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COURT FILE NUMBER	
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985, C C-8, AS AMENDED
	AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF BR CAPITAL LP, BR CAPITAL INC., ICE HEALTH SYSTEMS LP, ICE HEALTH SYSTEMS GP LP, ICE HEALTH SYSTEMS INC., HEALTH EDUCATION LP, HEALTH EDUCATION GP LP, HELP INC., FIRST RESPONSE INTERNATIONAL LP, FIRST RESPONSE INTERNATIONAL GP LP, FIRST RESPONSE INTERNATIONAL INC., ICE HEALTH SYSTEMS LTD. AND SESCI HEALTH SERVICES INC.
	AND IN THE MATTER OF A PLAN OF ARRANGEMENT OF ICE HEALTH SYSTEMS LTD., ICE HEALTH SYSTEMS INC., HEALTH EDUCATION GP LP, HELP INC., FIRST RESPONSE INTERNATIONAL INC. AND SESCI HEALTH SERVICES INC. UNDER THE *BUSINESS CORPORATIONS ACT*, RSA 2000, CH B-9, AS AMENDED
DOCUMENT	BENCH BRIEF OF THE APPLICANTS
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**GOWLING WLG (CANADA) LLP** Suite 1600, 421 – 7th Avenue SW Calgary, AB T2P 4K9 Telephone: 403-298-1938 / 403-298-1018 Fax: 403-263-9193 Email: tom.cumming@gowlingwlg.com / stephen.kroeger@gowlingwlg.com File No.: A167833 **Attention: Tom Cumming / Stephen Kroeger**

APPLICATION BEFORE THE HONOURABLE JUSTICE C. DARIO OCTOBER 14, 2022 AT 3:00 PM ON THE COMMERCIAL LIST

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I. INTRODUCTION

1. This Bench Brief is submitted on behalf of the Applicants, BR Capital LP ("**BR LP**"), BR Capital Inc. ("**BR GP**"), Ice Health Systems LP ("**ICE LP**"), Ice Health Systems GP LP ("**ICE GP LP**"), Ice Health Systems Inc. ("**ICE AB Inc.**"), Health Education LP ("**HE LP**"), Health Education GP LP ("**HE GP LP**"), Help Inc. ("**HE Inc.**"), First Response International LP ("**FRI LP**"), First Response International GP LP ("**FRI GP LP**"), First Response International Inc. ("**FRI Inc.**"), ICE Health Systems Ltd. ("**ICE Ltd.**"), and SESCI Health Services Inc. ("**SESCI**") (collectively, the "**Applicants**").

2. In this Application, the Applicants are seeking from this Honourable Court an Order, among other things:

   (a) directing that the proposal proceedings and estates of BR LP, BR GP, ICE LP, ICE GP LP, ICE AB Inc., HE LP, HE GP LP, HE Inc., FRI LP, FRI GP LP, FRI Inc., ICE Ltd. and SESCI shall be procedurally consolidated and shall continue under a single proceeding and estate (such proceedings, the "**Proposal Proceedings**", and such consolidated estates, the "**Estate**"), authorizing and directing KMPG Inc. in its capacity as proposal trustee of the Estate (in such capacity, the "**Proposal Trustee**") to administer the Estate on a consolidated basis, authorizing the Applicants to file and make a single, consolidated proposal to their creditors, authorizing and directing the Applicants to prepare consolidated cash flow statements for the Estate, and granting ancillary relief arising from the procedural consolidation of the Estate;

   (b) declaring that all of the Applicants' present and after-acquired assets, property and undertakings (together, the "**Property**") is subject to a charge and security (the "**Administration Charge**") in favour of the Applicants' counsel, the Proposal Trustee and the Proposal Trustee's counsel (collectively, the "**Administrative Professionals**") to secure the payment of the fees and expenses of the Administrative Professionals incurred in connection with the Proposal Proceedings and the preparation therefor up to a maximum amount of $350,000;

(c) approving a letter loan agreement dated September 16, 2022 (the "**Interim Financing Agreement**") between 2443970 Alberta Inc. as administrative agent (in such capacity, the "**Interim Agent**") for and on behalf of the syndicate of lenders (such lenders, together with the Interim Agent, being collectively referred to as the "**Interim Lenders**") and the Applicants, creating an interim financing credit facility in an amount not to exceed $430,010 (the "**Interim Financing Facility**");

(d) declaring that the Property is subject to a charge and security (the "**Interim Financing Charge**") in favour of the Interim Lenders to secure the payment and performance of the Applicants' indebtedness, liabilities and obligations to the Interim Lenders under the Interim Financing Facility and Interim Financing Agreement;

(e) declaring that the Property is subject to a charge and security in favour of the directors and officers of the corporate applicants, ICE AB Inc., HE Inc., FRI Inc., ICE Ltd. and SESCI and the chief executive officer and chief financial officer of BR LP (such officers and directors, collectively, the "**Directors**") over the Property to indemnify the Directors against obligations and liabilities that they may incur as directors or officers of the Applicants after the commencement of the Proposal Proceedings in an amount not to exceed $300,000 (the "**D&O Charge**");

(f) declaring that the Administration Charge, Interim Financing Charge and D&O Charge (collectively, the "***BIA* Charges**") are priority charges ranking ahead of any and all charges, security interests, liens, trusts, deemed trusts and encumbrances against the Property, including created by federal or provincial legislation, and that the *BIA* Charges, amongst each other, rank in the following order of priority:

First, the Administration Charge;

Second, the Interim Financing Charge; and

Third, the D&O Charge; and

(g) extending the 30 day time period within which the Applicants are required to file a proposal, which ends on October 17, 2022, by an additional 45 days to end on

December 1, 2022 (such extension being the "**Stay Extension**" and such period being the "**Stay Period**").

3. All capitalized terms not otherwise defined in this Brief shall have the meaning ascribed to them in the Genuis Affidavit (defined below).

II. FACTS AND BACKGROUND

4. The Applicants' application is supported by an Affidavit sworn by Mark Genuis on October 5, 2022, the Chief Executive Officer of the Applicants and a director of the corporate Applicants (the "**Genuis Affidavit**"). Capitalized terms not defined herein have the meanings given to them in the Genuis Affidavit.

5. BR LP is an Alberta limited partnership formed pursuant to a limited partnership agreement dated February 28, 2006 between BR GP, an Alberta corporation, as general partners, and Peter Hoven, as initial limited partner, as amended from time to time. BR LP has 240 limited partners (collectively, the "BR Limited Partners").

Genuis Affidavit at para 21

6. BR LP is the sole limited partner of ICE LP, HE LP and FRI LP, each of which is an Alberta limited partnership. The general partner of ICE LP is ICE GP LP, an Alberta limited partnership, and the general partner of ICE GP LP is ICE AB Inc., an Alberta corporation.

Genuis Affidavit at para 22

7. ICE LP owns all of the shares of ICE Health Systems Inc. ("**ICE NV**"), a Nevada corporation, and of ICE Ltd., an Alberta corporation. ICE Ltd. owns all of the shares in Servicio de Excelencia en y Communication por Salud Internet ("**SHS MX**", which together with ICE NV and the Applicants, are collectively referred to as the "**BR Capital Group**", and individually as a "**BR Entity**"), a Mexico corporation and SESCI, an Alberta Corporation. ICE NV and SHS MX are not Applicants, and have not and do not intend to file notices of intention to make proposals under the *Bankruptcy and Insolvency Act*, RSC

1985, c B-3, as amended (the "***BIA***"). An organization chart is attached to the Genuis Affidavit as **Exhibit "I"**.

Genuis Affidavit at para 20, Exhibit "I"

8. The BR Capital Group is under the overall management and supervision of the board of directors of BR GP (the "**BR Board**"), the general partner of BR LP. BR GP employs Dr. Mark Genuis as the Chief Executive Officer and James E. Lawson as the Chief Financial Officer, who act in those capacities over all of the BR Capital Group. All of the other current and former employees since May 2018 were employed directly by SESCI but their services were provided to all of the BR Entities.

Genuis Affidavit at paras 21 and 28

9. While separate accounts are maintained for each BR Entity, the financial statements of the BR Capital Group have always been prepared on a consolidated basis.

Genuis Affidavit at paras 44 and 51

10. The general partner of FRI LP is FRI GP LP, an Alberta limited partnership, and the general partner of FRI GP LP is FRI Inc., an Alberta corporation. The general partner of HE LP is HE GP LP, an Alberta limited partnership, and the general partner of HE GP LP is HE Inc., an Alberta corporation. In addition to the individuals who are directors on the BR Board, James Lawson and Mark Genuis act as directors of FRI Inc., HE Inc. and ICE AB Inc. Mark Genuis is the director of ICE NV and SHS MX.

