover to confirm that the second and third notes were due and payable. The trustee declined to do so as long as the proof of claim included all three notes.

Since the issue of whether the second and third notes are now due is very much in dispute, I can find nothing objectionable in the trustee's response.

(d) In May 2013 Andover obtained about $1.7 million from a private placement. According Mr. Scargill, none of this money was used to pay the first promissory note. Instead, it was used to repay a shareholder loan and to settle a wrongful dismissal lawsuit. Enirgi is concerned that all of the money from the private placement has been used for purposes other than payment of the first note.

Mr. Blankstein agrees that Andover received $1.7 million from a private placement. However, he deposes that Mr. Scargill "neglects to include" all of the facts although Mr. Scargill "knew all about" the placement "from its inception" and Enirgi "was invited to participate in it." Specifically, Mr. Scargill was "fully aware" of the payment of the shareholder loan (in the amount of $375,000). He was told about it at the time and he "never indicated any objection" to it then. Further, the funds from the placement were committed in April 2012 to "pay certain items" and for the operating expenses of Andover "for the next several months, well before the sudden demand for repayment by Energi [sic] on May 23, 2013." Despite knowing that Andover was to receive the money from the private placement at the time of its demand, Enirgi raised no complaints or allegations until Mr. Scargill's affidavit, filed September 17, 2013.

Mr. Blankstein also deposes that the former employee involved in the lawsuit was an employee of Chief and it made the settlement. The settlement was for $275,000 but it is to be paid in instalments and only $50,000 has thus far been paid. Chief is responsible for paying the balance.

Overall there was a private placement of about $1.7 million dollars that was received by Andover before its proposal was filed. It was used to pay for a shareholder loan and for operating expenses and some of these at least were committed to as early as April 2012. Further, the wrongful dismissal payment

was a matter involving Chief, rather than Andover, and only $50,000 has been paid by Chief. I conclude that Mr. Scargill did not have all of the pertinent information before him when he gave his affidavit evidence.

(e) According to the affidavit of Mr. Scargill, Andover's agreement to the August 2013 Consent Order:

> … was calculated to encourage Enirgi to consent to the Judgment and mislead Enirgi into believing that Andover would be in a position to pay the Judgment as required and that available funds would not be used in the interim, for the Preferential Payments [the private placement, discussed above] or other improper purposes.

On the other hand, Mr. Blankstein deposes that Andover agreed to the Consent Order because it thought at the time that it was to receive $3 million as a result of mortgaging assets of its Utah operations, through Chief. However, the mortgage did not complete. Efforts to obtain an unsecured loan were then unsuccessful. Mr. Blankstein has also deposed that in the summer of 2013, counsel for Enirgi contacted counsel for Andover, "[d]espite there being no apparent legal basis for doing so", and "insisted that Chief entering into a mortgage transaction would violate the agreements between Energi [sic] and Andover and was prohibited." This left Mr. Blankstein "scrambling to raise an unsecured loan in a very short time frame."

In argument, Enirgi described Mr. Blankstein's evidence on this issue as misleading. The basis of this is that the correspondence between counsel was without prejudice, it occurred on or about June 21, 2013 and, therefore, "the suggestion that Andover only learned after August 8, 2013 [the date of the Consent Order] that Enirgi refused to consent is clearly misleading."

From this I take it that Enirgi did contact Chief to say any mortgage by Chief would violate agreements between Andover and Enirgi. This took place before the date of the Consent Order. On its face it supports the contention by Andover that Enirgi has obstructed its efforts to obtain funding although there

is no evidence or argument before me to decide whether Enirgi was correct in taking the view it did with Chief.

(f) Enirgi asserts, through Mr. Scargill, that Andover is attempting to restructure its assets and this is evidenced from its "continued failure to engage Enirgi" by refusing to provide information regarding its plans or opportunities, despite Enirgi's repeated requests for information. Mr. Blankstein replies by deposing that Andover is not attempting to restructure; [i]t is simply attempting to gain some time and distance so as to be able to pay Enirgi."

All that can be said on this point is that there is no evidence that Andover is restructuring its assets. Mr. Scargill is concerned that is happening or it is going to happen but the evidence here does not support that conclusion.

(g) In argument Enirgi submits that Andover has been "unresponsive" to requests for information about the proposal process being followed by Andover. For example, Mr. Scargill deposes that Andover, in correspondence in August 2013, did not adequately address the concerns of Enirgi. Similarly, according to Enirgi, Andover has provided a deficient cash flow statement and has generally provided inadequate information. Enirgi also submits that Andover has given only "vague assertions" and inconsistent information about its assets and its potential plans.

For its part, Mr. Scargill deposes that Andover asked Enirgi by letter of September 6, 2013 (through counsel) to present "whatever proposal or suggestion" Enirgi might have and Andover would be "more than happy to consider same." No reply was received.

Mr. Blankstein also deposes that Andover provided information to Enirgi about all of Chief's information, files and data with the agreement by Enirgi that it would be returned. It was not returned. In reply Mr. Scargill deposes that "by oversight" the information was not returned and it was returned on or about September 18, 2013.

The evidence is that both parties have been tactical in their requests for information and their responses to those requests. There has been some unresponsiveness and some vagueness as the parties have positioned themselves for their competing applications. I can find no legal or other issue that is relevant to those applications.

(h) In its 2013 financial statements Andover stated that it had filed a notice "to seek creditor protection" and it was done "to ensure the fair and equitable settlement of the Company's liabilities in light of the legal challenges launched" by Enirgi. According to Enirgi the reference to "legal challenges" is incorrect and this statement by Andover demonstrates that the notice of proposal was a "purely defensive" act on the part of Andover.

I take it as beyond dispute that Andover has been operating in a defensive manner since the demand on the first note was made in May 2013. Further, I accept that its notice of intention to file a proposal is also defensive. As for what are "legal challenges" that is a phrase that is capable of many meanings.

(i) Andover alleges that Enirgi has obstructed its efforts to obtain financing to pay the first promissory note of $2.5 million. Mr. Blankstein deposes that, to this end, Enirgi has done the following (in part, this is a summary of some of the above issues): made an abrupt demand for payment (after it and Sentient had given verbal assurances that there would be no demand); made demands on the second and third promissory notes that are payable in 2014; interfered in attempts by Andover to enter into a joint venture with Ophir without any legal basis to do so; and disrupted a mortgage transaction between Andover and Chief in the summer of 2013.

Mr. Scargill, in reply, deposes that neither he nor anyone ("after due inquiry") has been in contact with Ophir.

The allegation by Andover about Ophir is a vague one and I accept Mr. Scargill's evidence on it. I have discussed the issues of Enirgi's abrupt demand on the first promissory note and the allegation that Enirgi disrupted a mortgage arrangement between Andover and Chief above. Enirgi interprets the language of the three promissory notes to mean that all are due on default of the first one. That is a legal issue that is not before me.

(j) Enirgi attempts to minimize the assets of Andover and maximize its debts. There may well be more detailed evidence that supports a different valuation of the assets than presented by Andover. However, on the evidence in this application, I accept that Andover is cash poor and asset rich.

[30] Despite vigorous argument to the contrary by both parties I am unable to find bad faith on the part of either party. There is the apparent communication by Enirgi to Chief about a possible mortgage arrangement for Andover which reflects the aggressive approach that Enirgi has taken to Andover. That represents the aggressiveness of Enirgi rather than any bad faith.

[31] Clearly there has been a falling out between the parties and it is also clear that Andover is vulnerable because of its lack of cash and Enirgi is being aggressive in seeking repayment of, at least, the first note.

The applications

[32] Andover now seeks an extension of its proposal pursuant to s. 50.4(9) of the *BIA* and Enirgi seeks termination of Andover's proposal pursuant to s. 50.4(11) of the *BIA*.

[33] I set out the two provisions of the *BIA* at issue as follows;

Extension of time for filing proposal

50.4(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five

> months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that
>
> (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
>
> (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
>
> (c) no creditor would be materially prejudiced if the extension being applied for were granted.
>
> . . .
>
> **Court may terminate period for making proposal**
>
> 50.4(11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that
>
> > (a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,
> >
> > (b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,
> >
> > (c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or
> >
> > (d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,
>
> and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

[34] Each party says that its application should prevail over the other's application. I will review the case law presented by the parties on this issue as well as some interpretive issues under s. 50.4(9) and s. 50.4(11).

The approaches in *Cumberland* and in *Baldwin*

[35] In a decision relied on by Enirgi, Mr. Justice Farley of the Ontario Court of Justice denied the appeal of a registrar's decision that had dismissed an application for an extension of time by debtors under s. 50.4(9): *Baldwin Valley Investors Inc. (Re)*, [1994] O.J. No. 271, (C.J. (Gen. Div.)). The court noted that the test under s. 50.4(9)(b) was whether the debtors "would likely be able to make a viable proposal if the extension being applied for was granted." "Likely" did not mean a certainty and, using the Oxford Dictionary, it was defined as "such as might well

happen, or turn out to be the thing specified, probable … to be reasonably expected." Applied to the facts, the conclusion was that it was not likely the debtors would be able to make such a proposal since they had only submitted a cash flow statement. At para. 4, Mr. Justice Farley concluded "I do not see the conjecture of the debtor companies' rough submission as being 'likely'". Further, the court noted at para. 6 that the debtors did not even attempt to meet the condition of material prejudice under s. 50.4(9)(c) and the debtor was changing inventory into cash.

[36] The court also noted that the registrar (who made the decision being appealed) focused on the fact that the creditor had lost all confidence in the debtor. The creditor held a substantial part of the creditor's debt. Mr. Justice Farley pointed out, at para. 3, that that was not the test under s. 50.4(9)(b):

> This becomes clear when one examines s. 50.4(11)(b) and (c); it appears that Parliament wished to distinguish between a situation of a viable proposal (s. 50.4(9)(b) and 11(b)) versus a situation in which it is likely that the creditors will not vote for this proposal, no matter how viable that proposal (s. 50.4(11)(c) but with no corresponding clause in s. 50.4(9)).

[37] Enirgi relies on this statement for its submission that its application for termination under s. 50.4(11) should prevail over the application of Andover under s. 50.4(9).

[38] However, that statement was made as a comment on the previous registrar's reliance on the fact that the creditor (who held significant security) would not vote for any proposal. Mr. Justice Farley in *Baldwin* pointed out that was not the test under s. 50.4(9). He reasoned that this was clear because Parliament had distinguished between a situation of a viable proposal under s. 50.4(9)(b) and s. 50.4(11)(b) from a situation where it is likely that the creditors will not vote for a proposal no matter how viable, under s. 50.4(11)(c). In s. 50.4(9) there was no clause corresponding to s. 50.4(11)(c). The result is that this part of *Baldwin* does not support Enirgi's submission that an application under s. 50.4(11) supersedes one under s. 50.4(9).

[39] The result in *Baldwin* was that the debtor's application under s. 50.4(9) was denied. There does not appear to have been an application for termination under s. 50.4(11), unlike the subject case. At para. 8, the court did contrast the provisions

by saying that, if the debtor had been successful in its application to extend, it would have been a "Pyrrhic victory" because the creditor bank would have been able "to come right back in a motion based on s. 50.4(11)(c)."

[40] This is broad language but I acknowledge that it is capable of meaning that s. 50.4(11) is to supersede s. 50.4(9). However, such an interpretation would seem to be inconsistent with the other reference in *Baldwin* that the two provisions apply to different situations (discussed above). I also note that *Baldwin* only decided the merits of the s. 50.4(9) application, there was no application under s. 50.4(11) and there was no decision in favour of the creditor on the basis of that provision. The above statement was, therefore, *obiter*.

[41] Another decision relied on by Enirgi is *Cumberland Trading Inc. (Re)*, [1994] O.J. No. 132, (C.J. (Gen. Div.)) where a creditor sought to terminate a debtor's proposal after the notice of intention was filed. There does not appear to have been an application by the debtor to extend the proposal under s. 50.4(9), only an application under s. 50.4(11). Mr. Justice Farley found there was no indication what the proposal of the debtor was to be; "… there was not even a germ of a plan revealed" only a "bald assertion" and "[t]his is akin to trying to box with a ghost" (paragraph 8). The application for termination under s. 50.4(11) was allowed.

[42] The court noted, at para. 5, that the *BIA* was "debtor friendly legislation" because it provided for the possibility of reorganization by a debtor but it (and the *Companies Creditors Arrangement Act,* R.S.C. 1985 c. C–36) "do not allow debtors absolute immunity and impunity from their creditors". Concern was expressed about debtors too frequently waiting until the last moment, or beyond the last moment, before thinking about reorganization. The automatic stay available to a debtor by filing a notice of intention to file a proposal was noted. However:

> … [the] *BIA* does not guarantee the insolvent person a stay without review for any set period of time. To keep the playing field level and dry so that it remains in play, a creditor or creditors can apply to the court to cut short the otherwise automatic (or extended) stay; in this case [the creditor] is utilizing s. 50.4(11) to do so.

[43] Enirgi relies on this statement in its submission that its termination application should proceed over the extension application of Andover. This is broad language but I acknowledge Enirgi's submission that this statement provides support for its position that s. 50.4(11) permits it to "cut short" a stay or extension under s. 50.4(9).