Genuis Affidavit at paras 13-16 and 24

11. The BR Capital Group is in the business of designing, building, marketing and licensing web based electronic health record and learning management systems supporting dentistry and medical clinics and similar organizations and all software and intellectual property associated therewith (such software and intellectual property, the "**Software**", and the business, the "**Business**"). The dental and health record Software is owned by ICE LP, which sublicenses it to customers in the United States of America through a license in favour of ICE NV, and sublicenses it to customers in Canada and elsewhere in the world through a license in favour of ICE Ltd. (ICE LP, ICE GP LP, ICE AB Inc., ICE Ltd. and

ICE NV being collectively the "**ICE Group**"). The First Responder Software is owned by FRI LP and sublicensed to customers in Canada through licenses in favour of FRI LP GP and FRI Inc. (FRI LP, FRI GP LP and FRI Inc. being collectively, the "**FRI Group**"). The Health Education Software is owned by HE LP and sublicensed to customers in Canada through licenses in favour of HE LP GP and HE Inc. (HE LP, HE GP LP and HE Inc. being collectively, the "**HE Group**"). The First Responder Software is used by EMS officers in Alberta pursuant to licenses by FRI LP and FRI Inc. with governmental bodies. HE LP currently licenses the Health Education Software to an institutional cancer clinic in Calgary.

Genuis Affidavit at para 32

12. The BR Capital Group had, prior to the onset of the COVID 19 pandemic, 27 employees but since that time has reduced the number of its employees to 5. Its office was located at Suite 240, Glenmore Court, 2880 Glenmore Trail, Calgary, Alberta until December, 2021 but in order to reduce costs gave up the leased premises.

Genuis Affidavit at paras 38 and 39(a)

13. BR LP financed the development of the Software and Business and the operations of the BR Capital Group through a series of subscriptions from BR Limited Partners for limited partnership units, which raised an aggregate of approximately $31,487,000 from 2006 to 2021, and through the issuance of unsecured promissory notes to investors in the aggregate as of July 31, 2022 equal to $9,713,052 of which $6,923,921 consisted of principal and the remainder consisted of accrued and unpaid interest (collectively, the "**BR Notes**", and such investors, collectively the "**Noteholders**"), of whom 26 are BR Limited Partners and 17 are third party investors.

Genuis Affidavit at para 33

14. In 2018 the BR Capital Group entered into agreements with hemodialysis centres in Mexico to license the Software. Shortly after entering into the agreements the new Mexican President cancelled the program which was required to fund the licences and the contracts were never performed.

Genuis Affidavit at para 35

15. Over the next several years the BR Capital Group continued negotiations with Mexican state entities to license the Software and in early 2020 resulted in a negotiated 10 year agreement for a licence fee of US$13,500,000 per year. The COVID-19 pandemic caused negotiations to break down.

Genuis Affidavit at para 37

16. The market disruptions caused by the global COVID-19 pandemic also reduced both the revenues received by the Applicants under their licences and the demand for new licenses. The BR Capital Group undertook numerous cost cutting measures throughout the pandemic but were unable to general sufficient revenue to repay the amounts outstanding under the BR Notes or other liabilities as they become due.

Genuis Affidavit at paras 38 and 39

17. On September 15 and 16, 2022, each of the Applicants each filed notices of intention to make a proposal (collectively, the "**NOIs**") pursuant to section 50.4(1) of the *BIA*, naming KPMG Inc. as Proposal Trustee.

18. As a result of the filing of the NOIs, all proceedings against the Applicants and the Property were automatically stayed for an initial period of thirty (30) days, ending on October 15, 2022 in the case of BR LP, BR GP, CE GP LP, ICE AB Inc., HE LP, HE GP LP, HE Inc., FRI LP, FRI GP LP, FRI Inc. and SESCI, and October 16, 2022 in the case of ICE LP and ICE Ltd. (collectively, the "**Stay Period**").

19. Since filing the NOIs the Applicants have worked diligently to advance these Proposal Proceedings by:

    (a) preparing and analysing a list of creditors and identifying issues specific to certain creditors;

    (b) providing the Proposal Trustee with access to their books and records;

    (c) working with the Proposal Trustee on the preparation of the Cash Flow Projections and weekly monitoring for the Applicants;

(d) communicating with stakeholders regarding the proposal process;

(e) communicating with customers regarding the proposal process;

(f) working with the Administrative Professionals in developing the Proposal; and

(g) reviewing their operating expenses, pursuing the collection of accounts receivable and taking other steps to ensure the Applicants remain financially viable during these Proposal Proceedings.

Genuis Affidavit at para 63

63. The requested Stay Extension will allow the Applicants to continue operations and generate revenue, continue restructuring of their businesses and will preserve and enhance the value of their business, for the benefit of all stakeholders. The Stay Extension is critical to ensuring that the Applicants can continue their operations and formulate a proposal to maximize the value of their assets to the benefit of all of their stakeholders.

III. ISSUES

20. This Brief addresses whether this Honourable Court should:

(a) approve the procedural consolidation of the Proposal Proceedings;

(b) grant the Administration Charge;

(c) approve the Interim Financing Facility and grant the Interim Financing Charge;

(d) grant the D&O Charge; and

(e) extend the time within which the Applicants are required to file a proposal.

IV. LAW AND ARGUMENT

A. The Procedural Consolidation is Appropriate

21. The ***BIA*** does not confer an express power to consolidate the administration of bankrupt estates; however, Courts throughout Canada have routinely found that they have jurisdiction to grant a procedural or substantive order to consolidate proposal proceedings under the equitable jurisdiction of the Court pursuant to section 183 of the *BIA*.

BIA section 183 **[Tab 1]**
Gray Aqua Group of Companies, Re, 2015 NBQB 107 **[*Aqua*]**
at para 10 **[Tab 2]**

22. The Ontario Superior Court in *Electro Sonic*, citing section 3 of the *Bankruptcy and Insolvency General Rules* states:

> Bankruptcy proceedings in this Court operate subject to the general principle that the litigation process should secure the just, most expeditious and least expensive determination of every proceeding on its merits . One practical application of that general principle occurs when courts join together two closely-related bankruptcy proceedings so that they can proceed and be managed together. This procedural or administrative consolidation does not involve the substantive merger or consolidation of the bankruptcy estates, merely their procedural treatment together by the court.

Bankruptcy and Insolvency General Rules, CRC, c 368 at section 3
[Tab 3]
Re Electro Sonic Inc., 2014 CarswellOnt 1568 **[*Electro*]** at para 4
[Tab 4]

23. In *Kitchener Frame,* Morawetz J. of the Ontario Superior Court held that in deciding whether to grant substantive consolidation of proposal proceedings, it should not be done at the expense of, or possible prejudice of, any particular creditor.

Kitchener Frame Ltd., Re, 2012 ONSC 234 **[*Kitchener*]** at paras 30, 31
[Tab 5]

24. Consolidating proceedings under Part III of the *BIA* also avoids a multiplicity of proceedings and the costs associated with serving and filing separate sets of largely identical materials with this Court at each juncture of the proceedings.

Mustang GP Ltd., Re, 2015 ONSC 6562 **[*Mustang*]** at para 25
[Tab 6]

25. The businesses of the Applicants are vertically and financially integrated. BR LP is the head limited partner of the sub-limited partnerships. In addition, the entities share a single management team, accounting, administration, human resources and financial function and together they represent a cohesive business operation. The Applicants are intertwined such that they share substantially the same creditor base, leadership teams and known liabilities.

Genuis Affidavit at paras 20-28, Exhibit "I"
Kitchener at para 31 **[Tab 5]**

26. It is respectfully submitted that no creditor in the Estate will be materially prejudiced by consolidation and it is not expected that any creditor will object to the proposed consolidation. Over 80% the indebtedness owing by the Applicants is under the BR Notes. The third party creditors are in the corporate subsidiaries, SESCI, ICE AB Inc., FRI Inc., HE LP and ICE AB Inc. and the Software is owned by ICE LP, FRI LP and HE LP. The sublicense agreements are held by each of ICE NV, ICE Ltd., FRI Inc. and HE Inc. Ultimately any funds required under a Proposal will be provided through the Interim Financing Facility. Therefore, the creditors did not have direct relationships with the BR Entities that owned the Software or held the licenses, and therefore are not prejudiced by the procedural consolidation. In fact, a Proposal will provide a mechanism whereby creditors' claims will be paid or converted on a consolidated basis and therefore will be to the benefit of the creditors.

Genuis Affidavit at para 46, Exhibit 'W"

27. Further, the consolidation of the Estate serves to streamline the proposal process, create savings for all parties and facilitate a faster restructuring of the Applicants.

28. The Ontario Superior Court granted orders effecting procedural consolidations in *Electro*, *Mustang* and *Kitchener Frame*. In *Kitchener Frame* the Court allowed affected creditors of the different entities to vote on a consolidated basis for the joint proposal.

Electro at para 6 **[Tab 4]**; *Mustang* at para 25 **[Tab 6]**; *Kitchener Frame* at para 15 **[Tab 5]**

29. Given the proposed consolidated Interim Financing Facility, and the intention of the Applicants to apply together to this Honourable Court in these Proposal Proceedings at future dates for relief such as any extensions of time required to file the Proposal and the approval of a Proposal, the Applicants respectfully submit that this Honourable Court should exercise its discretion and approve the consolidation of the Estate.

B. The Administration Charge

30. The Applicants seek the Administration Charge to secure the fees of the Administrative Professionals whose services are critical to these proceedings. The Administrative Charge is to rank in priority to all other security interests in the Property.