[44] The court also described s. 50.4(11)(c) as permitting termination of a proposal if the debtor cannot make one before the expiration of the "period in question, that will be accepted by the creditors …" Mr. Justice Farley concluded that s. 50.4(11) deals specifically with the situation "where there has been no proposal tabled." It provides that there is "no absolute requirement" that the creditors have to wait to see what the proposal is "before they can indicate they will vote it down" (paragraph 9). Enirgi relies on this statement.

[45] In my view, this statement goes no further than saying what is self-evident: under s. 50.4(11)(c) any proposal must be accepted by the creditors. However, as explained in *Baldwin,* that is not a requirement under s. 50.4(9). *Cumberland* also says that the making of the proposal may be still to come but a creditor can exercise its rights under s. 50.4(11)(c). I do not agree with Enirgi that this statement in *Cumberland* supports its submission.

[46] From the above I conclude that there is some support for the submission of Enirgi that I should consider (and allow) its application under s. 50.4(11) over that of Andover under s. 50.4(9). There is the *obiter* in *Baldwin* that a successful application under s. 50.4(9) would be a Pyrrhic victory because a creditor could come right back with an application under s. 50.4(11). And there is the statement in *Cumberland* that an application under s. 50.4(11) can cut short an application under s. 50.4(9).

The approach in *Cantrail*

[47] A quite different view is set out in a more recent British Columbia case, *In the Matter of the Proposal of Cantrail Coach Lines Ltd.*, 2005 BCSC 351, [*Cantrail*] a decision relied on by Andover. Master Groves, as he then was, was presented with a submission by the creditor in that case that it intended to vote against any proposal from the debtor because it had lost faith in the debtor. The creditor was one of 91

creditors and its share of the total debt was not explained. This is essentially the position of Enirgi.

[48] In response to the creditor's submission that it could vote under s. 50.4(11) against any proposal of the debtor under s. 50.4(9) the court said:

> 14. If that was simply the test to be applied then one wonders why Parliament would have gone to the trouble, and creativity perhaps, of setting out proposals as an option in the *Bankruptcy and Insolvency Act*. Secured creditors or major creditors not uncommonly, in light of general security agreements and other type [sic] of security available, are in a position to claim to be over 50 percent of the indebtedness. Thus they will be the determining creditor or, I should say, are likely to be the determining creditor or, I should say, are likely to be the determining creditor in any vote on any proposal.
>
> 15. If a creditor with over 50 percent of the indebtedness could take the position that it would vote no, prior to seeing any proposal, and thus terminate all efforts under the proposal provisions, one wonders why Parliament would not simply set up the legislation that way. One wonders what the point would be of the proposal sections in the *Bankruptcy and Insolvency Act* if that were the case.
>
> 16. If the test to be applied was simply one of majority rules then in my view Parliament would not have set the test as it did in s. 50.4(9). They would simply set a test that if 50 percent of the creditors object at any point the proposal would be over. That is not the test that has been set.

[49] Since there was no evidence of bad faith on the part of the debtor in *Cantrail* and no determination of what the actual proposal would be, Master Groves allowed the application under s. 50.4(9) to extend the proposal and dismissed the application of the creditor under s. 50.4(11) to terminate the proposal (paragraphs 15-17). This is the result sought by Andover but opposed by Enirgi.

[50] Master Groves also adopted the view at para. 11 of *N.W.T. Management Group (Re),* [1993] O.J. No. 621 (C.J. (Gen. Div.)) that the intent of the *BIA* is that s. 50.4(9) and s. 50.4(11) should be judged on a rehabilitation basis rather than on a liquidation basis. And, in *Cantrail*, at para. 4, the court concluded that an objective standard must be applied to determine what a reasonable person or creditor would do, as was done in *Baldwin.*

[51] Enirgi distinguishes *Cantrail* on two grounds. First, it is submitted that at para. 9 *Cantrail* contains the inaccurate statement that "s. 50.4(11) is the mirror of s. 50.4(9)". As well, there was no discussion of *Cumberland* in *Cantrail*.

[52] I accept that, while there are a number of similarities between the two sections, there is one significant difference: under s. 50.4(11)(c) a creditor has a veto over any proposal. S. 50.4(9) does not contain such a veto and it is not a mirror to the extent of being exactly the same as s. 50.4(11). In my view this comment on a very small part of *Cantrail* does not affect the broader meaning of that judgement. And it is true that *Cumberland* was not discussed in *Cantrail* although the submission of the creditor in *Cantrail*, as recorded in the oral judgement, is in language very similar to that used in *Cumberland.*

[53] Another decision relied on by Andover as being similar to *Cantrail* is *Heritage Flooring Ltd. (Re)*, [2004] N.B.J. No. 286 (Q.B.) where a debtor filed an application under s. 50.4(9) for an extension and the creditor filed an application for termination under s. 50.4(11). The court allowed the application for an extension. The *Cumberland* and *Baldwin* decisions were noted but in *Heritage* the evidence was that the creditor would be paid out and, in any event, the creditor was not in a position to veto any proposal. *Cantrail* was also followed in *Entegrity Wind Systems Inc. (Re)*, 2009 PESC 25 although the facts in *Entegrity* did not include an application by the creditor under s. 50.4(11). The objective standard discussed in *Cantrail* was also adopted in *Convergix Inc. (Re)*, 2006 NBQB 288.

Cumberland* or *Cantrail?

[54] The result of the above is that there are different approaches to situations where there are competing applications under sections 50.4(9) and 50.4(11).

[55] The comments from *Cumberland* discussed above suggest that an application by a creditor under s. 50.4(11) can "cut short" an application under s. 50.4(9) and there is no absolute requirement that a creditor has to wait to see a proposal before voting it down. And in *Baldwin* there is a comment, in *obiter*, that

any successful application under s. 50.4(9) would be a Pyrrhic victory because the creditor could "come right back" with an application under s. 50.4(11).

[56] On the other hand, in *Cantrail* the court decided that there should be an extension for a viable proposal, not yet formulated, under s. 50.4(9) even though the creditor has lost faith in the debtor and has said it will vote against any proposal.

[57] As a matter of interpretation of the *BIA* I consider that s. 50.4(9) and s. 50.4(11) set out distinct rights and obligations. In the first case a debtor is entitled to an extension of time to make a proposal; in the second case a creditor can apply for the termination of the time for making a proposal. As I understand the submission of Enirgi the fact that it is the primary creditor (by some considerable margin), that it has lost confidence in Andover and that it will not accept any proposal from Andover supports consideration of its application for termination under s. 50.4(11).

[58] The problem with this submission is that it does not reflect the factors under s. 50.4(9) for granting an extension of time for a proposal. A creditor under this provision does not have the rights that Enirgi seeks over the debts of Andover. Those rights are in s. 50.4(11)(c) but that is a different inquiry. Indeed, one effect of the submission of Enirgi is to conflate s. 50.4(9) and s. 50.4(11). I recognize the comments from *Cumberland* and *Baldwin* that may support a contrary view. However, recognition must be given to the differences between the provisions in dispute and that contrary view does not do so. In my view the analysis and conclusions in *Cantrail* is to be preferred.

[59] I add that there are some situations where an application for an extension is overtaken by an application for termination. In *Cumberland* there was not even a germ of a proposal from the debtor for the analysis under s. 50.4(9). In that circumstance the court then proceeded to the other application before it from the creditor under s. 50.4(11).

[60] Other cases relied on by Enirgi are of a similar kind. In *Baldwin* the proposal was conjecture and rough (and the debtor had not even considered the issue of any

material prejudice to the creditor from the proposal). Similarly, in *St. Isidore Meats Inc. v. Paquette Fine Foods Inc.,* [1997] O.J. No. 1863 (Gen. Div.)) and *1252206 Alberta Ltd. v. Bank of Montreal*, [2009] A.J. No. 648 (Q.B.) the courts proceeded to a determination of the s. 50.4(11) application after finding there was no viable proposal. In *Triangle Drugs Inc. (Re)*, [1993] O.J. No. 40 (C.J. (Gen. Div.)) the creditors had a veto and they had actually seen the proposal. The court imported principles from the *Companies Creditors Arrangement Act,* R.S.C. 1985, c. C-36, concluded that it was fruitless to proceed with a plan that is doomed to failure and allowed the creditor's application under s. 50.4(11). In *Com/Mit Hitech Services Inc. (Re),* [1997] O.J. No. 3360 (C.J. (Gen. Div.)) there was no good faith or due diligence on the part of the debtor and the court proceeded to consider and allow the creditor's application under s. 50.4(11).

[61] In my view, these cases represent recognition of the procedural and business realities of the various situations rather than a legal conclusion that an application for termination will supersede an application for an extension.

[62] It follows that I find that Andover is entitled to have its application under s. 50.4(9) considered on its merits. If it is not meritorious then it is logical and consistent with the authorities to proceed with the application by Enirgi under s. 50.4(11).

The application by Andover under s. 50.4(9)

[63] With regards to the merits of Andover's application under s. 50.4(9) all of the following issues must be decided in its favour. Has it acted in good faith and with due diligence? Is it likely it would be able to make a viable proposal if an extension is granted? And, if an extension is granted, would a creditor be materially prejudiced?

[64] With regards to good faith and due diligence *N.T.W.* says that it is the conduct of Andover following the notice of intention in August 2013, rather than its conduct before then, that is to be considered. I have found above that the evidence does not support a finding of bad faith against either party.

[65] With regards to due diligence, since August 2013 Andover has obtained the September 24, 2013 letter from Ophir that says the latter "is in the process" of finalizing a loan of $3,000,000 to Andover. This is not a firm commitment of funds and nor does it need to be under s. 50.4(9); it does reflect some diligence on Andover's part. Mr. Blankstein also deposes that he has been having discussions with another party but he cannot reveal the name of that party because he is concerned that Enirgi will obstruct those discussions, as they did with Chief in June 2013. This latter information is not particularly helpful. Nonetheless I conclude that Andover has acted with sufficient due diligence.

[66] Turning to s. 50.4(9)(b), a viable proposal is one that would be reasonable on its face to a reasonable creditor; "this ignores the possible idiosyncrasies of any specific creditor": *Cumberland* at para. 4. It follows that Enirgi's views about any proposal are not necessarily determinative. The proposal need not be a certainty and "likely" means "such as might well happen."(*Baldwin*, paras. 3-4). And Enirgi's statement that it has lost faith in Andover is not determinative under s. 50.4(9): *Baldwin* at para. 3; *Cantrail* at paras. 13-18).

[67] I turn to a review of the assets of Andover in order to consider whether they provide some support for the viability of any proposal from Andover. The evidence for this review is from the affidavit of Mr. Blankstein.

[68] Alaska (wholly owned by Andover) is expecting, as a result of preliminary discussions, a N143101 Resource Calculation for a property to show approximately 1,200,000,000 pounds of copper with a gross value of about $3,600,000,000. An immediate net value of $60,000,000 and $120,000,000 is estimated, depending on the world price of copper. The State of Alaska is confident enough in the property that it has financed a road to it. In a separate property, Alaska has an estimated mineralization of 4,000,000 tons of 4.5 % copper and Andover has spent approximately $10,000,000 in developing this project. Alaska is solvent and up to date in its financial obligations.

[69] With respect to Chief (83% owned by Andover), it is also solvent and generally up to date on its obligations. Andover purchased 65% of the shares of Chief in 2008 for $8,700,000 with an environmental claim against it in the amount of $60,000,000. That claim has been negotiated down to a smaller number and the current amount due is $450,000, with half due in November 2013 and the other half due in November 2014. This has increased the value of Chief significantly, according to Andover.

[70] Financial statements in March 2013 showed Chief had $33,000,000 in equity, based on land and equipment (not mineral deposits). It owns more than 16,000 acres of land in Utah and leases an additional 2,000 acres. Plant and equipment have been independently appraised at $19,200,000. Andover estimates a cash flow in the next year of $7,000,000 to $11,000,000 to Chief.

[71] Andover and Chief are also presently involved in a joint venture with Ophir regarding deposits of silica, limestone and aggregate on property owned by Chief. Production will commence in November 2013 and sold to customers of Ophir. Ophir is spending $3,000,000 on exploration and development and production equipment has been ordered. Andover expects to receive from these two mines and a third (a joint venture with Rio Tinto) $7,200,000 to $10,900,000 in annual production net revenues commencing at the end of 2014.

[72] Chief has another property called Burgin Complex. At one time Enirgi was apparently interested in this specific property. A Technical Report, dated December 2, 2011, shows an expected cash flow of $483,000,000 in today's metal prices.

[73] By way of a summary, publicly available financial statements in March 2013 report that Andover had $42.5 million in assets and $9.1 of liabilities.

[74] Enirgi generally minimizes the asset value of Andover but it does not dispute the specific numbers above. In my view these are impressive numbers and they reflect a strong asset base for Andover. I accept that they do not demonstrate the cash at hand to pay the first promissory note and at this time Andover remains asset

rich and cash poor. But it is not "trying to box with a ghost" (as in *Cumberland*) to conclude that the assets of Andover support the view that it is likely that it can present a viable proposal. As above, there is also the prospect of a $3,000,000 cash loan from Ophir and that is some evidence of an imminent injection of cash into Andover. It has not materialized as yet but it is further evidence of the likelihood of a viable proposal. A certainty is not required and I conclude that a proposal is likely in the sense it might well happen.

[75] Enirgi points out that it holds the largest portion of unsecured debt of Andover (more than 80%) and it submits that this gives them a veto over any proposal. That may take place but thus far there is no proposal and Enirgi will have to make a business decision about its response in the event one is presented. Again, as an issue under s. 50.4(9), a proposal does not have to be acceptable to Enirgi. As well, I also note comments from the Court of Appeal, in the context of the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, that questioned the legal basis of a creditor forestalling an application for a stay and whether the court's jurisdiction could be "neutralized" in that way: *Asset Engineering LP v. Forest & Marine Financial Limited Partnership*, 2009 BCCA 319 at para. 26, cited in *Pacific Shores Resort & Spa Ltd. (Re),* 2011 BCSC 1775, at paras. 40-41.

[76] The third requirement under s. 50.4(9) is that no creditor should be materially prejudiced if an extension is granted. As emphasized in *Cantrail* at para. 21 the test is not prejudice but material prejudice. It is also an objective test: *Cumberland* at para. 11. In the subject case there is no evidence that the security in the first promissory note would be less if an extension was granted. Enirgi asserts that Andover is restructuring its assets but there is no evidence of that and, in the event it occurs, remedies are available on short notice. Unlike in *Cumberland,* the debtor here is not converting inventory into cash. It is true that the note (or notes) is non-interest bearing but Enirgi knew that when it became an assignee in March 2013 and the note had not been unpaid since October 2012. I conclude that there is some prejudice to Enirgi but not material prejudice.

[77] Finally, I note in *Cantrail* and *N.W.T.* that the objective of the *BIA* is rehabilitation rather than liquidation. Andover has a nominal payroll but liquidation of Andover and its assets would obviously affect a number of other companies and be a complicated and protracted affair. It may come to that but on the basis of the evidence available at this time I conclude that an extension of Andover's proposal should be granted.

[78] Since Andover has met the requirements of s. 50.4(9) I find that its application under that provision must be allowed. It should be given the opportunity to make a proposal and an extension of time of 45 days is granted to do so.

Summary and conclusion

[79] In cases such as this where there are competing applications under s. 50.4(9) and s. 50.4(11) the debtor is entitled to present a proposal under the former provision if it is likely a viable proposal can be presented and the other requirements of s. 50.4(9) are met. In that event the debtor should have the opportunity to present a proposal. A creditor has the ability under s. 50.4(11) to decide whether a proposal is acceptable but does not have that right under s. 50.4(9).

[80] In this case Andover has significant assets and it is likely that it will be able to present a viable proposal. As well, there is no evidence of the part of Andover of bad faith, it has acted generally in good faith, it has acted with due diligence in attempting to construct a proposal and there is no material prejudice to Enirgi if an extension is granted. In the event that Andover presents a proposal Enirgi will have then have the opportunity to decide what its position will be on it. This will be a business decision rather than a matter under s. 50.4(11).

[81] The application by Andover under s. 50.4(9) is allowed. It is entitled to an Order extending the time for filing a proposal under Part III of the *BIA* for a period of 45 days to give it an opportunity to present a proposal.

[82] The application of Enirgi under s. 50.4(11) is dismissed with leave to reapply.

[83] I considered the alternate application of Enirgi to appoint a receiver under section 47.1 of the *BIA.* I note that there is a trustee appointed as part of the notice of intention. He apparently disagreed with Enirgi about what should be in a proof of claim document but for defensible reasons. There is otherwise no evidence that something more than a trustee is warranted at this time.

[84] I remain seized of this matter and any subsequent applications related to the insolvency of Andover. I am available on short notice if there is a need to move expeditiously. Costs will be in the cause.

"Steeves J."

TAB 5

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

proceedings and other benefits of an initial order under the CCAA extended to the Partnerships, which are related to or carry on operations that are integral to the business of the Applicants.

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

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

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

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

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

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

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

b) Develop and implement support mechanisms for employees as vulnerable stakeholders affected by the wind-down, particularly (i) an employee trust (the "Employee Trust") funded by Target Corporation; (ii) an employee representative counsel to safeguard employee interests; and (iii) a key

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

    a) Should the stay be extended to the Partnerships?

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

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

    d) Should the Court approve protections for employees?

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

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

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

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

[26] "Insolvent" is not expressly defined in the CCAA. However, for the purposes of the CCAA, a debtor is insolvent if it meets the definition of an "insolvent person" in section 2 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("BIA") or if it is "insolvent" as described in *Stelco Inc. (Re)*, [2004] O.J. No. 1257, [*Stelco*], leave to appeal refused, [2004] O.J. No. 1903, leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336, where Farley, J. found that "insolvency" includes a corporation "reasonably expected to run out of liquidity within [a]

reasonable proximity of time as compared with the time reasonably required to implement a restructuring" (at para 26). The decision of Farley, J. in *Stelco* was followed in *Priszm Income Fund (Re)*, [2011] O.J. No. 1491 (SCJ), 2011 and *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4286, (SCJ) [*Canwest*].

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

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

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

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

[31] The Target Canada Entities state that the purpose for seeking the proposed initial order in these proceedings is to effect a fair, controlled and orderly wind-down of their Canadian retail business with a view to developing a plan of compromise or arrangement to present to their creditors as part of these proceedings. I accept the submissions of counsel to the Applicants that although there is no prospect that a restructured "going concern" solution involving the Target Canada Entities will result, the use of the protections and flexibility afforded by the CCAA is entirely appropriate in these circumstances. In arriving at this conclusion, I have noted the comments of the Supreme Court of Canada in *Century Services Inc.* v. *Canada (Attorney General)*, [2010] SCC 50 ("*Century Services*") that "courts frequently observe that the CCAA is skeletal in nature", and does not "contain a comprehensive code that lays out all that is permitted or barred". The flexibility of the CCAA, particularly in the context of large and complex restructurings, allows for innovation and creativity, in contrast to the more "rules-based" approach of the BIA.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[54] The Applicants seek court approval of the Employee Trust which provides for payment to eligible employees of certain amounts, such as the balance of working notice following termination. Counsel contends that the Employee Trust was developed in consultation with the proposed monitor, who is the administrator of the trust, and is supported by the proposed Representative Counsel. The proposed trustee is The Honourable J. Ground. The Employee Trust is exclusively funded by Target Corporation and the costs associated with administering the Employee Trust will be borne by the Employee Trust, not the estate of Target Canada Entities. Target Corporation has agreed not to seek to recover from the Target Canada Entities estates any amounts paid out to employee beneficiaries under the Employee Trust.

[55] In my view, it is questionable as to whether court authorization is required to implement the provisions of the Employee Trust. It is the third party, Target Corporation, that is funding the expenses for the Employee Trust and not one of the debtor Applicants. However, I do recognize that the implementation of the Employee Trust is intertwined with this proceeding and is beneficial to the employees of the Applicants. To the extent that Target Corporation requires a court order authorizing the implementation of the employee trust, the same is granted.

[56] The Applicants seek the approval of a KERP and the granting of a court ordered charge up to the aggregate amount of $6.5 million as security for payments under the KERP. It is proposed that the KERP Charge will rank after the Administration Charge but before the Directors' Charge.

[57] The approval of a KERP and related KERP Charge is in the discretion of the Court. KERPs have been approved in numerous CCAA proceedings, including *Re Nortel Networks Corp.*, 2009 CarswellOnt 1330 (S.C.J.) [*Nortel Networks (KERP)]*, and *Re Grant Forest Products Inc.*, 2009 CarswellOnt 4699 (Ont. S.C.J.). In *U.S. Steel Canada Inc.*, 2014 ONSC 6145, I recently approved the KERP for employees whose continued services were critical to the stability of the business and for the implementation of the marketing process and whose services

could not easily be replaced due, in part, to the significant integration between the debtor company and its U.S. parent.

[58] In this case, the KERP was developed by the Target Canada Entities in consultation with the proposed monitor. The proposed KERP and KERP Charge benefits between 21 and 26 key management employees and approximately 520 store-level management employees.

[59] Having reviewed the record, I am of the view that it is appropriate to approve the KERP and the KERP Charge. In arriving at this conclusion, I have taken into account the submissions of counsel to the Applicants as to the importance of having stability among the key employees in the liquidation process that lies ahead.

[60] The Applicants also request the Court to appoint Koskie Minsky LLP as employee representative counsel (the "Employee Representative Counsel"), with Ms. Susan Philpott acting as senior counsel. The Applicants contend that the Employee Representative Counsel will ensure that employee interests are adequately protected throughout the proceeding, including by assisting with the Employee Trust. The Applicants contend that at this stage of the proceeding, the employees have a common interest in the CCAA proceedings and there appears to be no material conflict existing between individual or groups of employees. Moreover, employees will be entitled to opt out, if desired.

[61] I am satisfied that section 11 of the CCAA and the *Rules of Civil Procedure* confer broad jurisdiction on the court to appoint Representative Counsel for vulnerable stakeholder groups such as employee or investors (see *Re Nortel Networks Corp.*, 2009 CarswellOnt 3028 (S.C.J.) (Nortel Networks Representative Counsel)). In my view, it is appropriate to approve the appointment of Employee Representative Counsel and to provide for the payment of fees for such counsel by the Applicants. In arriving at this conclusion, I have taken into account:

(i) the vulnerability and resources of the groups sought to be represented;

(ii) the social benefit to be derived from the representation of the groups;

(iii) the avoidance of multiplicity of legal retainers; and

(iv) the balance of convenience and whether it is fair and just to creditors of the estate.

[62] The Applicants also seek authorization, if necessary, and with the consent of the Monitor, to make payments for pre-filing amounts owing and arrears to certain critical third parties that provide services integral to TCC's ability to operate during and implement its controlled and orderly wind-down process.

[63] Although the objective of the CCAA is to maintain the status quo while an insolvent company attempts to negotiate a plan of arrangement with its creditors, the courts have expressly acknowledged that preservation of the status quo does not necessarily entail the preservation of the relative pre-stay debt status of each creditor.

[64] The Target Canada Entities seek authorization to pay pre-filing amounts to certain specific categories of suppliers, if necessary and with the consent of the Monitor. These include:

a) Logistics and supply chain providers;

b) Providers of credit, debt and gift card processing related services; and

c) Other suppliers up to a maximum aggregate amount of $10 million, if, in the opinion of the Target Canada Entities, the supplier is critical to the orderly wind-down of the business.

[65] In my view, having reviewed the record, I am satisfied that it is appropriate to grant this requested relief in respect of critical suppliers.

[66] In order to maximize recovery for all stakeholders, TCC indicates that it intends to liquidate its inventory and attempt to sell the real estate portfolio, either en bloc, in groups, or on an individual property basis. The Applicants therefore seek authorization to solicit proposals from liquidators with a view to entering into an agreement for the liquidation of the Target Canada Entities inventory in a liquidation process.

[67] TCC's liquidity position continues to deteriorate. According to Mr. Wong, TCC and its subsidiaries have an immediate need for funding in order to satisfy obligations that are coming due, including payroll obligations that are due on January 16, 2015. Mr. Wong states that Target Corporation and its subsidiaries are no longer willing to provide continued funding to TCC and its subsidiaries outside of a CCAA proceeding. Target Corporation (the "DIP Lender") has agreed to provide TCC and its subsidiaries (collectively, the "Borrower") with an interim financing facility (the "DIP Facility") on terms advantageous to the Applicants in the form of a revolving credit facility in an amount up to U.S. $175 million. Counsel points out that no fees are payable under the DIP Facility and interest is to be charged at what they consider to be the favourable rate of 5%. Mr. Wong also states that it is anticipated that the amount of the DIP Facility will be sufficient to accommodate the anticipated liquidity requirements of the Borrower during the orderly wind-down process.

[68] The DIP Facility is to be secured by a security interest on all of the real and personal property owned, leased or hereafter acquired by the Borrower. The Applicants request a court-ordered charge on the property of the Borrower to secure the amount actually borrowed under the DIP Facility (the "DIP Lenders Charge"). The DIP Lenders Charge will rank in priority to all unsecured claims, but subordinate to the Administration Charge, the KERP Charge and the Directors' Charge.

[69] The authority to grant an interim financing charge is set out at section 11.2 of the CCAA. Section 11.2(4) sets out certain factors to be considered by the court in deciding whether to grant the DIP Financing Charge.

[70] The Target Canada Entities did not seek alternative DIP Financing proposals based on their belief that the DIP Facility was being offered on more favourable terms than any other

potentially available third party financing. The Target Canada Entities are of the view that the DIP Facility is in the best interests of the Target Canada Entities and their stakeholders. I accept this submission and grant the relief as requested.

[71] Accordingly, the DIP Lenders' Charge is granted in the amount up to U.S. $175 million and the DIP Facility is approved.

[72] Section 11 of the CCAA provides the court with the authority to allow the debtor company to enter into arrangements to facilitate a restructuring under the CCAA. The Target Canada Entities wish to retain Lazard and Northwest to assist them during the CCCA proceeding. Both the Target Canada Entities and the Monitor believe that the quantum and nature of the remuneration to be paid to Lazard and Northwest is fair and reasonable. In these circumstances, I am satisfied that it is appropriate to approve the engagement of Lazard and Northwest.

[73] With respect to the Administration Charge, the Applicants are requesting that the Monitor, along with its counsel, counsel to the Target Canada Entities, independent counsel to the Directors, the Employee Representative Counsel, Lazard and Northwest be protected by a court ordered charge and all the property of the Target Canada Entities up to a maximum amount of $6.75 million as security for their respective fees and disbursements (the "Administration Charge"). Certain fees that may be payable to Lazard are proposed to be protected by a Financial Advisor Subordinated Charge.