31. This Honorable Court has jurisdiction under section 64.2 of the *BIA* to grant the Administration Charge and give it super priority:

> **64.2(1)** ***Court may order security or charge to cover certain costs****:* On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of
>
> (a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;
>
> (b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division;
>
> […]
>
> **64.2(2)** ***Priority*****:** The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

BIA section 64.2 **[Tab 1]**

32. The Applicants seek the Administration Charge in an amount up to $350,000 to secure the fees and expenses of its own counsel, of the Proposal Trustee and of the Proposal Trustee's counsel. Such a charge is necessary and appropriate in the circumstances to ensure that the Applicants have access to professional advisors throughout the course of these proceedings.

33. Administration charges have been approved in *BIA* proposal proceedings where, as in the present case, the participation of insolvency professionals is necessary to ensure a successful proceeding under the *BIA*.

Mustang at paras 32-33 **[Tab 6]**

34. The Applicants submit that the present case is an appropriate circumstance for this Honourable Court to grant the Administration Charge with priority over any pre-existing security interests and other encumbrances. The quantum of the proposed Administration Charge is both fair and reasonable given the size and complexity of the Applicants' business. The Administrative Professionals have played, and will continue to play, a critical role in these proceedings.

35. The BR Capital Group does not have any secured creditors. The only party with security is the CRA who has been given notice of this application.

Genuis Affidavit at para 46, Exhibit "W"

36. As a result of the foregoing, the Applicants respectfully submit that this Honourable Court should exercise its discretion to grant the Administration Charge.

C. The Interim Financing Facility and the Interim Financing Charge are Necessary and Appropriate

37. Section 50.6 of the *BIA* confers this Honourable Court with the jurisdiction to approve the Interim Financing Facility and the Interim Financing Agreement and declare the Property to be subject to Interim Financing Charge:

> **50.6(1)** ***Interim Financing*****:** 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.2 [emphasis added]

BIA section 50.6(1) **[Tab 1]**

38. Section 50.6(5) of the *BIA* provides a non-exhaustive list of factors to be considered by this Honourable Court in deciding whether to declare the Applicants' Property subject to the Interim Financing Charge:

> 50.6(5) Factors to be considered: In deciding whether to make an order, the court is to consider, among other things,
>
> (a) the period during which the 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.

BIA section 50.6(5) **[Tab 1]**

39. The Applicants respectfully submit that this Honourable Court should approve the Interim Financing Facility and Interim Lender's Charge because they are essential to provide the Applicants with the financing they require to continue to operate their business and make a viable proposal to their creditors. The following factors support the this relief:

(a) ***The period during which the debtor is expected to be subject to proceedings under the BIA***. The Applicants initiated the Proposal Proceedings in order to obtain the stability offered by the stay of proceedings. The Interim Financing Facility is needed immediately and during the initial 30 day stay period. The Applicants have a well developed draft Proposal and anticipate filing the Proposal within weeks of this Honourable Court hearing this Application;

(b) ***The Applicants will manage their business and financial affairs during these proceedings in a cost-effective and efficient manner, with oversight from advisors and key stakeholders***. The current management of the Applicants have extensive experience in the software industry and will be essential to the Applicants through these proceedings and thereafter. In addition, the Proposal Trustee will monitor the Applicants' cash flow and financial affairs and report any material adverse changes. The Interim Financing Facility provides funds for the Applicants to operate with an established cash flow and capital expenditure budget and to make regular reports to the Interim Lenders;

(c) ***The Applicants' management has the confidence of its major creditors***. The Applicants have engaged with, and received the support of, its primary creditors. In particular, certain of the Applicants' creditors are lenders pursuant to the Interim Financing Facility;

Genuis Affidavit at para 52

(d) ***The Interim Financing Facility will enhance the prospects of the Applicants' making a viable proposal***. Absent the Interim Financing Facility, there is no prospect of the Applicants making a viable proposal. The necessity for the Interim Financing Facility is demonstrated and supported by the Applicants' cash flow statement appended to the Genuis Affidavit as **Exhibit "X"**. The Interim Financing Facility will allow the Applicants to avoid bankruptcy or receivership and the corresponding detriment to all of its stakeholders;

(e) ***The nature and value of the Applicants' property is such that the Interim Financing Facility is essential to maximizing its values***. The most valuable assets of the Applicants are the Software and Licenses. Failure to approve the Interim Financing Facility would have a drastic impact on the value of the assets as the Applicants would be forced to sell, or otherwise dispose of, the Software and Licenses in a further insolvency proceeding;

Genuis Affidavit at para 54

(f) ***The anticipated benefit to creditors from the Interim Financing Facility and Interim Financing Charge materially outweighs any resulting prejudice***. Any prejudice to the Applicants' creditors that may result from the Interim Financing Facility or Interim Financing Charge is minimal given the amount of the facility and the Applicants' urgent need for funding for ordinary course expenses. The Cash Flow Projections project that without the Interim Financing Facility the Applicants will not have sufficient capital to continue as going concerns. If the Interim Financing Facility and the corresponding Interim Financing Charge are not granted, the resulting bankruptcy or receivership will significantly decrease the prospects of any recovery for the Applicants' creditors; and

Genuis Affidavit at para 54

(g) ***The Proposal Trustee's views***. The Proposal Trustee supports the relief sought by the Applicants.

40. This Honourable Court has the jurisdiction under section 50.6(3) of the *BIA* to order that the Interim Financing Charge rank in priority over the claim of any creditor, including secured creditors. Section 60.6(3) provides that, "the court may order that the security or charge [granted in favour of the interim lender] rank in priority over the claim of any secured creditor of the debtor".

BIA section 50.6(3) **[Tab 1]**

41. In the context of a CCAA proceeding, Morawetz J. in *Timminco* considered whether to grant a super priority charge in favour of an interim lender. The Court granted the charge and stated as follows:

> [i]t is unrealistic to expect that any commercially motivated DIP Lender will advance funds without receiving the priority that is being requested on this motion. […] The alternative […] of a DIP Charge without super priority […] is not, in my view, realistic, nor is directing the Monitor to investigate alternative financing without providing super priority. If there is going to be any opportunity for the Timminco Entities to put forth a restructuring plan, it seems to me that it is essential and necessary for the DIP Financing to be approved and the DIP Charge granted. The alternative is a failed CCAA process.

Timminco Ltd., Re, 2012 ONSC 948 at paras 46, 47 **[Tab 7]**

42. Importantly, and critical to these proceedings, the Interim Financing Facility is contingent on this Honourable Court granting an Order approving the Interim Financing Facility and Interim Financing Agreement and declaring the Property to be subject to the Interim Financing Charge ranking in priority to all other charges and security other than the Administration Charge. Absent the Interim Financing Facility the Applicants will not have the ability to put forth a proposal to their creditors.

43. For all of these reasons, the Applicants respectfully submit that an Order approving the Interim Financing Facility in a maximum amount of $430,010, approving the Interim Financing Agreement and declaring that the Property is subject to the priority Interim Financing Charge is necessary and appropriate in the circumstances.

D. The D&O Charge is Appropriate and Necessary

44. The Applicants also seek a declaration that the Property is subject to the D&O Charge, in the maximum amount of $300,000, indemnifying the Directors for obligations and liabilities which they may incur in their capacities as officers and directors after the commencement of these proceedings, except to the extent that the obligation or liability was incurred as a result of the director or officer's gross negligence or willful misconduct. In addition, the Applicants seek a declaration that the D&O Charge rank in priority to any other security or charge other than the Administration Charge and Interim Financing Charge.

45. The *BIA* permits this Honourable Court the statutory jurisdiction to grant the D&O Charge:

> **64.1 (1)** ***Security or charge relating to director's indemnification***. On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is 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 property of the person is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.
>
> **64.1(2)** ***Priority*****.** The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

> **64.1(3)** ***Restriction – indemnification insurance***. The court may not make the order if in its opinion the person could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

BIA sections 64.1(1) , 64.1(2) and 64.1(3) **[Tab 1]**

46. The purpose of the D&O Charge is to:

(a) keep the Directors in place during a restructuring by providing them with protection against liabilities they could incur during the restructuring and to avoid the inevitable destabilization of the business of the Applicants that would arise if the Directors did not remain in place, or were concerned about potential liabilities that they may incur in carrying out their functions; and

(b) enable the Applicants to benefit from the experience and expertise of the Directors.

Northstar Aerospace Inc., Re, 2013 ONSC 1780 at para 29 **[Tab 8]**;
Canwest Global Communications Corp., Re, 2009 CarswellOnt 6184 at para 48 **[Tab 9]**

47. There is currently no directors' and officers' liability insurance in place to indemnify the Directors. The Directors have been unable to secure directors' and officers' liability coverage at a reasonable cost.

Genuis Affidavit at paras 56 and 57

48. D&O Charges, as in the immediate case, have been approved in *BIA* proposal proceedings where:

(a) the charge is only available to the extent that the directors and officers do not have coverage under existing policies;

(b) there is a possibility the directors and officers whose participation in the process is critical, may not continue their involvement; and

(c) the Proposal Trustee states the charge is reasonable and is supportive of the same.

Colossus Minerals Inc., Re, 2014 ONSC 514 at paras 18-21 **[Tab 10]**; *Mustang* at para 35 **[Tab 6]**

49. The Applicants respectfully submit that these circumstances are appropriate for this Honourable Court to grant the D&O Charge.