[74] In *Canwest Publishing Inc.*, 2010 ONSC 222, Pepall J. (as she then was) provided a non-exhaustive list of factors to be considered in approving an administration charge, including:

a. The size and complexity of the business being restructured;

b. The proposed role of the beneficiaries of the charge;

c. Whether there is an unwarranted duplication of roles;

d. Whether the quantum of the proposed Charge appears to be fair and reasonable;

e. The position of the secured creditors likely to be affected by the Charge; and

f. The position of the Monitor.

[75] Having reviewed the record, I am satisfied, that it is appropriate to approve the Administration Charge and the Financial Advisor Subordinated Charge.

[76] The Applicants seek a Directors' and Officers' charge in the amount of up to $64 million. The Directors Charge is proposed to be secured by the property of the Target Canada Entities and to rank behind the Administration Charge and the KERP Charge, but ahead of the DIP Lenders' Charge.

[77] Pursuant to section 11.51 of the CCAA, the court has specific authority to grant a "super priority" charge to the directors and officers of a company as security for the indemnity provided by the company in respect of certain obligations.

[78] I accept the submissions of counsel to the Applicants that the requested Directors' Charge is reasonable given the nature of the Target Canada Entities retail business, the number of employees in Canada and the corresponding potential exposure of the directors and officers to personal liability. Accordingly, the Directors' Charge is granted.

[79] In the result, I am satisfied that it is appropriate to grant the Initial Order in these proceedings.

[80] The stay of proceedings is in effect until February 13, 2015.

[81] A comeback hearing is to be scheduled on or prior to February 13, 2015. I recognize that there are many aspects of the Initial Order that go beyond the usual first day provisions. I have determined that it is appropriate to grant this broad relief at this time so as to ensure that the status quo is maintained.

[82] The comeback hearing is to be a "true" comeback hearing. In moving to set aside or vary any provisions of this order, moving parties do not have to overcome any onus of demonstrating that the order should be set aside or varied.

[83] Finally, a copy of Lazard's engagement letter (the "Lazard Engagement Letter") is attached as Confidential Appendix "A" to the Monitor's pre-filing report. The Applicants request that the Lazard Engagement Letter be sealed, as the fee structure contemplated in the Lazard Engagement Letter could potentially influence the structure of bids received in the sales process.

[84] Having considered the principles set out in *Sierra Club of Canada* v. *Canada (Minister of Finance)*, [2002] 211 D.L.R (4^{th}) 193 2 S.C.R. 522, I am satisfied that it is appropriate in the circumstances to seal Confidential Appendix "A" to the Monitor's pre-filing report.

[85] The Initial Order has been signed in the form presented.

Regional Senior Justice Morawetz

Date: January 16, 2015

TAB 6

Court of Queen's Bench of Alberta

Citation: Sanjel Corporation (Re), 2016 ABQB 257

Date: 05162016
Docket: 1601 03143
Registry: Calgary

In the matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

And in the matter of the Compromise or Arrangement of Sanjel Corporation, Sanjel Canada Ltd., Terracor Group Ltd., Suretech Group Ltd., Suretech Completions Canada Ltd., Sanjel Energy Services (USA) Inc., Sanjel (USA) Inc., Suretech Completions (USA) Inc., Sanjel Capital (USA) Inc., Terracor (USA) Inc., Terracor Resources (USA) Inc., Terracor Logistics (USA) Inc., Sanjel Middle East Ltd., Sanjel Latin America Limited and Sanjel Energy Services DMCC

Reasons for Decision of the Honourable Madam Justice B.E. Romaine

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I. Introduction

[1] The Sanjel debtors seek orders approving certain sales of assets generated through a SISP that was conducted prior to the debtors filing under the *Companies' Creditors Arrangement Act*. The proceeds of the sales will be insufficient to fully payout the secured creditor, and will generate no return to unsecured creditors, including the holders of unsecured Bonds.

[2] The Trustee of the Bonds challenged the process under which the SISP was conducted, and the use of what he characterized as a liquidating CCAA in this situation. He alleged that the use of the CCAA to effect a pre-packaged sale of the debtors' assets for the benefit of the secured creditor was an abuse of the letter and spirit of the CCAA. He also alleged that bad faith and collusion tainted the integrity of the SISP.

[3] After reviewing extensive evidence and hearing submissions from interested parties, I decided to allow the application to approve the sales, and dismiss the application of the Trustee. These are my reasons.

[64] Whether before or after the enactment of section 36, Canadian courts have approved en bloc sales of a debtor company, recognizing that such sales are consistent with the broad remedial purpose and flexibility of the CCAA.

[65] What the provisions of the CCAA can provide in situations such as those facing the Sanjel Group is a court-supervised process of the execution of the sales, with provision for liquidity and the continuation of the business through the process provided by interim financing, a Key Employee Retention Plan that attempts to ensure that key employees are given an incentive to ensure a seamless transition, critical supplier relief that keeps operations functioning pending the closing of the sales and a process whereby a company with operations in Canada, the United States and internationally is able to invoke the aid of both Canadian and US courts during the process. It is true that the actual SISP process preceded the CCAA filing, and I will address that factor later in this decision.

[66] As counsel to the Sanjel Group notes, this type of insolvency proceeding is well-suited to the current catastrophic downturn of the economy in Alberta, with companies at the limit of their liquidity. It allows a business to be kept together and sold as a going concern to the extent possible. There have been a number of recent similar filings in this jurisdiction: the filing in Southern Pacific and Quicksilver are examples.

[67] The Monitor supports the sales, and is of the view, supported by investigation into the likely range of forced sale liquidation recoveries with financial advisors and others with industry knowledge, that a liquidation of assets would not generate a better result than the consideration contemplated by the proposed sales. The Monitor's investigations were hampered by the lack of recent sales of similar businesses, but I am satisfied by its thorough report that the Monitor's investigation of likely recoveries is the best estimate available. A CS estimate provided a different analysis, but I am satisfied by the evidence that it has little probative value.

[68] In summary, this is not an inappropriate use of the CCAA arising from the nature of the proposed sales.

B. The Trustee submits that the proposed sales are the product of a defective SISP conducted outside of the CCAA.

[69] It is true that the SISP, and the restructuring negotiations with the Ad Hoc Bondholders, took place prior to the filing under the CCAA, that this was a "pre-pack" filing.

[70] A pre-filing SISP is not of itself abusive of the CCAA. Nothing in the statute precludes it. Of course, a pre-filing SISP must meet the principles and requirements of section 36 of the CCAA and must be considered against the Soundair principles. The Trustee submits that such a SISP should be subject to heightened scrutiny. It may well be correct that a pre-filing SISP will be subject to greater challenges from stakeholders, and that it may be more difficult for the debtor company to establish that it was conducted in a fair and effective manner, given the lack of supervision by the Court and the Monitor, who as a court officer has statutory duties.

[71] Without prior court approval of the process, conducting a SISP outside of the CCAA means that both the procedure and the execution of the SISP are open to attack by aggrieved stakeholders and bitter bidders, as has been the case here. Any evidence or reasonable allegations of impropriety would have to be investigated carefully, whereas in a court-approved process, comfort can be obtained through the Monitor's review and the Court's approval of the process in

TAB 7

1993 CarswellOnt 208
Ontario Court of Justice (General Division), In Bankruptcy

N.T.W. Management Group Ltd., Re

1993 CarswellOnt 208, [1993] O.J. No. 621, 19 C.B.R. (3d) 162

Re insolvency of N.T.W. MANAGEMENT GROUP LIMITED; Re insolvency of COAST OPERATIONS OF CANADA LIMITED; Re insolvency of PERSONALIZED LEASING SERVICES LIMITED

Chadwick J.

Judgment: March 15, 1993
Docket: Docs. Ottawa 065330/93, 065331/93, 065332/93

Counsel: *Hugh Blakeney* and *Annette J. Nicholson*, for Canadian Imperial Bank of Commerce.
John P. O'Toole, for interim receiver and trustee.
Heather P. Griffiths, for trustee.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
VI Proposal
VI.5 Annulment of approved proposal

Headnote

Bankruptcy --- Proposal — Annulment of approved proposal

Proposals — Procedure — Notice of intention — Application to terminate notice of intention to enforce security being dismissed where applicant unable to meet onus set out in s. 50.4(11) of Act — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 50.4(11).

A bank served notice of its intention to enforce its security pursuant to s. 224(1) of the *Bankruptcy and Insolvency Act* against three insolvent companies. On the same day, it applied for receiving orders against each of the companies. The next day, the companies filed notices of intention to make a proposal pursuant to s. 50.4 of the Act. A trustee was named for the purposes of the notice. When the companies opened a bank account with another bank, thereby diverting funds covered by the bank's general security agreement, the bank moved for the appointment of an interim receiver under s. 47.1. The trustee was appointed as interim receiver.

The bank brought a motion for an order pursuant to s. 50.4(11) of the Act terminating the notices of intention. The bank argued that it would not support any proposal put forth by the insolvent companies and that, therefore, the notice of intention to file a proposal and the protection afforded by that proposal should be terminated. The evidence showed that if the bank were to realize on its security there would be no assets left in the insolvent companies. The bank alleged that together the companies owed it $21,369,427.99. The companies argued that the application was premature and that they should have an opportunity to formulate a proposal.

Held:

The application was dismissed.

The bank did not meet the onus set out in s. 50.4(11)(*a*). The opening of a new bank account was indicative of the companies' bad faith, but was done before the filing of the notice of intention. Since the notice of intention was filed, the companies had been acting in good faith. Further, the fact that the companies had not yet arranged financing was not evidence of their failure to act with due diligence; such financing takes time to arrange. There was no evidence that the intention to file a proposal was a sham or delaying tactic.

The bank presented no evidence to show that the companies would not be able to make a viable proposal before the expiration of the 30-day period provided in the Act. While it was difficult to determine this at such an early point in the proceedings, the bank was unable to fulfil the test in s. 50.4(11)(*b*) to show on the balance of probabilities that the companies would not be able to make a viable proposal.

The bank had stated that it would not accept any proposal. However, since the companies had not yet had the opportunity to put forth their proposal, it was impossible to make a final determination under s. 50.4(11)(*c*). The companies should have the opportunity to formulate and make their proposal.

While the bank would be prejudiced by the delay in allowing the proposal to go forward, s.50.4(11)(*d*) requires that all creditors be considered. There was no evidence to show that all the creditors would be materially prejudiced by allowing the proposal to be made.

The application was dismissed without prejudice to the bank to re-apply once the proposal was filed or if the companies failed to comply with the specific requirements of the Act.

Table of Authorities

Cases considered:

Diemaster Tool Inc. v. Skvortsoff (Trustee of) (1991), 3 C.B.R. (3d) 133 (Ont. Gen. Div.) — *referred to*

First Treasury Financial Inc. v. Cango Petroleums Inc. (1991), 3 C.B.R. (3d) 232, 78 D.L.R. (4th) 585 (Ont. Gen. Div.) — *referred to*

Inducon Development Corp., Re (1991), 8 C.B.R. (3d) 306 (Ont. Gen. Div.) — *referred to*

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, *(*sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 282, 1 O.R. (3d) 289 (C.A) — *considered*

Perkins Holdings Ltd., Re (1991), 6 C.B.R. (3d) 299, 4 B.L.R. (2d) 211 (Ont. Gen. Div.) — *referred to*

Triangle Drugs Inc., Re (1993), 16 C.B.R. (3d) 1, 12 O.R. (3d) 219 (Bktcy.) — *considered*

851820 N.W.T. Ltd. v. Hopkins Construction (Lacombe) Ltd. (1992), 12 C.B.R. (3d) 31 (N.W.T.S.C.) — *referred to*

Statutes considered:

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

s. 47(2)

s. 47.1

s. 50(8)

s. 50.4

s. 50.4(2)

s. 50.4(11)

s. 50.4(11)(a)

s. 50.4(11)(b)

s. 50.4(11)(c)

s. 50.4(11)(d)

s. 50.9

s. 224(1)

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

Application pursuant to s. 50.4(11) of *Bankruptcy and Insolvency Act* for order terminating notice of intention.

***Chadwick J.*:**

1 The applicant, Canadian Imperial Bank of Commerce (C.I.B.C.) is a secured creditor of each of the three insolvent corporations, Coast Operations of Canada Limited (Coast), N.T.W. Management Group Limited (N.T.W. Management), and Personalized Leasing Services Limited (c.o.b. Mac's). The applicant, C.I.B.C. brings this application pursuant to s. 50.4(11), R.S.C. 1985, c. B-3.

2 On February 16th, 1993 C.I.B.C. served notice of their intention to enforce their security in accordance with s. 224(1) against each of the insolvent companies. On the same date they applied for receiving orders regarding each of the companies. On the 17th of February, 1993 the three companies filed notices of intention to make a proposal pursuant to the provisions of s. 50.4 of the *Bankruptcy and Insolvency Act*. Deloitte & Touche Inc. were named as trustees for the purpose of the notice.