Genuis Affidavit at para 57

50. The Directors are named defendants in an action brought by a former employee of the BR Group who is seeking damages for wrongful termination. The action was stayed upon filing of the NOIs.

Genuis Affidavit at para 47

51. The quantum of the proposed D&O Charge is both fair and reasonable given the size and complexity of the Applicants' business. The Directors have played, and will continue to play, an important role in these Proposal Proceedings.

52. Accordingly, the Applicants respectfully submit that this Honourable Court should exercise its discretion to grant the D&O Charge.

E. Priority of *BIA* Charges

53. The Applicants request that the *BIA* Charges rank in priority to all other charges and security, and as between the *BIA* Charges, rank as follows:

> Firstly, the Administration Charge, up to the maximum amount of $350,000;
>
> Secondly, the Interim Financing Charge, up to the maximum amount of $430,010; and
>
> Thirdly, the D&O Charge up to a maximum amount of $300,000.

54. The Court has the discretion to make declaration granting the *BIA* Charges priority to any other security or charge.

BIA section 50.6(3),, 64.1(2) and 64.2(2) **[Tab 1]**

55. The Applicants have no secured creditors and therefore no secured creditors will be prejudiced by a declaration that the *BIA* Charges rank in priority to any other security or

charges. The only creditor having security is the CRA pursuant to section 67(3) of the *BIA* for income tax source deductions and for employment insurance and Canada pension plan remittances. The CRA has been served with notice of this application and the supporting materials.

BIA section 67(3) **[Tab 1]**
Genuis Affidavit at para 46

56. In *Canada North*, the Supreme Court of Canada endorsed prior authority stating that the granting of super-priority charges is critical as a "key aspect of the debtor's ability to attempt a workout", although it notes that a Court in granting a charge with priority over Crown interests should do so only when necessary. The Supreme Court did not determine in *Canada North* whether the Crown's deemed trust for employee withholdings renders it a "secured creditor" for the purposes of determining whether it can be primed by charges created by ss. 50.6(1), 50.6(3) and 50.6(5) of the *BIA*, the question was left open. However, while the Cash Flow Projections project sufficient revenues during the initial 13 week period to cover operational expenditures, they are insufficient to cover restructuring costs, including the fees and disbursements of the Administrative Professionals, or potential liabilities of Directors.

Canada v. Canada North Group Inc., 2021 SCC 30 **[Tab 11]** at paras 67 and 72

57. The Applicants respectfully submit that this Court should exercise its discretion to rank the *BIA* Charges in the priority requested.

F. The Stay Extension should be granted

58. The Stay Period of the Applicants expires on either October 15 or 16, 2022. The Applicants are required to file a proposal within the Stay Period unless they obtain an extension of time from the Court prior to the said expiration.

59. Pursuant to section 50.4(9) of the *BIA*, a debtor in a proposal proceeding may apply to the Court for an order extending the time to file a proposal by a maximum of 45 days provided the Court is satisfied 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 be applied for were granted.

BIA section 50.4(9) **[Tab 1]**

60. The Applicants are seeking a stay extension to November 30, 2022, in the Consolidated Proposal Proceedings (the "**Stay Extension**"). The Applicants respectfully submit that the Stay Extension ought to be approved for, *inter alia*, the following reasons:

(a) the Applicants are acting in good faith and with due diligence;

(b) the Stay Extension is required in order to prepare and finalize a proposal for the benefit of the Applicants stakeholders;

(c) the Applicants require Court approval of the Interim Financing Facility which is being sought concurrently absent which the Applicants will become bankrupt to the detriment of their stakeholders;

(d) no creditor will be materially prejudiced if the Stay Extension is granted; and

(e) the Proposal Trustee supports the Stay Extension.

61. The Applicants respectfully submit that this Court should exercise its discretion to grant the Stay Extension requested.

V. CONCLUSION AND RELIEF SOUGHT

62. For the reasons above, the Applicants request the Orders sought be granted as they are fair, necessary and reasonable in the circumstances and represent the best option to permit the Applicants to present a joint proposal which will benefit their creditors.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of October, 2022.

GOWLING WLG (CANADA) LLP

Per: _____

Tom Cumming/Stephen Kroeger
Counsel for the Applicants

TABLE OF AUTHORITIES

Tab	Authority
1.	*Bankruptcy and Insolvency Act*, RSC 1985, c B-3
2.	*Gray Aqua Group of Companies, (Re)*, 2015 NBQB 107
3.	*Bankruptcy and Insolvency General Rules*, CRC, c 368
4.	*Electro Sonic Inc. (Re)*, 2014 ONSC 942
5.	*Kitchener Frame Limited (Re)*, 2012 ONSC 234
6.	*Mustang GP Ltd. (Re)*, 2015 ONSC 6562
7.	*Timminco Ltd. (Re)*, 2012 ONSC 948
8.	*Northstar Aerospace, Inc. (Re)*, 2013 ONSC 1780
9.	*Canwest Global Communications Corp., (Re)*, 2009 CarswellOnt 6148
10.	*Colossus Minerals Inc. (Re)*, 2014 ONSC 514
11.	*Canada v. Canada North Group Inc.*, 2021 SCC 30

TAB 1

R.S.C. 1985, c. B-3, s. 50.4

s 50.4

Currency

50.4

50.4(1)Notice of intention

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,

(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).

50.4(2)Certain things to be filed

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.

50.4(3)Creditors may obtain statement

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

50.4(4)Exception

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.

50.4(5)Trustee protected

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.

50.4(6)Trustee to notify creditors
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).

50.4(7)Trustee to monitor and report
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.

50.4(8)Where assignment deemed to have been made
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;

(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.

50.4(9)Extension of time for filing proposal
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.

50.4(10)Court may not extend time
Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

50.4(11)Court may terminate period for making proposal
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.

Amendment History
1992, c. 27, s. 19; 1997, c. 12, s. 32(1); 2005, c. 47, s. 35; 2007, c. 36, s. 17; 2017, c. 26, s. 6

Currency
Federal English Statutes reflect amendments current to June 22, 2022
Federal English Regulations Current to Gazette Vol. 156:12 (June 8, 2022)

End of Document

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part III — Proposals (ss. 50-66.4)
Division I — General Scheme for Proposals

R.S.C. 1985, c. B-3, s. 50.6

s 50.6

Currency

50.6

50.6(1)Order — interim financing

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.

50.6(2)Individuals

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.

50.6(3)Priority

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

50.6(4)Priority — previous orders

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

50.6(5)Factors to be considered

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

(a) the period during which the 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.

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

Currency
Federal English Statutes reflect amendments current to June 22, 2022
Federal English Regulations Current to Gazette Vol. 156:12 (June 8, 2022)

End of Document

R.S.C. 1985, c. B-3, s. 64.1

s 64.1

Currency

64.1

64.1(1)Security or charge relating to director's indemnification

On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is 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 property of the person is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

64.1(2)Priority

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

64.1(3)Restriction — indemnification insurance

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

64.1(4)Negligence, misconduct or fault

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

Amendment History

2005, c. 47, s. 42; 2007, c. 36, s. 24

Currency

Federal English Statutes reflect amendments current to June 22, 2022
Federal English Regulations Current to Gazette Vol. 156:12 (June 8, 2022)

End of Document

R.S.C. 1985, c. B-3, s. 64.2

s 64.2

Currency

64.2

64.2(1)Court may order security or charge to cover certain costs

On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of

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

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

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

64.2(2)Priority

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

64.2(3)Individual

In the case of an individual,

(a) the court may not make the order unless the individual is 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.

Amendment History

2005, c. 47, s. 42; 2007, c. 36, s. 24

Currency

Federal English Statutes reflect amendments current to June 22, 2022
Federal English Regulations Current to Gazette Vol. 156:12 (June 8, 2022)

End of Document

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part IV — Property of the Bankrupt (ss. 67-101.2)

R.S.C. 1985, c. B-3, s. 67

s 67.

Currency

67.

67(1)Property of bankrupt

The property of a bankrupt divisible among his creditors shall not comprise

(a) property held by the bankrupt in trust for any other person,

(b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides;

(b.1) goods and services tax credit payments that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b);

(b.2) prescribed payments relating to the essential needs of an individual that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b); or

(b.3) without restricting the generality of paragraph (b), property in a "registered retirement savings plan", a "registered retirement income fund" or a "registered disability savings plan", as those expressions are defined in the *Income Tax Act*, or in any prescribed plan, other than property contributed to any such plan or fund in the 12 months before the date of bankruptcy,

but it shall comprise

(c) all property wherever situated of the bankrupt at the date of the bankruptcy or that may be acquired by or devolve on the bankrupt before their discharge, including any refund owing to the bankrupt under the *Income Tax Act* in respect of the calendar year — or the fiscal year of the bankrupt if it is different from the calendar year — in which the bankrupt became a bankrupt, except the portion that

(i) is not subject to the operation of this Act, or

(ii) in the case of a bankrupt who is the judgment debtor named in a garnishee summons served on Her Majesty under the *Family Orders and Agreements Enforcement Assistance Act*, is garnishable money that is payable to the bankrupt and is to be paid under the garnishee summons, and

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

Note:

S.C. 1997, c. 12, s. 59(2), provides as follows:

(2) Application

Subsection (1) [S.C. 1997, c. 12, s. 59(1), which re-enacted s. 67(1)(b) and enacted s. 67(1)(b.1)] applies to bankruptcies in respect of which proceedings are commenced after that subsection came into force [on April 30, 1998].