3 C.I.B.C. immediately moved for the appointment of an interim receiver in accordance with s. 47.1. This application was based upon the companies opening a new bank account with the Royal Bank. As such funds covered by the General Security Agreement of C.I.B.C. were being diverted. I was satisfied on the evidence that an interim receiver should be appointed. The debtor company opposed the appointment of the interim receiver recommended by C.I.B.C. In order to attempt to reduce costs, I appointed the insolvent companies' trustee as interim receiver.

4 At the time of the application for interim receiver, the prime concern was Personalized Leasing Services Limited which carries on business as Mac's Delivery Service. On the evening of February 17th, 1993 Budget Rent-A-Car, operating under Ottawa Car and Truck Leasing, attempted to seize vehicles operated by Mac's. On February 18th, Ottawa Car and Truck Leasing voluntarily returned the vehicles to Mac's. I provided directions to the interim receiver in order to protect the interest of Ottawa Car and Truck Leasing. On that date as well, Ottawa Car and Truck Leasing brought an application to terminate the proposal filed by Personalized Leasing Services Limited according to s. 50.4(11) of the *Bankruptcy and Insolvency Act*. That application was adjourned *sine die*. The position put forward by Ottawa Car and Truck Leasing was that, as a result of their leasing arrangement with Mac's, they were the largest single creditor of that company, excluding C.I.B.C.

5 There is some dispute in the affidavit material as to how much is owing to C.I.B.C. by the insolvent companies. As all of the companies are inter-related there are guarantees and cross-guarantees between the companies to secure the indebtedness of C.I.B.C. It is also apparent that under the terms of the C.I.B.C. General Security Agreement if C.I.B.C. were to realize on their security, there would be no assets left in the three insolvent companies.

6 The Notice of Intention dated February 17th, 1993 filed by the companies, acknowledged a debt to C.I.B.C. of

$10,453,302.96. In addition, there is an unlimited guarantee of the debts of N.T.W. Realty Limited, another insolvent company related to the three named companies which are the subject matter of this application. Under the unlimited guarantee, there is indebtedness of $14,916,427.99. According to C.I.B.C.'s material, the companies are indebted to them in the amount of $21,369,427.99.

7 C.I.B.C. now seeks an order pursuant to s. 50.4(11) terminating the notice of intention. It is the position of C.I.B.C. that as a result of the conduct of the insolvent companies and their principle Walter Boyce, they will not support any proposal put forth by the insolvent companies. On this basis alone, they take the position that the court should terminate the notice of intention to file a proposal and the subsequent protection that that proposal gives the insolvent companies.

8 Counsel on behalf of the insolvent companies argue that the application is premature. Their position is that they should be allowed to formulate a proposal which would allow them to pay out the indebtedness of C.I.B.C. In support of their position, Michael K. Carson, Senior Vice-President of Deloitte & Touche, the trustee and interim receiver of the insolvent companies has filed affidavit material setting forth what actions they have taken since their appointment. The trustee has filed a cash-flow statement, as required by s. 50.4(2).

9 I am satisfied on the evidence that the interim receiver and trustee has received in the cooperation of the principals of the insolvent companies and that the bank's security over the general assets is not in jeopardy.

10 The thrust of C.I.B.C.'s application pursuant to s. 50.4(11) is sub-paragraph (*a*), (*b*) and (*c*). This section allows the creditors such as C.I.B.C. to apply to the court to terminate the application prior to the 30-day expiration period if the court is satisfied as follows:

> (*a*) the insolvent person has not acted, or is not acting, in good faith and with due diligence,
>
> (*b*) the insolvent person will not be likely able to make a viable proposal before the expiration of the period in question,
>
> (*c*) the insolvent person will not be likely able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors ...

11 In support of their application, Mr. Blakeney, counsel for C.I.B.C. has referred me to a number of cases which were decided under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. where applications by insolvent companies were dismissed when the applications were opposed by major creditors who would not approve the plan of compromise or arrangement. (See *Diemaster Tool Inc. v. Skvortsoff (Trustee of)* (1991), 3 C.B.R. (3d) 133 (Ont. Gen. Div.); *851820 N.W.T. Ltd. v. Hopkins Construction (Lacombe) Ltd.* (1992), 12 C.B.R. (3d) 31 (N.W.T. S.C.); *First Treasury Financial Inc. v. Cango Petroleums Inc.* (1991), 3 C.B.R. (3d) 232 (Ont. Gen. Div.); *Re Inducon Development Corp.* (1991), 8 C.B.R. (3d) 306 (Ont. Gen. Div.); *Re Perkins Holdings Ltd.* (1991), 6 C.B.R. (3d) 299 (Ont. Gen. Div.); *Re Triangle Drugs Inc.* (1993, unreported) [now reported at 16 C.B.R. (3d) 1 (Ont. Bktcy.)].)

12 In *Nova Metal Products Inc. v. Comiskey (Trustee of)* [(1990), 1 C.B.R. (3d) 101 (Ont. C.A.)] Finlayson, J.A. on behalf of the court considered the operation of the *Companies' Creditors Arrangement Act* as it related to various secured creditors. After reviewing the classification of creditors and placing the major secured creditors in one particular class, it was apparent that the major secured creditor would not support the proposed plan of arrangement. At p. 115 he concluded:

> My assessment of these secured creditors is that the bank should be in its own class. This being so, it is obvious that no plan of arrangement can succeed without its approval. There is no useful purpose to be served in putting a plan of arrangement to a meeting of creditors if it is known in advance that it cannot succeed. This is another cogent reason for the Court declining to exercise its discretion in favour of the debtor companies.

13 Doherty J.A. dissented in part with the views of Finlayson J.A. At p. 129 he states:

> I agree that the feasibility of the plan is a relevant and significant factor to be considered in determining whether to order a meeting of creditors: S.E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act," at pp. 594-

> 595. I would not, however, impose a heavy burden on the debtor company to establish the likelihood of ultimate success from the outset. As the Act will often be the last refuge for failing companies, it is to be expected that many of the proposed plans of reorganization will involve variables and contingencies which will make the plan's ultimate acceptability to the creditors and the Court very uncertain at the time the initial application is made.

14 The procedure set out in the *Companies' Creditors Arrangement Act* are far different than the procedure in the new *Bankruptcy and Insolvency Act*. Under the C.C.A.A. application for a stay must be made to the court. The onus is on the applicant to show that there is some likelihood of success. Under the *Bankruptcy and Insolvency Act* the stay is granted automatically once the notice of intention or proposal is filed. The *Bankruptcy and Insolvency Act* then goes on to provide specific time restrictions and requirements that the applicant must comply with in order to continue to receive the protection of the Act. The insolvent company may seek a 45-day extension of time, but the onus is on the insolvent company to satisfy the requirement of s. 50.9. These requirements are similar to requirements that the creditors must satisfy in an application to terminate under s. 50.4(11). The difference being the onus is now on the insolvent company rather than the creditor.

15 Considering the application on its merits and the provisions of s. 50.4(11).

> (*a*) the insolvent person has not acted, or is not acting, in good faith and with due diligence,

16 The opening of a new bank account and diverting the funds from C.I.B.C. is certainly an indication of bad faith. This action was done before the filing of the notice of intention. Since filing the notice the insolvent companies appear to be acting in good faith. The isolated act of changing the bank account is not evidence that the insolvent companies are not acting in good faith regarding this application.

17 C.I.B.C. takes the position that the insolvent companies have not proceeded with due diligence. I am not satisfied on the evidence before me that this is the case. The insolvent companies have a difficult task in attempting to arrange new financing. This is not something that can be accomplished overnight. The officers and principals of the insolvent companies are cooperating with the trustee. There is no evidence they are not acting in good faith or that the notice of intention to file a proposal is a sham or delaying tactic.

> (*b*) the insolvent person will not be likely able to make a viable proposal before the expiration of the period in question,

18 Under s. 50(8) the insolvent companies must file their proposal within thirty days. There was no evidence before me that they could not meet that deadline. The question is whether they "will not be likely able to make a viable proposal". It is difficult to make this determination so early in the proceedings. It is clear that for any proposal to be viable it will have to contain provisions for a complete discharge of the C.I.B.C. obligation. The evidence indicates that the principals are negotiating with other banks to arrange new take-out financing. The onus is on the applicant to prove on a balance of probabilities that the insolvent companies will likely not be able to make a viable proposal before the expiration period. The applicant has not met this onus.

> (*c*) The insolvent person will not be likely able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors ...

19 C.I.B.C. the major secured creditor has indicated they will not accept any proposal put forth, other than complete discharge of the C.I.B.C. indebtedness. Other substantial creditors have taken the same position. There is no doubt that the insolvent companies have a substantial obstacle to overcome. As the insolvent companies have not had the opportunity to put forth this proposal, it is impossible to make the final determination. In *Triangle Drugs Inc.* Farley J. had the proposal. Well over one-half of the secured creditors indicated they would not vote for the proposal. As such, he then terminated the proposal. We have not reached that stage in this case. The insolvent companies should have the opportunity of putting forth the proposal.

> (*d*) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

20 There is no doubt that C.I.B.C. is prejudiced by the delay. The insolvent companies are not paying down their loans and are using the secured capital to operate the companies. However, the wording of this section deals with all creditors and they must be materially prejudiced. There is no evidence before me that all the creditors will be materially prejudiced.

21 Although the general principles in the cases referred to under the C.C.A.A. may have some application, there are now statutory requirements to be satisfied under s.50.4(11)(*c*).

22 The bankruptcy insolvency legislation and in particular the proposal sections are to give an insolvent company or person, an opportunity of putting forward a plan. The intent of the legislation is towards rehabilitation, not liquidation. In this case, the application to terminate has been made even before a proposal was put forward.

23 For these reasons, the application which would terminate the intention to file a proposal, is dismissed. In dismissing the application it is without prejudice to C.I.B.C. to re-apply once the proposal has been filed or if the insolvent companies fail to comply with the specific requirements of the *Bankruptcy and Insolvency Act*. If the insolvent companies apply for extensions of time to file their proposals, the application should be made before me.

24 The interim receiver and trustee applied for an order for the payment of fees and disbursements pursuant to s. 47(2). They also sought further directions. In my initial order, I defined the duties of the interim receiver in respect to the operation of N.W.T. Management Group. I did not make any order with reference to the other two companies.

25 With reference to the payment of fees and disbursements, I will hear submissions from counsel once the proposal has been filed or if it is terminated and in regards to duties of the interim receiver with reference to the other two companies, if the parties cannot agree upon the duties, then I will review C.I.B.C.'s proposal and the interim receiver and trustee's proposals.

26 Costs of this application will be reserved until the filing of the proposal.

Application dismissed.

TAB 8

In the matter of the bankruptcy of Portus Alternative Asset Management Inc. and Portus Asset Management Inc., both corporations, incorporated pursuant to the Business Corporations Act (Ontario) with their principal place of business in the City of Toronto, bankrupts

[Indexed as: Portus Alternative Asset Management Inc. (Re)]

88 O.R. (3d) 313

Ontario Superior Court of Justice,
C. Campbell J.
October 17, 2007

Bankruptcy and insolvency -- Powers of court -- Court having power to fill "gap" in bankruptcy legislation to avoid inequitable result where bankrupt securities firm defrauded its customers and misappropriated and commingled their funds.

PAAM was a "securities firm" within the meaning of Part XII of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("BIA"). It acted as a portfolio manager for approximately 26,000 investors, representing to them that it would invest all of the funds received from them to purchase Canadian securities listed on the Toronto Stock Exchange. PAAM received approximately $792 million from the investors, but did not purchase any Canadian securities. Instead, it misappropriated the funds, commingling them with other funds and assets held by related entities. A customer of a bankrupt securities firm under Part XII of the BIA has a claim against the bankrupt securities firm for the amount of his or her "net equity". As a result of PAAM's actions, the investors had no assets in their accounts and were unable to trace their funds to either of the Notes, the cash or the other property in the hands of the Receiver. The Receiver brought a motion for an order that would

assist in the administration and distribution of funds to the investors.

Held, the motion should be granted

According to the definition of "net equity" in s. 253 of the BIA, each investor's "net equity" would be zero. That result would be neither just nor equitable. Part XII of the BIA contemplates the establishment of securities accounts for the customers of a security firm and presumes that the securities firm will utilize all funds received from its customers to purchase securities. Part XII of the BIA does not contemplate a misappropriation of funds received by a securities firm from its customers. This is a "functional gap" in the BIA. The statutory purpose of Part XII would be defeated if a fraud by or on behalf of the securities firm operated to defeat an otherwise legitimate entitlement to recovery by a customer. The court had the power to fill the gap as a matter of statutory interpretation. It would be just and equitable and within the purpose of Part XII to declare that the net equity of each customer was in an amount equal to the amount invested by each customer, less any amounts received by each customer prior to March 4, 2005.

Cases referred to

Clear Creek Contracting Ltd. v. Skeena Cellulose Inc., [2003] B.C.J. No. 1335, 2003 BCCA 344, 4 B.C.A.C. 54, 43 C.B.R. (4th) 187; MacMillan Bloedel Ltd. v. Simpson, [1995] 4 S.C.R. 725, [1995] S.C.J. No. 101, 14 B.C.L.R. (3d) 122, 130 D.L.R. (4th) 385, 191 N.R. 260, [1996] 2 W.W.R. 1, 33 C.R.R. (2d) 123, 103 C.C.C. (3d) 225, 44 C.R. (4th) 277 (sub nom. P. (J.) v. MacMillan Bloedel Ltd.); United Used Auto & Truck Parts Ltd. (Re), [2000] B.C.J. No. 409, 16 C.B.R. (4th) 141 (C.A.), affg [1999] B.C.J. No. 2754, 12 C.B.R. (4th) 144 (S.C.) [page314]

Statutes referred to

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

253, Part XII
Companies' Creditors Arrangements Act, R.S.C. 1985, c. C-36, as am.