67(2)Deemed trusts

Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.

67(3)Exceptions

Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

Amendment History

1992, c. 27, s. 33; 1996, c. 23, s. 168; 1997, c. 12, s. 59; 1998, c. 19, s. 250; 2005, c. 47, s. 57; 2007, c. 36, s. 32; 2019, c. 29, s. 134

Currency

Federal English Statutes reflect amendments current to June 22, 2022
Federal English Regulations Current to Gazette Vol. 156:12 (June 8, 2022)

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Canada Federal Statutes
Bankruptcy and Insolvency Act
Part VII — Courts and Procedure(ss. 183-197)
Jurisdiction of Courts

R.S.C. 1985, c. B-3, s. 183

s 183.

Currency

183.

183(1)Courts vested with jurisdiction

The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

(a) in the Province of Ontario, the Superior Court of Justice;

(b) [Repealed 2001, c. 4, s. 33(2).]

(c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;

(d) in the Provinces of New Brunswick and Alberta, the Court of Queen's Bench;

(e) in the Province of Prince Edward Island, the Supreme Court of the Province;

(f) in the Provinces of Manitoba and Saskatchewan, the Court of Queen's Bench of the Province;

(g) in the Province of Newfoundland and Labrador, the Trial Division of the Supreme Court; and

(h) in Yukon, the Supreme Court of Yukon, in the Northwest Territories, the Supreme Court of the Northwest Territories, and in Nunavut, the Nunavut Court of Justice.

183(1.1)Superior Court jurisdiction in the Province of Quebec

In the Province of Quebec, the Superior Court is invested with the jurisdiction that will enable it to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during its term, as it is now, or may be hereafter, held, and in vacation and in chambers.

183(2)Courts of appeal — common law provinces

Subject to subsection (2.1), the courts of appeal throughout Canada, within their respective jurisdictions, are invested with power and jurisdiction at law and in equity, according to their ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the courts vested with original jurisdiction under this Act.

183(2.1)Court of Appeal of the Province of Quebec

In the Province of Quebec, the Court of Appeal, within its jurisdiction, is invested with the power and jurisdiction, according to its ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the Superior Court.

183(3)Supreme Court of Canada

The Supreme Court of Canada has jurisdiction to hear and to decide according to its ordinary procedure any appeal so permitted and to award costs.

Amendment History

R.S.C. 1985, c. 27 (2nd Supp.), s. 10 (Sched., item 2); 1990, c. 17, s. 3; 1993, c. 28, s. 78 (Sched. III, item 6) [Repealed 1999, c. 3, s. 12 (Sched., item 3).]; 1998, c. 30, s. 14(a); 1999, c. 3, s. 15; 2001, c. 4, s. 33(2), (3); 2002, c. 7, s. 83; 2015, c. 3, s. 9

Currency

Federal English Statutes reflect amendments current to June 22, 2022
Federal English Regulations Current to Gazette Vol. 156:12 (June 8, 2022)

End of Document

TAB 2

2015 NBQB 107
New Brunswick Court of Queen's Bench

Gray Aqua Group of Companies, Re

2015 CarswellNB 222, 2015 NBQB 107, 1139 A.P.R. 197, 254 A.C.W.S. (3d) 25, 436 N.B.R. (2d) 197

In the Matter of the bankruptcy of Gray Aqua Group of Companies

Reg. Natalie H. LeBlanc

Heard: January 7, 2014
Judgment: May 25, 2015
Docket: NB 19425, Estate No. 51-1780540

Counsel: John D. Stringer, Q. C., Ben R. Durnford, for Ernst & Young Inc. - Trustee
Joshua J.B. McElman, for Business Development Bank of Canada
Ian Purvis, Q.C., for Gray Aqua Farms Ltd, Gray's Aqua Management Ltd, Gray Aqua Processing Ltd., Gray Aqua Group Ltd., Butter Cove Aqua Farms Ltd., Jervis Island Aqua Farms Ltd., Pass-My-Can Aqua Farms Ltd., and Goblin Bay Aqua Farms Ltd.
Celine Leicher, for Europharma Inc.

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.4 Approval by court
VI.4.a General principles
Headnote
Bankruptcy and insolvency --- Proposal — Approval by court — General principles
Group filed notices of intention to make proposal ("NOI") — Proposal trustee was appointed — Order allowed for service on all creditors and affected parties to NOIs via telecommunications — Group companies were vertically and financially integrated with singular management and accounting structure — Group companies operated as integrated enterprise with centralized management, sales and accounting based in New Brunswick — Group shared common senior creditors — Proposal trustee brought motion for order to file consolidated proposal to respective and individual creditors — Motion granted — Historically, courts have been reluctant to grant right of consolidation to moving parties on basis of consolidation being seen as extraordinary remedy under Bankruptcy and Insolvency Act — Group was suitable candidate for order for consolidated proposal — All creditors were served and none contested motion — Evidence was sufficiently integrated from financial and practical perspective that it functioned as centralized company — Purpose of Act is to facilitate financial rehabilitation in fair and structured atmosphere while protecting integrity of process and all of its participants, including creditors — Proposal trustee's evidence struck right balance of efficiency and equity that would serve to streamline proposal, create savings for all parties and facilitate faster restructuring of group.
Table of Authorities
Cases considered by *Reg. Natalie H. LeBlanc*:
Ashley v. Marlow Group Private Portfolio Management Inc. (2006), 2006 CarswellOnt 3449, 22 C.B.R. (5th) 126, 270 D.L.R. (4th) 744 (Ont. S.C.J. [Commercial List])
Kitchener Frame Ltd., Re (2012), 2012 ONSC 234, 2012 CarswellOnt 1347, 86 C.B.R. (5th) 274 (Ont. S.C.J. [Commercial List])
Statutes considered:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 34 — pursuant to

s. 66 — pursuant to

s. 183 — considered

s. 192 — pursuant to

MOTION brought by proposal trustee for order to file consolidated proposal to respective and individual creditors.

***Reg. Natalie H. LeBlanc*:**

Background

1 On August 21, 2013 various Notices of Intention to Make a Proposal ("NOI") were filed by Gray Aqua Farms Ltd, Gray's Aqua Management Ltd, Gray Aqua Processing Ltd., Gray Aqua Group Ltd., Butter Cove Aqua Farms Ltd., Jervis Island Aqua Farms Ltd., Pass-My-Can Aqua Farms Ltd., and Goblin Bay Aqua Farms Ltd., (collectively the "Group").

2 As a result of the filing of the NOIs, Ernst & Young ("Proposal Trustee) was appointed as the Proposal Trustee ("Proposal Trustee"). On September 24, 2013 the Proposal Trustee presented a Motion for an Order Respecting Service and Accessibility Protocol which was granted. This Order allowed, *inter alia*, for service on all creditors and affected parties to the NOIs filed by the Group via telecommunications.

3 On or about January 7, 2014 solicitors for the Proposal Trustee applied to the Court for an Order allowing the filing of a Consolidated Proposal to the respective and individuals creditors of the Group, pursuant to sections 34, 66, 183 and 192 of the *Bankruptcy and Insolvency Act* (Canada).

4 Evidence contained in various reports from the Proposal Trustee, in particular the sixth report of the Proposal Trustee and the sixth affidavit of Tim Gray, which documents submit evidence supporting the Group's suitability for the filing of a Consolidated Motion.

5 In particular, the Group companies are vertically and financially integrated with a singular management and accounting structure. Moreover, solicitors for the Proposal Trustee submit uncontested evidence that Group companies operated at all times as an integrated enterprise with centralized management, sales and accounting based in Northampton, New Brunswick.

6 The Group also shares several common senior creditors, which include Callidus Capital Corporation ("Callidus") who acquired debt and security from HSBC Canada ("HSBC") on a number of the Group companies and Business Development Bank of Canada ("BDC").

7 It is submitted that the shared and respective creditors of the Group, if an Order allowing a Consolidated Proposal would not be deprived of any rights and would not suffer any measurable prejudice.

8 The largest individual respective group of creditors who require accommodation deriving from a Group company would be the unsecured creditors of Gray Aqua Processing Limited ("GAPL") who are proposed as a distinct class of creditors under a Consolidated Proposal.

Analysis

9 Historically, Courts have been reluctant to grant the right of consolidation to moving parties on the basis of consolidation being seen as an extraordinary remedy under the BIA, *supra.*

10 The BIA is void of any statutory test establishing benchmarks for the consolidation of corporate entities. Limited caselaw on point seems to rely on the equitable jurisdiction of the Court under Section 183.

11 Counsel for the Proposal Trustee submitted two cases for review by the Court. In *Ashley v. Marlow Group Private Portfolio Management Inc.* (2006), 22 C.B.R. (5th) 126 (Ont. S.C.J. [Commercial List]), the consolidation was opposed and ultimately denied by the Court. A thorough review of the issue was nonetheless undertaken by Justice Mesbur of the Ontario Superior Court, Commercial List.