Authorities referred to

Cot, Pierre-Andr, The Interpretation of Legislation in Canada, 3rd ed. (Toronto: Carswell, 2000)
Houlden, Lloyd W. and Geoffrey B. Morawetz, Bankruptcy & Insolvency Law of Canada, 3rd ed., looseleaf, vol. 3 (Toronto: Thomson Carswell)
Jackson, Georgina R. and Janis P. Sarra, "Selecting the Judicial Tool To Get The Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in Annual Review of Insolvency Law (Toronto: Thomson Carswell, 2003-)
Jacob, I.H., "The Inherent Jurisdictions of the Court" (1970) 23 Curr. Legal Probs. 23
Sullivan, Ruth, Sullivan and Driedger on the Construction of Statutes, 4th ed. (Markham: Butterworths, 2002)

MOTION by a Trustee in Bankruptcy for an order assisting in administration and distribution of funds.

James H. Grout and Larry C. Ellis, for KPMG Inc., in its capacity as Trustee of the Consolidated Estate of Portus Alternative Asset Management Inc. and Portus Asset Management Inc., bankrupts.

Jeffrey Leon, for Manulife.

R. Shayne Kukulowicz, representative counsel.

C. Smith, for Berkshire Hathaway.

[1] C. CAMPBELL J.: -- The Trustee in the above-noted Estate of Portus Alternative Asset Management Inc. ("PAAM") sought an

Order that would assist in the administration and distribution of funds to Investors.

[2] Approximately twenty-six thousand (26,000) parties (the "Investors") retained PAAM as a portfolio manager by entering into an investment management agreement with PAAM (the "Management Agreement"). Pursuant to the Management Agreement, the Investor granted PAAM complete discretion to invest all of the assets that the Investor contributed to its account with PAAM (the "Account") from time to time subject to representations that were made by PAAM regarding the way in which it proposed to exercise the investment discretion granted to it by the Investor.

[3] PAAM represented to the Investors that it would utilize all of the funds received by it from the Investors to purchase Canadian securities listed on the Toronto Stock Exchange (the "Canadian Securities"). Pursuant to a complicated series of forward contracts with offshore counterparties involving the Canadian Securities, the Investors were to receive the indirect economic [page315] benefit of principal protected notes issued by a bank to a series of trusts (the "Managed Account Structure").

[4] PAAM received approximately $792 million from the Investors. It did not purchase any Canadian Securities. The Managed Account Structure as it was described to the Investors and the failure of PAAM to implement the Managed Account Structure is fully described in the Consolidated Bankruptcy Report dated May 4, 2007 (the "Consolidated Bankruptcy Report") of KPMG Inc. (the "Receiver") in its capacity as the Receiver of the property, assets and undertaking of PAAM, PAM, BancNote Corp. and certain other related entities and assets (collectively, the "Portus Group").

[5] The Receiver ascertained that all funds contributed by the Investors to their Accounts for investment by PAAM were transferred by PAAM through numerous commingled offshore and domestic bank accounts controlled by PAAM before being used for one of two purposes.

[6] First, approximately $110 million of the amount that PAAM received from the Investors was misappropriated by PAAM and used by PAAM to, among other things, fund its operations, repay investors who requested a return of some or all of their investments, fund the redemption of units of a related fund -- the Market Neutral Preservation Fund (the "MNPF") -- and pay referral fees to the financial advisors that had referred the Investors to PAAM.

[7] Second, approximately $529 million of the amount that PAAM received from the Investors was used to acquire fifteen (15) principal protected notes (the "Notes") from Socit Genrale (Canada). The Notes were held in a custodial account that was maintained by RBC Dominion Securities Inc. in the name of the MNPF (the "MNPF Account").

[8] On the date the Receiver was appointed, there were numerous bank accounts in the names of various members of the Portus Group containing commingled funds and assets. For example, the Notes, cash received from the Investors and cash subsequently claimed by investors in the MNPF, were contained and commingled in the MNPF Account.

[9] As a result of the above-described misappropriations and the extensive commingling of the funds received by PAAM from the Investors, the Receiver was of the view that:

(a) none of the Investors could assert a proprietary claim to the assets in the hands of the Receiver;

(b) the Receiver should seek an Order declaring that all of the cash, the Notes and any other property of the Portus Group (collectively the "Property") was the property of PAAM; and [page316]

(c) the assets in the hands of the Receiver ought to be realized upon and distributed to the Investors by way of a bankruptcy of PAAM administered under Part XII of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (the "BIA").

[10] On November 9, 2005, upon the application of the Receiver, this court made an Order declaring that the Property was the property of PAAM and all claims of the other members of the Portus Group, their creditors and any claimants against them in respect of the Property were vested out (the "Title Declaration Order").

[11] The Title Declaration Order also granted relief in respect of the subsequent bankruptcy of PAAM to be administered under Part XII of the BIA. The Title Declaration Order declared that:

(a) PAAM is a "securities firm" within the meaning of Part XII of the BIA;

(b) the Property constituted "cash" and "securities" within the meaning of Part XII of the BIA and were held by or for the account of PAAM as a securities firm, for securities accounts of customers of PAAM or for PAAM's own account as a securities firm all within the meaning of Part XII of the BIA; and

(c) each Investor is a "customer" of PAAM within the meaning of Part XII of the BIA.

[12] On March 24, 2006, upon the application of the Receiver, PAAM was adjudged a bankrupt and KPMG Inc. was appointed as Trustee of the Estate (the "PAAM Estate") pursuant to an Order of this Honourable Court (the "PAAM Bankruptcy Order").

[13] On May 18, 2007, upon the application of the Receiver, PAM was adjudged a bankrupt, KPMG Inc. was named as Trustee of the Estate and the Estate was consolidated with the PAAM Estate on a substantive and procedural basis (the "Consolidated Estate") pursuant to an Order of this honourable court (the "Consolidated Bankruptcy Order").

[14] Counsel for the Trustee submitted that the Order sought could be made, given that this court has the inherent jurisdiction to "fill" a "functional" gap in a statute and/or to give effect to the provisions of the statute itself where

the provisions of the statute itself are insufficient to fulfill the purpose of the statute.

[15] The Order sought was granted on July 25, 2007, at which time counsel were advised that reasons for the Order may well be given to amplify the basis for the Order.

[16] The question of the inherent jurisdiction of the court has received considerable attention recently, particularly in the context [page317] of insolvency and commercial law. When a court is asked to extend the terms of legislation or to deal with circumstances not provided for, the question arises: on what basis may the court do so? The basis on which a court may provide relief in circumstances not specifically covered in legislation requires an analysis of the tools available to the court to achieve that result.

[17] That analysis has now been done in a forthcoming article co-authored by a noted jurist and a noted academic. Justice Georgina R. Jackson of the Saskatchewan Court of Appeal and Dr. Janis P. Sarra of the British Columbia Faculty of Law explore this area in a paper to be published in the forthcoming (2007) Annual Review of Insolvency Law (Toronto: Thomson Carswell, 2003-). [See Note 1 below]

[18] What the learned authors explore in their paper is an articulation of the basis for exercising the court's authority to provide appropriate remedies within the context of insolvency statutes.

[19] There is wide recognition that a statute such as the Companies' Creditors Arrangements Act [See Note 2 below] ("CCAA") requires the court to provide practical, effective and often very speedy resolution in what has often been referred to as "real time" litigation. Indeed, it has been said that to achieve the objectives of the legislation, the court requires a broad, flexible and often urgent exercise of jurisdiction. [See Note 3 below]

[20] The Bankruptcy & Insolvency Act [See Note 4 below] ("BIA"), while often dealing with less urgent issues of

priority, does so in a more prescribed context but does allow for the development of the common law and the exercise of some equitable principles.

[21] I accept the hierarchical analysis proposed by Justice Jackson and Dr. Sarra. The first step in that process is to have regard to the scheme of the Statute under consideration, its purpose as determined from the Act, its context and the expression intention of Parliament.

[22] One aspect of judicial power has been referred to as "gap filling". As the learned authors note, this power has sometimes been referred to as permitting a judge to make explicit what is already [page318] implicit in the words of a statute. [See Note 5 below] Alternatively, the authors note "gap filling" may be regarded as a judicial tool when the nature of the legislative scheme requires the court to "make it work". [See Note 6 below]

[23] I accept the advice of the authors that the first task of the court is to "interpret the statute before it and exercise authority pursuant to the statute, before reaching for other tools in the judicial toolbox". [See Note 7 below] The exercise of statutory interpretation that allows for what is referred to as "gap filling" will frame and in circumstances may limit what has been referred to as "judicial discretion".

[24] If the above referred to method of statutory interpretation is accepted, resolution of many issues before the court may be made before resort to what has increasingly been referred to as the "inherent jurisdiction" of the court.

[25] In this methodology referred to by Justice Jackson and Dr. Sarra, [See Note 8 below] inherent jurisdiction of the court may be defined as "being the reserve or fund of powers, a residual source of powers, which the Court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observation of the due process of law, to prevent improper vexation or oppression . . .".

[26] I considered at the time of granting the Order in July that a simple justification for relief that was not opposed and

also made practical sense was available invoking the inherent jurisdiction of the court. Further reflection and the availability of the paper by Justice Jackson and Dr. Sarra have led me to reconsider the basis for my Order.

[27] Part XII of the BIA was added in 1997 to facilitate customer compensation upon the bankruptcy of a securities firm, particularly where there are customer name securities and to expedite claims where those other claims of customers are involved. [See Note 9 below] This matter does fall within Part XII of the BIA. [page319]

[28] A customer of a bankrupt securities firm under Part XII of the BIA has a claim against the bankrupt securities firm for the amount of his or her "net equity". "Net equity" is defined in s. 253 of the BIA as:

> "net equity" means, with respect to the securities account or accounts of a customer, maintained in one capacity, the net dollar value of the account or accounts, equal to the amount that would be owed by a securities firm to the customer as a result of the liquidation by sale or purchase at the close of business of the securities firm on the date of bankruptcy of the securities firm, of all security positions of the customer in each securities account, other than customer name securities reclaimed by the customer, including any amount in respect of a securities transaction not settled on the date of bankruptcy but settled thereafter, less any indebtedness of the customer to the securities firm on the date of bankruptcy including any amount owing in respect of a securities transaction not settled on the date of bankruptcy but settled thereafter, plus any payment of indebtedness made with the consent of the trustee after the date of bankruptcy;

[29] Part XII of the BIA presumes that the bankrupt securities firm purchased securities with funds received by it from its customers. The intention of the definition of "net equity" is for the quantum of the claim of each customer to be the market value of the securities purchased and held for him or her by the securities firm as at the date of bankruptcy less any amounts owing by the customer to the securities firm.

[30] As a result of:

(a) the failure of PAAM to purchase Canadian Securities with the funds received by it from the Investors;

(b) the misappropriation of the funds received by PAAM from the Investors; and

(c) the extensive co-mingling of the funds received by PAAM from the Investors and the Notes purchased with a portion of those funds on behalf of non-existent trusts;

the Customers have no assets in their Accounts and the Customers are unable to trace their funds to either of the Notes, the cash or the other property in the hands of the Receiver.

[31] As a result, according to the definition of "net equity" in s. 253 of the BIA, each Investor's "net equity" would be zero. This result would neither be just nor equitable.

[32] Part XII of the BIA contemplates the establishment of securities accounts for the customers of a securities firm and presumes that the securities firm will utilize all funds received from its customers to purchase securities. Part XII of the BIA does not contemplate a misappropriation of funds received by a securities firm from its customers. This is a "functional gap" in the BIA. [page320]

[33] The rationale of Part XII of the BIA is to provide for recovery by customers of amounts owing to them when their priority is determined. Section 253 of the BIA provides the mechanism for determining the amount of the customer priority.

[34] In my view, the statutory purpose of Part XII would be defeated if a fraud by or on behalf of the securities firm operated to defeat an otherwise legitimate entitlement to recovery by a customer.

[35] I accept the submission of the Trustee that making the

Order being sought in respect of the quantum of the claims of the Investors against PAAM will not conflict with the provisions of Part XII of the BIA -- in particular the definition of "net equity" contained in s. 253. Section 253 of the BIA is inapplicable to the facts before this honourable court because PAAM failed to purchase any securities whatsoever with the funds it received from the Investors.

[36] The "gap" created arises because Part XII does not specifically contemplate a fraud by a securities firm on its own customer prior to the firm's bankruptcy.

[37] In such circumstances it is not only just and equitable but within the purpose of Part XII to declare that the net equity of each customer of the Consolidated Estate is in an amount equal to the amount invested by each customer by or through PAAM less any amounts received by each such customer from PAAM prior to March 4, 2005 together with the ancillary relief contained in the draft Order filed.

[38] It is to be noted that no other party involved in the PAAM bankruptcy objected or contested the relief sought since it is accepted that making the Order being sought is essential to the administration of the Consolidated Estate because it will ensure that the Investors have the claims against the Estate to which they are entitled.