12 Justice Mesbur said the following:

> [70] Essentially, a substantive consolidation would treat all of the corporate defendants as one entity. The assets of each would fall into one common pool, to be shared by all their creditors on a *pari passu* basis.
>
> [71] There is no specific authority in the *Bankruptcy and Insolvency Act* to grant an order for substantive consolidation. It is common ground, however, that the court has the authority to do so under its equitable jurisdiction under section 183 of the *Act.*
>
> [...]
>
> [74] The Receiver goes on to say that all four companies operated as an interrelated entity, with shared premises, telephone, fax, bank accounts and accounting records. The Receiver says that they were operated as a single, consolidated enterprise, and should be treated as such for bankruptcy purposes, because to do so would be most expedient and cost-effective.
>
> [...]
>
> [76] CIPF also points out that the Receiver wishes to use the only assets of Securities Inc., some cash, to fund the bankruptcy, and thus there is no practical advantage to any of Securities Inc.'s creditors to having a substantive consolidation of all the estates.
>
> [77] CIPF says that substantive consolidation profoundly affects the substantive rights of debtors and creditors, and thus should be considered an extreme remedy and carefully scrutinized. It involves more than procedural convenience, which of course can be accomplished by the procedural consolidation that everyone supports.

13 The Court ultimately upheld the objection of the creditor, CIPF, on the basis of a lack of evidence that the creditors would NOT be harmed by the consolidation.

14 The second case cited by the solicitors for the Proposal Trustee was the case of *Kitchener Frame Ltd., Re*, 2012 ONSC 234 (Ont. S.C.J. [Commercial List]) ("Kitchener Frame") whereby a Motion to consolidate was granted by Justice Morawetz.

15 Justice Morawetz made the following observations on substantial consolidations:

> [30].....Although not expressly contemplated under the *BIA*, the Applicants submit that the court may look to its incidental, ancillary and auxiliary jurisdiction under s. 183 of the *BIA* and its equitable jurisdiction to grant an order for substantive consolidation. See *Ashley v. Marlow Group Private Portfolio Management Inc*. (2006) 2006 CANLII 31307 (ON SC), 22 CBR (5th) 126 (Ont. S.C.J.) (Commercial List). In deciding whether to grant substantive consolidation, courts have held that it should not be done at the expense of, or possible prejudice of, any particular creditor. See *Ashley*, *supra*. However, counsel submits that this court should take into account practical business considerations in applying the *BIA*. See *A & F Baillargeon Express Inc. (Trustee of) (Re)* (1993), 27 CBR (3d) 36.
>
> [31] In this case, the Applicants submit that substantive consolidation inherent in the Consolidated Proposal is appropriate in the circumstances due to, among other things, the intertwined nature of the Applicants' assets and liabilities. Each Applicant had substantially the same creditor base and known liabilities (other than certain Excluded Claims). In addition, KFL had no cash or cash equivalents and the Applicants are each dependant on the Escrow Funds and borrowings under the Restated Senior Secured Loan Agreement to fund the same underlying pension and OPEB obligations and costs relating to the Proposal Proceedings.

[32] The Applicants submit that creditors in neither estate will be materially prejudiced by substantive consolidation and based on the fact that no creditor objected to the substantial consolidation, counsel submits the Consolidated Proposal ought to be approved.

Disposition

16 On the whole, I am satisfied that the Group is a suitable candidate for an Order for a Consolidated Proposal. After a thorough protocol on service was established by the Court, all creditors of the Group were served and none contested the Motion.

17 I am further satisfied by the evidence submitted in the sixth report of the Proposal Trustee and the six affidavit of Tim Gray that the Group is sufficiently integrated both from a financial and practical perspective that it functions as a centralized company for all intents and purposes.

18 The purpose of the BIA is to facilitate financial rehabilitation in a fair and structured atmosphere while protecting the integrity of the process and all of its participants, including creditors.

19 The Proposal Trustee's evidence, including the accommodation of the GAPL creditors, strikes the right balance of efficiency and equity which will ultimately serve to streamline the proposal process, create savings for all parties and facilitating a faster restructuring of the Group.

20 For the above-noted reasons, I grant the Motion for a Consolidated Proposal in the case of the Group companies.

Motion granted.

End of Document

TAB 3

Canada Federal Regulations
Bankruptcy and Insolvency Act
Can. Reg. 368 — Bankruptcy and Insolvency General Rules
General

C.R.C. 1978, c. 368, s. 3

s 3.

Currency

3.
In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.

Amendment History
SOR/98-240, s. 1

Currency
Federal English Statutes reflect amendments current to June 22, 2022
Federal English Regulations Current to Gazette Vol. 156:12 (June 8, 2022)

End of Document

TAB 4

2014 ONSC 942
Ontario Superior Court of Justice [Commercial List]

Electro Sonic Inc., Re

2014 CarswellOnt 1568, 2014 ONSC 942, 14 C.B.R. (6th) 256, 237 A.C.W.S. (3d) 585

In the Matter of the Notice of Intention to Make a Proposal of Electro Sonic Inc.

In the Matter of the Notice of Intention to Make a Proposal of Electro Sonic of America LLC

D.M. Brown J.

Heard: February 10, 2014
Judgment: February 10, 2014
Docket: 31-1835443, 31-1835488

Counsel: H. Chaiton for Applicants, Electro Sonic Inc. and Electro Sonic of America LLC
I. Aversa for Royal Bank of Canada

Subject: Insolvency; Civil Practice and Procedure
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.10 Practice and procedure
Headnote
Bankruptcy and insolvency --- Proposal — Practice and procedure
Companies were owned by same parties and were involved in distribution of electronic and electrical parts — One company was Ontario corporation and other was Delaware corporation — On February 6, 2014, both companies filed notices of intention to make proposals pursuant to s. 50.4 of Bankruptcy and Insolvency Act (BIA) — Companies applied for administrative consolidation, administrative professionals charge, and authorization for proceedings in United States — Application granted — Court ordered administrative consolidation of two proceedings — There was possibility of applicants applying together at future dates for relief such as stay extensions and sale approvals, and companies shared same lender — Applicants were granted administrative charge in amount of $250,000 on property of companies to secure payment of reasonable fees and expenses of legal advisors and proposal trustee — Factors taken into account included: senior secured did not oppose granting of charge, operations of two companies were highly integrated, and Ontario company technically met BIA definition of "insolvent person" — Proposal trustee was authorized to apply to United States Bankruptcy Court for relief pursuant to Chapter 15 of United States Bankruptcy Code — Proposal trustee was most appropriate person to act as representative in respect of any proceeding under BIA for purpose of having it recognized in jurisdiction outside Canada.
Table of Authorities
Cases considered by *D.M. Brown J.*:
Callidus Capital Corp. v. Xchange Technology Group LLC (2013), 2013 ONSC 6783, 2013 CarswellOnt 15133 (Ont. S.C.J. [Commercial List]) — referred to
Van Breda v. Village Resorts Ltd. (2012), 17 C.P.C. (7th) 223, 2012 SCC 17, 2012 CarswellOnt 4268, 2012 CarswellOnt 4269, 91 C.C.L.T. (3d) 1, 343 D.L.R. (4th) 577, 429 N.R. 217, 10 R.F.L. (7th) 1, (sub nom. *Charron Estate v. Village Resorts Ltd.)* 114 O.R. (3d) 79 (note), 291 O.A.C. 201, (sub nom. *Club Resorts Ltd. v. Van Breda)* [2012] 1 S.C.R. 572 (S.C.C.) — followed
Statutes considered:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 2(1) "insolvent person" — considered

s. 50(1) — considered

s. 50.4 [en. 1992, c. 27, s. 19] — referred to

s. 64.2(1) [en. 2005, c. 47, s. 42] — considered

s. 279 — referred to

Bankruptcy Code, 11 U.S.C. 1982

Chapter 15 — referred to

Rules considered:

Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368

R. 3 — referred to

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

R. 1.04(1) — referred to

APPLICATION by companies for administrative consolidation, administrative professionals charge, and authorization for proceedings in United States.

***D.M. Brown J.*:**

I. Motions for administrative consolidation of NOI proceedings, an Administrative Professionals Charge and authorization to initiate Chapter 15 proceedings

1 Electro Sonic Inc. ("ESI") is an Ontario corporation with its registered office in Markham, Ontario. Electro Sonic of America LLC ("ESA") is a Delaware limited liability corporation which carries on business from a facility in Tonawanda, New York. Both companies are owned by the Rosenthal family. Both companies are involved in the distribution of electronic and electrical parts.

2 On February 6, 2014, both companies filed notices of intention to make proposals pursuant to section 50.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. MNP Ltd. was appointed proposal trustee.

3 Both companies applied for three types of relief: (i) the administrative consolidation of the two proceedings; (ii) the approval of an Administrative Professionals Charge on the property of both companies to secure payment of the reasonable fees of the legal advisors; and, (iii) authorization that the proposal trustee could act as foreign representative of the NOI proceedings and could apply to the United States Bankruptcy Court for relief pursuant to Chapter 15 of the *United States Bankruptcy Code* (the "Code"). At the hearing I granted the orders sought; these are my reasons for so doing.