[39] If it were necessary to do so, I would not hesitate to employ the tools of judicial discretion or indeed inherent discretion to provide recovery for Investors. For the reasons set out above, I am satisfied that the Order sought is more than justified on the basis of statutory interpretation and have so ordered.

[40] The above approach is in my view consistent with a growing judicial preference for a hierarchy of judicial tools, a discussion that will be accelerated and amplified by the work of Justice Jackson and Dr. Sarra. [See Note 10 below]

Motion granted.

Notes

Note 1: "Selecting the Judicial Tool to Get The Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters".

Note 2: R.S.C. 1985, c. C-36, as amended.

Note 3: See United Used Auto & Truck Parts Ltd. Re, [1999] B.C.J. No. 2754, 12 C.B.R. (4th) 144 (S.C.) (Chambers J.), affd [2000] B.C.J. No. 409, 16 C.B.R. (4th) 141 (C.A.).

Note 4: R.S.C. 1985 c. B-3, as amended.

Note 5: See references at pp. 5-7 to the work of Pierre-Andr Cot, The Interpretation of Legislation in Canada, 3rd ed. (Toronto: Carswell, 2000).

Note 6: See reference to Professor Sullivan on p. 7 of the article and her work Sullivan and Driedger on the Construction of Statutes, 4th ed. (Markham: Butterworths, 2002).

Note 7: [Ibid.], [s]ee section C, pp. 10-11.

Note 8: See p. 27 referring to I.H. Jacob, "The Inherent Jurisdictions of the Court" (1970) 23 Curr. Legal Probs. 23. Also see MacMillan Bloedel Ltd. v. Simpson, [1995] 4 S.C.R. 725, [1995] S.C.J. No. 101, at para. 29 -- adopting.

Note 9: See Houlden & Morawetz, Bankruptcy & Insolvency Law of Canada, 3rd ed., looseleaf, vol. 3 (Toronto: Thomson Carswell), p. 7-180.

Note 10: See Clear Creek Contracting Ltd. v. Skeena Cellulose Inc., [2003] B.C.J. No. 1335, 43 C.B.R. (4th) 187 (C.A.), and the conclusion of the authors at pp. 41-42 of their paper.

TAB 9

2019 ONCA 508, 2019 CarswellOnt 9683

2019 ONCA 508
Ontario Court of Appeal

Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.

2019 CarswellOnt 9683, 2019 ONCA 508

Third Eye Capital Corporation (Applicant / Respondent) and Ressources Dianor Inc. /Dianor Resources Inc. (Respondent / Respondent) and 2350614 Ontario Inc. (Interested Party / Appellant)

S.E. Pepall J.A., P. Lauwers J.A., and Grant Huscroft J.A.

Heard: September 17, 2018
Judgment: June 19, 2019
Docket: CA C62925

Proceedings: affirming *Third Eye Capital Corp. v. Dianor Resources Inc.* (2016), 41 C.B.R. (6th) 320, 2016 CarswellOnt 15947, 2016 ONSC 6086, Newbould J. (Ont. S.C.J. [Commercial List]); additional reasons at *Third Eye Capital Corp. v. Ressources Dianor Inc. / Dianor Resources Inc.* (2016), 2016 CarswellOnt 18827, 2016 ONSC 7112, 42 C.B.R. (6th) 269, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Peter L. Roy, Sean Grayson, for Appellant, 2350614 Ontario Inc.
Shara Roy, Nilou Nezhat, for Respondent, Third Eye Capital Corporation
Stuart Brotman, Dylan Chochla, for Receiver of Respondent, Ressources Dianor Inc./Dianor Resources Inc., Richter Advisory Group Inc.
Nicholas Kluge, for Monitor of Essar Steel Algoma Inc., Ernst & Young Inc.
Steven J. Weisz, for Intervener, Insolvency Institute of Canada

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Estates and Trusts; Insolvency; Natural Resources; Property

Headnote

Natural resources --- Mines and minerals — Remedies — Vesting orders
At request of insolvent company's lender (Third Eye), court-appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 had acquired royalty rights — Notices of agreements granting GORs were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GORs be terminated or reduced — Motion judge approved sale to successful bidder Third Eye and granted vesting order purporting to extinguish GORs — Motion judge rejected 235's argument that claims would continue to be subject to GORs after their transfer to Third Eye holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to Third Eye on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights were found to be fair and receiver paid this amount to 235, which were held in trust — 235 Co. appealed and Third Eye moved for order quashing appeal as moot since 235 did not seek stay of vesting order which operated to extinguish GORs when it was registered on title, however, it was premature to quash appeal — 235 served and filed notice of appeal of sale approval 29 days after motion judge's decision and 8 days after order was signed, issued and entered — Appeal dismissed — Third party interest in land in nature of GOR can be extinguished by vesting order granted in receivership proceeding; however, motion judge erred in concluding that it was appropriate to extinguish them from title given nature of GORs — It was held that GOR was interest in gross product extracted from land, not fixed monetary sum — While GOR, like fee simple interest, may be capable of being valued at point

in time, this does not transform substance of interest into one that is concerned with fixed monetary sum rather than element of property itself — Interest represented by GOR was ownership in product of mining claim, either payable by share of physical product or share of revenues — Given nature of 235's interest and absence of any agreement that allowed for any competing priority, there was no need to resort to any further considerations — Motion judge erred in granting order extinguishing 235's GORs, although it had jurisdiction to do so.

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Miscellaneous

At request of insolvent company's lender (Third Eye), court-appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 had acquired royalty rights — Notices of agreements granting GORs were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GORs be terminated or reduced — Third eye was successful — Motion judge approved sale to Third Eye and granted vesting order purporting to extinguish GORs — Motion judge rejected 235's argument that claims would continue to be subject to GORs after their transfer to Third Eye holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of Courts of Justice Act, gave him "the jurisdiction to grant a vesting order of the assets to be sold to Third Eye on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights was found to be fair and receiver paid this amount to 235, which were held in trust — 235 was unsuccessful in its cross-motion claiming payment for debt owing under Repair and Storage Liens Act — 235 appealed — In holding that royalty rights created no interest in law, vesting order was granted whereby receiver sold mining rights to third-party purchaser, free and clear of royalty rights — Vesting order was not stayed pending appeal and was executed — Appeal dismissed — Third party interest in land in nature of GOR can be extinguished by vesting order granted in receivership proceeding; however, motion judge erred in concluding that it was appropriate to extinguish them from title given nature of GORs — It was held that GOR was interest in gross product extracted from land, not fixed monetary sum — While GOR, like fee simple interest, may be capable of being valued at point in time, this does not transform substance of interest into one that is concerned with fixed monetary sum rather than element of property itself — Interest represented by GOR was ownership in product of mining claim, either payable by share of physical product or share of revenues — Given nature of 235's interest and absence of any agreement that allowed for any competing priority, there was no need to resort to any further considerations — Motion judge erred in granting order extinguishing 235's GORs, although it had jurisdiction to do so.

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Time for appeal

At request of insolvent company's lender (Third Eye), court-appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 had acquired royalty rights — Notices of agreements granting GORs were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GORs be terminated or reduced — Motion judge approved sale to successful bidder Third Eye and granted vesting order purporting to extinguish GORs — Motion judge rejected 235's argument that claims would continue to be subject to GORs after their transfer to Third Eye holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of the Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to Third Eye on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights was found to be fair and receiver paid this amount to 235, which were held in trust — 235 appealed and Third Eye brought moved for order quashing 235's appeal as moot since 235 did not seek stay of vesting order which operated to extinguish GORs when it was registered on title, but it was premature to quash appeal — 235 served and filed notice of appeal of sale approval 29 days after motion judge's decision and 8 days after order was signed, issued and entered — Appeal dismissed — Appeal period in Bankruptcy and Insolvency General Rules (BIA) governed appeal — Under R. 31 of BIA, notice of appeal must be filed "within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates." — 235 had known for considerable time, there could be no sale to Third Eye in absence of extinguishment of GORs and royalty rights; this was condition of sale that was approved by motion judge — 235 was stated to be unopposed to sale but opposed sale condition requiring extinguishment — Jurisdiction to grant approval of sale emanated from BIA and so did vesting component It would have made little sense to split two elements of order in the circumstance — Essence of order was anchored in BIA — Accordingly, appeal period was 10 days as prescribed by R. 31 of BIA and ran from date of motion judge's decision and 235's appeal was out of time.

Personal property security --- Statutory liens — Miscellaneous

APPEAL by numbered company from judgment reported at *Third Eye Capital Corp. v. Dianor Resources Inc.* (2016), 2016 ONSC 6086, 2016 CarswellOnt 15947, 41 C.B.R. (6th) 320 (Ont. S.C.J. [Commercial List]), respecting whether third party interest in land in nature of Gross Overriding Rpyalty could be extinguished by vesting order granted in receivership proceeding and governance of appeal.

***S.E. Pepall J.A.*:**

Introduction

1 There are two issues that arise on this appeal. The first issue is simply stated: can a third party interest in land in the nature of a Gross Overriding Royalty ("GOR") be extinguished by a vesting order granted in a receivership proceeding? The second issue is procedural. Does the appeal period in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA") or the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 ("CJA") govern the appeal from the order of the motion judge in this case?

2 These reasons relate to the second stage of the appeal from the decision of the motion judge. The first stage of the appeal was the subject matter of the first reasons released by this court: see *Third Eye Capital Corporation v. Ressources Dianor Inc./ Dianor Resources Inc.*, 2018 ONCA 253, 141 O.R. (3d) 192 ("First Reasons"). As a number of questions remained unanswered, further submissions were required. These reasons resolve those questions.

Background

3 The facts underlying this appeal may be briefly outlined.

4 On August 20, 2015, the court appointed Richter Advisory Group Inc. ("the Receiver") as receiver of the assets, undertakings and properties of Dianor Resources Inc. ("Dianor"), an insolvent exploration company focused on the acquisition and exploitation of mining properties in Canada. The appointment was made pursuant to s. 243 of the BIA and s. 101 of the CJA, on the application of Dianor's secured lender, the respondent Third Eye Capital Corporation ("Third Eye") who was owed approximately $5.5 million.

5 Dianor's main asset was a group of mining claims located in Ontario and Quebec. Its flagship project is located near Wawa, Ontario. Dianor originally entered into agreements with 3814793 Ontario Inc. ("381 Co.") to acquire certain mining claims. 381 Co. was a company controlled by John Leadbetter, the original prospector on Dianor's properties, and his wife, Paulette A. Mousseau-Leadbetter. The agreements provided for the payment of GORs for diamonds and other metals and minerals in favour of the appellant 2350614 Ontario Inc. ("235 Co."), another company controlled by John Leadbetter.[1] The mining claims were also subject to royalty rights for all minerals in favour of Essar Steel Algoma Inc. ("Algoma"). Notices of the agreements granting the GORs and the royalty rights were registered on title to both the surface rights and the mining claims. The GORs would not generate any return to the GOR holder in the absence of development of a producing mine. Investments of at least $32 million to determine feasibility, among other things, are required before there is potential for a producing mine.

6 Dianor also obtained the surface rights to the property under an agreement with 381 Co. and Paulette A. Mousseau-Leadbetter. Payment was in part met by a vendor take-back mortgage in favour of 381 Co., Paulette A. Mousseau-Leadbetter, and 1584903 Ontario Ltd., another Leadbetter company. Subsequently, though not evident from the record that it was the mortgagee, 1778778 Ontario Inc. ("177 Co."), another Leadbetter company, demanded payment under the mortgage and commenced power of sale proceedings. The notice of sale referred to the vendor take-back mortgage in favour of 381 Co., Paulette A. Mousseau-Leadbetter, and 1584903 Ontario Ltd. A transfer of the surface rights was then registered from 177 Co. to 235 Co. In the end result, in addition to the GORs, 235 Co. purports to also own the surface rights associated with the mining claims of Dianor.[2]

7 Dianor ceased operations in December 2012. The Receiver reported that Dianor's mining claims were not likely to generate any realization under a liquidation of the company's assets.

8 On October 7, 2015, the motion judge sitting on the Commercial List, and who was supervising the receivership, made an order approving a sales process for the sale of Dianor's mining claims. The process generated two bids, both of which contained a condition that the GORs be terminated or impaired. One of the bidders was Third Eye. On December 11, 2015, the Receiver accepted Third Eye's bid conditional on obtaining court approval.

9 The purchase price consisted of a $2 million credit bid, the assumption of certain liabilities, and $400,000 payable in cash, $250,000 of which was to be distributed to 235 Co. for its GORs and the remaining $150,000 to Algoma for its royalty rights. The agreement was conditional on extinguishment of the GORs and the royalty rights. It also provided that the closing was to occur within two days after the order approving the agreement and transaction and no later than August 31, 2016, provided the order was then not the subject of an appeal. The agreement also made time of the essence. Thus, the agreement contemplated a closing prior to the expiry of any appeal period, be it 10 days under the BIA or 30 days under the CJA. Of course, assuming leave to appeal was not required, a stay of proceedings could be obtained by simply serving a notice of appeal under the BIA (pursuant to s. 195 of the BIA) or by applying for a stay under r. 63.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

10 On August 9, 2016, the Receiver applied to the court for approval of the sale to Third Eye and, at the same time, sought a vesting order that purported to extinguish the GORs and Algoma's royalty rights as required by the agreement of purchase and sale. The agreement of purchase and sale, which included the proposed terms of the sale, and the draft sale approval and vesting order were included in the Receiver's motion record and served on all interested parties including 235 Co.

11 The motion judge heard the motion on September 27, 2016. 235 Co. did not oppose the sale but asked that the property that was to be vested in Third Eye be subject to its GORs. All other interested parties including Algoma supported the proposed sale approval and vesting order.

12 On October 5, 2016, the motion judge released his reasons. He held that the GORs did not amount to interests in land and that he had jurisdiction under the BIA and the CJA to order the property sold and on what terms: at para. 37. In any event, he saw "no reason in logic . . . why the jurisdiction would not be the same whether the royalty rights were or were not an interest in land": at para. 40. He granted the sale approval and vesting order vesting the property in Third Eye and ordering that on payment of $250,000 and $150,000 to 235 Co. and Algoma respectively, their interests were extinguished. The figure of $250,000 was based on an expert valuation report and 235 Co.'s acknowledgement that this represented fair market value.[3]

13 Although it had in its possession the terms of the agreement of purchase and sale including the closing provision, upon receipt of the motion judge's decision on October 5, 2016, 235 Co. did nothing. It did not file a notice of appeal which under s. 195 of the BIA would have entitled it to an automatic stay. Nor did it advise the other parties that it was planning to appeal the decision or bring a motion for a stay of the sale approval and vesting order in the event that it was not relying on the BIA appeal provisions.

14 For its part, the Receiver immediately circulated a draft sale approval and vesting order for approval as to form and content to interested parties. A revised draft was circulated on October 19, 2016. The drafts contained only minor variations from the draft order included in the motion materials. In the absence of any response from 235 Co., the Receiver was required to seek an appointment to settle the order. However, on October 26, 2016, 235 Co. approved the order as to form and content, having made no changes. The sale approval and vesting order was issued and entered on that same day and then circulated.

15 On October 26, 2016, for the first time, 235 Co. advised counsel for the Receiver that "an appeal is under consideration" and asked the Receiver for a deferral of the cancellation of the registered interests. In two email exchanges, counsel for the Receiver responded that the transaction was scheduled to close that afternoon and 235 Co.'s counsel had already had ample time to get instructions regarding any appeal. Moreover, the Receiver stated that the appeal period "is what it is" but that the approval order was not stayed during the appeal period. Counsel for 235 Co. did not respond and took no further steps. The Receiver, on the demand of the purchaser Third Eye, closed the transaction later that same day in accordance with the terms of the agreement of purchase and sale. The mining claims of Dianor were assigned by Third Eye to 2540575 Ontario Inc. There is nothing in the record that discloses the relationship between Third Eye and the assignee. The Receiver was placed in funds by Third Eye, the sale approval and vesting order was registered on title and the GORs and the royalty interests were expunged from title. That same day, the Receiver advised 235 Co. and Algoma that the transaction had

closed and requested directions regarding the $250,000 and $150,000 payments.

16 On November 3, 2016, 235 Co. served and filed a notice of appeal of the sale approval and vesting order. It did not seek any extension of time to appeal. 235 Co. filed its notice of appeal 29 days after the motion judge's October 5, 2016 decision and 8 days after the order was signed, issued and entered.

17 Algoma's Monitor in its *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") proceedings received and disbursed the funds allocated to Algoma. The $250,000 allocated to 235 Co. are held in escrow by its law firm pending the resolution of this appeal.

Proceedings Before This Court

18 On appeal, this court disagreed with the motion judge's determination that the GORs did not amount to interests in land: see First Reasons, at para. 9. However, due to an inadequate record, a number of questions remained to be answered and further submissions and argument were requested on the following issues:

> (1) Whether and under what circumstances and limitations a Superior Court judge has jurisdiction to extinguish a third party's interest in land, using a vesting order, under s. 100 of the CJA and s. 243 of the BIA, where s. 65.13(7) of the BIA; s. 36(6) of the CCAA; ss. 66(1.1) and 84.1 of the BIA; or s. 11.3 of the CCAA do not apply;
>
> (2) If such jurisdiction does not exist, should this court order that the Land Title register be rectified to reflect 235 Co.'s ownership of the GORs or should some other remedy be granted; and
>
> (3) What was the applicable time within which 235 Co. was required to appeal and/or seek a stay and did 235 Co.'s communication that it was considering an appeal affect the rights of the parties.

19 The Insolvency Institute of Canada was granted intervener status. It describes itself as a non-profit, non-partisan and non-political organization comprised of Canada's leading insolvency and restructuring professionals.

A. Jurisdiction to Extinguish an Interest in Land Using a Vesting Order

(1) Positions of Parties

20 The appellant 235 Co. initially took the position that no authority exists under s. 100 of the CJA, s. 243 of BIA, or the court's inherent jurisdiction to extinguish a real property interest that does not belong to the company in receivership. However, in oral argument, counsel conceded that the court did have jurisdiction under s. 100 of the CJA but the motion judge exercised that jurisdiction incorrectly. 235 Co. adopted the approach used by Wilton-Siegel J. in *Romspen Investment Corporation v. Woods Property Development Inc.*, 2011 ONSC 3648, 75 C.B.R. (5th) 109, at para. 190, rev'd on other grounds, 2011 ONCA 817, 286 O.A.C. 189. It took the position that if the real property interest is worthless, contingent, or incomplete, the court has jurisdiction to extinguish the interest. However here, 235 Co. held complete and non-contingent title to the GORs and its interest had value.

21 In response, the respondent Third Eye states that a broad purposive interpretation of s. 243 of the BIA and s. 100 of the CJA allows for extinguishment of the GORs. Third Eye also relies on the court's inherent jurisdiction in support of its position. It submits that without a broad and purposive approach, the statutory insolvency provisions are unworkable. In addition, the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C. 34 ("CLPA") provides a mechanism for rights associated with an encumbrance to be channelled to a payment made into court. Lastly, Third Eye submits that if the court accedes to the position of 235 Co., Dianor's asset and 235 Co.'s GORs will waste. In support of this argument, Third Eye notes there were only two bids for Dianor's mining claims, both of which required the GORs to be significantly reduced or eliminated entirely. For its part, Third Eye states that "there is no deal with the GORs on title" as its bid was contingent on the GORs being vested off.

22 The respondent Receiver supports the position taken by Third Eye that the motion judge had jurisdiction to grant the order vesting off the GORs and that he appropriately exercised that jurisdiction in granting the order under s. 243 of the BIA and, in the alternative, the court's inherent jurisdiction.

23 The respondent Algoma supports the position advanced by Third Eye and the Receiver. Both it and 235 Co. have been paid and the Monitor has disbursed the funds paid to Algoma. The transaction cannot now be unwound.

24 The intervener, the Insolvency Institute of Canada, submits that a principled approach to vesting out property in insolvency proceedings is critical for a properly functioning restructuring regime. It submits that the court has inherent and equitable jurisdiction to extinguish third party proprietary interests, including interests in land, by utilizing a vesting order as a gap-filling measure where the applicable statutory instrument is silent or may not have dealt with the matter exhaustively. The discretion is a narrow but necessary power to prevent undesirable outcomes and to provide added certainty in insolvency proceedings.

(2) Analysis

(a) Significance of Vesting Orders

25 To appreciate the significance of vesting orders, it is useful to describe their effect. A vesting order "effects the transfer of purchased assets to a purchaser on a *free and clear* basis, while preserving the relative priority of competing claims against the debtor vendor with respect to the proceeds generated by the sale transaction" (emphasis in original): David Bish & Lee Cassey, "Vesting Orders Part 1: The Origins and Development" (2015) 32:4 Nat'l. Insolv. Rev. 41, at p. 42 ("Vesting Orders Part 1"). The order acts as a conveyance of title and also serves to extinguish encumbrances on title.

26 A review of relevant literature on the subject reflects the pervasiveness of vesting orders in the insolvency arena. Luc Morin and Nicholas Mancini describe the common use of vesting orders in insolvency practice in "Nothing Personal: the *Bloom Lake* Decision and the Growing Outreach of Vesting Orders Against *in personam* Rights" in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2017* (Toronto: Thomson Reuters, 2018) 905, at p. 938:

> Vesting orders are now commonly being used to transfer entire businesses. Savvy insolvency practitioners have identified this path as being less troublesome and more efficient than having to go through a formal plan of arrangement or *BIA* proposal.

27 The significance of vesting orders in modern insolvency practice is also discussed by Bish and Cassey in "Vesting Orders Part 1", at pp. 41-42:

> Over the past decade, a paradigm shift has occurred in Canadian corporate insolvency practice: there has been a fundamental transition in large cases from a dominant model in which a company restructures its business, operations, and liabilities through a plan of arrangement approved by each creditor class, to one in which a company instead conducts a sale of all or substantially all of its assets on a going concern basis outside of a plan of arrangement . . .
>
> Unquestionably, this profound transformation would not have been possible without the *vesting order*. It is the cornerstone of the modern "restructuring" age of corporate asset sales and secured creditor realizations . . . The vesting order is the holy grail sought by every purchaser; it is the carrot dangled by debtors, court officers, and secured creditors alike in pursuing and negotiating sale transactions. If Canadian courts elected to stop granting vesting orders, the effect on the insolvency practice would be immediate and extraordinary. Simply put, the system could not function in its present state without vesting orders. [Emphasis in original.]

28 The authors emphasize that a considerable portion of Canadian insolvency practice rests firmly on the granting of vesting orders: see David Bish & Lee Cassey, "Vesting Orders Part 2: The Scope of Vesting Orders" (2015) 32:5 Nat'l Insolv. Rev. 53, at p. 56 ("Vesting Orders Part 2"). They write that the statement describing the unique nature of vesting orders reproduced from Houlden, Morawetz and Sarra (and cited at para. 109 of the reasons in stage one of this appeal)[4]

which relied on 1985 and 2003 decisions from Saskatchewan is remarkable and bears little semblance to the current practice. The authors do not challenge or criticize the use of vesting orders. They make an observation with which I agree, at p. 65, that: "a more transparent and conscientious application of the formative equitable principles and considerations relating to vesting orders will assist in establishing a proper balancing of interests and a framework understood by all participants."

(b) Potential Roots of Jurisdiction

29 In analysing the issue of whether there is jurisdiction to extinguish 235 Co.'s GORs, I will first address the possible roots of jurisdiction to grant vesting orders and then I will examine how the legal framework applies to the factual scenario engaged by this appeal.

30 As mentioned, in oral submissions, the appellant conceded that the motion judge had jurisdiction; his error was in exercising that jurisdiction by extinguishing a property interest that belonged to 235 Co. Of course, a party cannot confer jurisdiction on a court on consent or otherwise, and I do not draw on that concession. However, as the submissions of the parties suggest, there are various potential sources of jurisdiction to vest out the GORs: s. 100 of the CJA, s. 243 of the BIA, s. 21 of the CLPA, and the court's inherent jurisdiction. I will address the first three potential roots for jurisdiction. As I will explain, it is unnecessary to resort to reliance on inherent jurisdiction.

(c) The Hierarchical Approach to Jurisdiction in the Insolvency Context

31 Before turning to an analysis of the potential roots of jurisdiction, it is important to consider the principles which guide a court's determination of questions of jurisdiction in the insolvency context. In *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 65, Deschamps J. adopted the hierarchical approach to addressing the court's jurisdiction in insolvency matters that was espoused by Justice Georgina R. Jackson and Professor Janis Sarra in their article "Selecting the Judicial Tool to Get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters"' in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2007* (Toronto: Thomson Carswell, 2008) 41. The authors suggest that in addressing under-inclusive or skeletal legislation, first one "should engage in statutory interpretation to determine the limits of authority, adopting a broad, liberal and purposive interpretation that may reveal that authority": at p. 42. Only then should one turn to inherent jurisdiction to fill a possible gap. "By determining first whether the legislation can bear a broad and liberal interpretation, judges may avoid the difficulties associated with the exercise of inherent jurisdiction": at p. 44. The authors conclude at p. 94:

> On the authors' reading of the commercial jurisprudence, the problem most often for the court to resolve is that the legislation in question is under-inclusive. It is not ambiguous. It simply does not address the application that is before the court, or in some cases, grants the court the authority to make any order it thinks fit. While there can be no magic formula to address this recurring situation, and indeed no one answer, it appears to the authors that practitioners have available a number of tools to accomplish the same end. In determining the right tool, it may be best to consider the judicial task as if in a hierarchy of judicial tools that may be deployed. The first is examination of the statute, commencing with consideration of the precise wording, the legislative history, the object and purposes of the Act, perhaps a consideration of Driedger's principle of reading the words of the Act in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament, and a consideration of the gap-filling power, where applicable. It may very well be that this exercise will reveal that a broad interpretation of the legislation confers the authority on the court to grant the application before it. Only after exhausting this statutory interpretative function should the court consider whether it is appropriate to assert an inherent jurisdiction. Hence, inherent jurisdiction continues to be a valuable tool, but not one that is necessary to utilize in most circumstances.

32 Elmer A. Driedger's now famous formulation is that the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: *The Construction of Statutes* (Toronto: Butterworth's, 1974), at p. 67. See also *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141, at para. 9. This approach recognizes that "statutory interpretation cannot be founded on the wording of the legislation alone": *Rizzo*, at