II. Administrative consolidation

4 Bankruptcy proceedings in this Court operate subject to the general principle that the litigation process should secure the just, most expeditious and least expensive determination of every proceeding on its merits: *Bankruptcy and Insolvency General Rules*, s. 3; *Ontario Rules of Civil Procedure*, Rule 1.04(1). One practical application of that general principle occurs when courts join together two closely-related bankruptcy proceedings so that they can proceed and be managed together. This procedural or administrative consolidation does not involve the substantive merger or consolidation of the bankruptcy estates, merely their procedural treatment together by the court. Administrative consolidation of two bankruptcy proceedings would be analogous to bringing two separate civil actions under common case management.

5 In the present case, the evidence disclosed that the operations of ESI and ESA are highly integrated, sharing a common managing director as well as consolidated accounting, finance and human resource functions, including payroll. As well, ESI has been the sole customer of ESA in 2013 and 2014.

6 Given the possibility of the applicants applying together at future dates for relief such as stay extensions and sale approvals, and given that both companies share the same lender — Royal Bank of Canada — it made sense to order that both bankruptcy proceedings be consolidated for the purposes of future steps in this order. For those reasons, I granted the administrative consolidation order sought.

III. Administrative Charge

7 The applicants seek a charge in the amount of $250,000 on the property of ESI and ESA to secure payment of the reasonable fees and expenses of the legal advisors retained by the applicants, MNP and its legal counsel (the "Administrative Professionals"). The applicants sought an order granting such an Administrative Professionals Charge priority over security interests and liens, save that the Charge would be subordinate to the security held by RBC and all secured claims ranking in priority thereto.

8 The applicants filed evidence identifying their creditors, as well as the results of searches made under the Personal Property Registration systems in Ontario and British Columbia and under the Uniform Commercial Code in respect of ESA. The applicants complied with the service requirements of *BIA* s. 64.2(1).

9 RBC did not oppose the Charge sought, but advised that it might later bring a motion to lift the stay of proceedings to enable it to enforce its security or to appoint an interim receiver.

10 As noted, ESA is a Delaware corporation with its place of business in New York State. ESA filed evidence that it has a U.S. dollar bank account in Canada, although it did not disclose the amount of money in that account.

11 *BIA* s. 50(1) authorizes an "insolvent person" to make a proposal. Section 2 of the *BIA* defines an "insolvent person" as, *inter alia*, one "who resides, carries on business or has property in Canada". That statutory definition would seem to establish the criteria upon which an Ontario court can assume jurisdiction in proposal proceedings, rather than the common law real and substantial connection test articulated by the Supreme Court of Canada in *Van Breda v. Village Resorts Ltd.*, 2012 SCC 17 (S.C.C.).

12 In the present case, I took into account several factors in granting a Charge over the property of both applicants, including property in New York State:

> (i) the senior secured for both companies, RBC, did not oppose the granting of the Charge;
>
> (ii) according to the results of the UCC search, the other secured creditor of ESA which has filed a collateral registration is ESI, a related company, which seeks the Charge;
>
> (iii) the operations of ESI and ESA are highly integrated;
>
> (iv) ESA has filed evidence of some assets in Canada, thereby technically meeting the definition of "insolvent person" in the *BIA*: *Callidus Capital Corp. v. Xchange Technology Group LLC*, 2013 ONSC 6783 (Ont. S.C.J. [Commercial List]), para. 19; and,
>
> (v) the proposal trustee intends to apply immediately for recognition of these proceedings under Chapter 15 of the *Code* which will afford affected persons in the United States an opportunity to make submissions on the issue.

IV. Proposal trustee as representative in foreign proceedings

13 The proposal trustee was the most appropriate person to act as a representative in respect of any proceeding under the *BIA* for the purpose of having it recognized in a jurisdiction outside Canada: *BIA*, s. 279. It followed that the proposal trustee should be authorized to apply to the United States Bankruptcy Court for relief pursuant to Chapter 15 of the *Code*.

Application granted.

TAB 5

2012 ONSC 234
Ontario Superior Court of Justice [Commercial List]

Kitchener Frame Ltd., Re

2012 CarswellOnt 1347, 2012 ONSC 234, 212 A.C.W.S. (3d) 631, 86 C.B.R. (5th) 274

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

In the Matter of the Consolidated Proposal of Kitchener Frame Limited and Thyssenkrupp Budd Canada, Inc. (Applicants)

Morawetz J.

Judgment: February 3, 2012
Docket: CV-11-9298-00CL

Counsel: Edward A. Sellers, Jeremy E. Dacks for Applicants
Hugh O'Reilly — Non-Union Representative Counsel
L.N. Gottheil — Union Representative Counsel
John Porter for Proposal Trustee, Ernst & Young Inc.
Michael McGraw for CIBC Mellon Trust Company
Deborah McPhail for Financial Services Commission of Ontario

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.4 Approval by court
VI.4.b Conditions
VI.4.b.i General principles
Headnote
Bankruptcy and insolvency --- Proposal — Approval by court — Conditions — General principles
Applicants KFL and BC were inactive entities with no operating assets and no material liquid assets — Applicants had significant and mounting obligations including pension and other non-pension post-employment benefit (OPEB) obligations to their former employees and surviving spouses of such former employees or others entitled to claim through such persons — Affiliates of BC provided up to date funding for pension and OPEB obligations, however, given that KFL and BC had no active operations status quo was unsustainable — KFL and BC brought motion to sanction amended consolidated proposal — Motion was granted — Proposal was reasonable — Proposal was calculated to benefit general body of creditors — Proposal was made in good faith — Proposal contained broad release in favour of applicants and certain third parties — Release of third-parties was permitted — Release covered all affected claims, pension claims, and existing escrow fund claims — Release did not cover criminal or wilful misconduct with respect to any matters set out in s. 50(14) of Bankruptcy and Insolvency Act — Unaffected claims were specifically carved out of release — No creditors or stakeholders objected to scope of release which was fully disclosed in negotiations — There was no express prohibition in BIA against including third-party releases in proposal — Any provision of BIA which purported to limit ability of debtor to contract with its creditors had to be clear and explicit — Third-party releases were permissible under Companies' Creditors Arrangement Act (CCAA) and court should strive, where language of both statutes supported it, to give both statutes harmonious interpretation — There was no principled basis on which analysis and treatment of third-party release in BIA proposal proceeding should differ from CCAA proceeding — Released parties contributed in tangle and realistic way to proposal — Without inclusion of releases it was unlikely that certain parties would have supported proposal — Releases benefited applicants and creditors generally — Applicants provided full and adequate disclosure of releases and their effect.

Table of Authorities

Cases considered by *Morawetz J.*:

A. & F. Baillargeon Express Inc., Re (1993), 27 C.B.R. (3d) 36, 1993 CarswellQue 49 (C.S. Que.) — referred to

Air Canada, Re (2004), 2004 CarswellOnt 1842, 2 C.B.R. (5th) 4 (Ont. S.C.J. [Commercial List]) — referred to

Allen-Vanguard Corp., Re (2011), 2011 CarswellOnt 1279, 2011 ONSC 733 (Ont. S.C.J.) — referred to

Angiotech Pharmaceuticals Inc., Re (2011), 2011 BCSC 450, 2011 CarswellBC 841, 76 C.B.R. (5th) 210 (B.C. S.C. [In Chambers]) — referred to

Ashley v. Marlow Group Private Portfolio Management Inc. (2006), 2006 CarswellOnt 3449, 22 C.B.R. (5th) 126, 270 D.L.R. (4th) 744 (Ont. S.C.J. [Commercial List]) — referred to

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 92 O.R. (3d) 513, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123 (Ont. C.A.) — followed

C.F.G. Construction inc., Re (2010), [2010] R.J.Q. 2360, 2010 CarswellQue 10226, 2010 QCCS 4643 (C.S. Que.) — considered

Canwest Global Communications Corp., Re (2010), 70 C.B.R. (5th) 1, 2010 ONSC 4209, 2010 CarswellOnt 5510 (Ont. S.C.J. [Commercial List]) — referred to

Cosmic Adventures Halifax Inc., Re (1999), 13 C.B.R. (4th) 22, 1999 CarswellNS 320 (N.S. S.C.) — considered

Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd. (1976), 1976 CarswellQue 32, [1978] 1 S.C.R. 230, 26 C.B.R. (N.S.) 84, 75 D.L.R. (3d) 63, (sub nom. *Employers' Liability Assurance Corp. v. Ideal Petroleum (1969) Ltd.)* 14 N.R. 503, 1976 CarswellQue 25 (S.C.C.) — referred to

Farrell, Re (2003), 2003 CarswellOnt 1015, 40 C.B.R. (4th) 53 (Ont. S.C.J. [Commercial List]) — referred to

Kern Agencies Ltd., (No. 2), Re (1931), 1931 CarswellSask 3, [1931] 2 W.W.R. 633, 13 C.B.R. 11 (Sask. C.A.) — considered

Lofchik, Re (1998), 1998 CarswellOnt 194, 1 C.B.R. (4th) 245 (Ont. Bktcy.) — referred to

Magnus One Energy Corp., Re (2009), 2009 CarswellAlta 488, 2009 ABQB 200, 53 C.B.R. (5th) 243 (Alta. Q.B.) — referred to

Mayer, Re (1994), 25 C.B.R. (3d) 113, 1994 CarswellOnt 268 (Ont. Bktcy.) — referred to

Mister C's Ltd., Re (1995), 1995 CarswellOnt 372, 32 C.B.R. (3d) 242 (Ont. Bktcy.) — considered

N.T.W. Management Group Ltd., Re (1994), 29 C.B.R. (3d) 139, 1994 CarswellOnt 325 (Ont. Bktcy.) — referred to

NAV Canada c. Wilmington Trust Co. (2006), 2006 CarswellQue 4890, 2006 CarswellQue 4891, 2006 SCC 24, (sub nom. *Greater Toronto Airports Authority v. International Lease Finance Corp.)* 80 O.R. (3d) 558 (note), (sub nom. *Canada 3000 Inc., (Bankrupt), Re)* 349 N.R. 1, (sub nom. *Canada 3000 Inc., Re)* [2006] 1 S.C.R. 865, 10 P.P.S.A.C. (3d) 66, 20 C.B.R. (5th) 1, (sub nom. *Canada 3000 Inc. (Bankrupt), Re)* 212 O.A.C. 338, (sub nom. *Canada 3000 Inc., Re)* 269 D.L.R. (4th) 79 (S.C.C.) — referred to

Olympia & York Developments Ltd., Re (1995), 34 C.B.R. (3d) 93, 1995 CarswellOnt 340 (Ont. Gen. Div. [Commercial List]) — referred to

Olympia & York Developments Ltd., Re (1997), 45 C.B.R. (3d) 85, 143 D.L.R. (4th) 536, 1997 CarswellOnt 657 (Ont. Bktcy.) — referred to

Society of Composers, Authors & Music Publishers of Canada v. Armitage (2000), 2000 CarswellOnt 4120, 20 C.B.R. (4th) 160, 50 O.R. (3d) 688, 137 O.A.C. 74 (Ont. C.A.) — referred to

Steeves, Re (2001), 25 C.B.R. (4th) 317, 208 Sask. R. 84, 2001 SKQB 265, 2001 CarswellSask 392 (Sask. Q.B.) — referred to

Ted Leroy Trucking Ltd., Re (2010), (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, 72 C.B.R. (5th) 170, [2011] 2 W.W.R. 383 (S.C.C.) — followed

2012 ONSC 234, 2012 CarswellOnt 1347, 212 A.C.W.S. (3d) 631, 86 C.B.R. (5th) 274

Statutes considered:

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

Generally — referred to

Pt. III — referred to

s. 50(14) — considered

s. 54(2)(d) — considered

s. 59(2) — considered

s. 62(3) — considered

s. 136(1) — referred to

s. 178(2) — referred to

s. 179 — considered

s. 183 — referred to

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

Generally — referred to

s. 5.1 [en. 1997, c. 12, s. 122] — referred to

Excise Tax Act, R.S.C. 1985, c. E-15

Generally — referred to

MOTION by applicants for court sanction of proposal under Bankruptcy and Insolvency Act which contained third-party release.

***Morawetz J.*:**

1 At the conclusion of this unopposed motion, the requested relief was granted. Counsel indicated that it would be helpful if the court could provide reasons in due course, specifically on the issue of a third-party release in the context of a proposal under Part III of the *Bankruptcy and Insolvency Act* ("*BIA*").

2 Kitchener Frame Limited ("KFL") and Thyssenkrupp Budd Canada Inc. ("Budd Canada"), and together with KFL, (the "Applicants"), brought this motion for an order (the "Sanction Order") to sanction the amended consolidated proposal involving the Applicants dated August 31, 2011 (the "Consolidated Proposal") pursuant to the provisions of the *BIA*. Relief was also sought authorizing the Applicants and Ernst & Young Inc., in its capacity as proposal trustee of each of the Applicants (the "Proposal Trustee") to take all steps necessary to implement the Consolidated Proposal in accordance with its terms.

3 The Applicants submit that the requested relief is reasonable, that it benefits the general body of the Applicants' creditors and meets all other statutory requirements. Further, the Applicants submit that the court should also consider that the voting affected creditors (the "Affected Creditors") unanimously supported the Consolidated Proposal. As such, the Applicants submit that they have met the test as set out in s. 59(2) of the *BIA* with respect to approval of the Consolidated Proposal.

4 The motion of the Applicants was supported by the Proposal Trustee. The Proposal Trustee filed its report recommending approval of the Consolidated Proposal and indicated that the Consolidated Proposal was in the best interests of the Affected Creditors.

5 KFL and Budd Canada are inactive entities with no operating assets and no material liquid assets (other than the Escrow Funds). They do have significant and mounting obligations including pension and other non-pension post-employment benefit ("OPEB") obligations to the Applicants' former employees and certain former employees of Budcan Holdings Inc. or the

surviving spouses of such former employees or others who may be entitled to claim through such persons in the *BIA* proceedings, including the OPEB creditors.

6 The background facts with respect to this motion are fully set out in the affidavit of Mr. William E. Aziz, sworn on September 13, 2011.

7 Affiliates of Budd Canada have provided up to date funding to Budd Canada to enable Budd Canada to fund, on behalf of KFL, such pension and OPEB obligations. However, given that KFL and Budd Canada have no active operations, the *status quo* is unsustainable.

8 The Applicants have acknowledged that they are insolvent and, in connection with the *BIA* proposal, proceedings were commenced on July 4, 2011.

9 On July 7, 2011, Wilton-Siegel J. granted Procedural Consolidation Orders in respect of KFL and Budd Canada which authorized the procedural consolidation of the Applicants and permitted them to file a single consolidated proposal to their creditors.

10 The Orders of Wilton-Siegel J. also appointed separate representative counsel to represent the interests of the Union and Non-Union OPEB creditors and further authorized the Applicants to continue making payments to Blue Cross in respect of the OPEB Claims during the *BIA* proposal proceedings.

11 On August 2, 2011, an order was granted extending the time to file a proposal to August 19, 2011.

12 The parties proceeded to negotiate the terms of the Consolidated Proposal, which meetings involved the Applicants, the Proposal Trustee, senior members of the CAW, Union Representative Counsel and Non-Union Representative Counsel.

13 An agreement in principle was reached which essentially provided for the monetization and compromise of the OPEB claims of the OPEB creditors resulting in a one-time, lump-sum payment to each OPEB creditor term upon implementation of the Consolidated Proposal. The Consolidated Proposal also provides that the Applicants and their affiliates will forego any recoveries on account of their secured and unsecured inter-company claims, which total approximately $120 million. A condition precedent was the payment of sufficient funds to the Pension Fund Trustee such that when such funds are combined with the value of the assets held in the Pension Plans, the Pension Fund Trustee will be able to fully annuitize the Applicants' pension obligations and pay the commuted values to those creditors with pension claims who so elected so as to provide for the satisfaction of the Applicants' pension obligations in full.

14 On August 19, 2011, the Applicants filed the Consolidated Proposal. Subsequent amendments were made on August 31, 2011 in advance of the creditors' meeting to reflect certain amendments to the proposal.

15 The creditors' meeting was held on September 1, 2011 and, at the meeting, the Consolidated Proposal, as amended, was accepted by the required majority of creditors. Over 99.9% in number and over 99.8% in dollar value of the Affected Creditors' Class voted to accept the Consolidated Proposal. The Proposal Trustee noted that all creditors voted in favour of the Consolidated Proposal, with the exception of one creditor, Canada Revenue Agency (with 0.1% of the number of votes representing 0.2% of the value of the vote) who attended the meeting but abstained from voting. Therefore, the Consolidated Proposal was unanimously approved by the Affected Creditors. The Applicants thus satisfied the required "double majority" voting threshold required by the *BIA*.

16 The issue on the motion was whether the court should sanction the Consolidated Proposal, including the substantive consolidation and releases contained therein.

17 Pursuant to s. 54(2)(d) of the *BIA*, a proposal is deemed to be accepted by the creditors if it has achieved the requisite "double majority" voting threshold at a duly constituted meeting of creditors.

18 The *BIA* requires the proposal trustee to apply to court to sanction the proposal. At such hearing, s. 59(2) of the *BIA* requires that the court refuse to approve the proposal where its terms are not reasonable or not calculated to benefit the general body of creditors.

19 In order to satisfy s. 59(2) test, the courts have held that the following three-pronged test must be satisfied:

(a) the proposal is reasonable;

(b) the proposal is calculated to benefit the general body of creditors; and

(c) the proposal is made in good faith.

See *Mayer, Re* (1994), 25 C.B.R. (3d) 113 (Ont. Bktcy.); *Steeves, Re* (2001), 25 C.B.R. (4th) 317 (Sask. Q.B.); *Magnus One Energy Corp., Re* (2009), 53 C.B.R. (5th) 243 (Alta. Q.B.).

20 The first two factors are set out in s. 59(2) of the *BIA* while the last factor has been implied by the court as an exercise of its equitable jurisdiction. The courts have generally taken into account the interests of the debtor, the interests of the creditors and the interests of the public at large in the integrity of the bankruptcy system. See *Farrell, Re* (2003), 40 C.B.R. (4th) 53 (Ont. S.C.J. [Commercial List]).

21 The courts have also accorded substantial deference to the majority vote of creditors at a meeting of creditors; see *Lofchik, Re*, [1998] O.J. No. 332 (Ont. Bktcy.). Similarly, the courts have also accorded deference to the recommendation of the proposal trustee. See *Magnus One*, *supra*.

22 With respect to the first branch of the test for sanctioning a proposal, the debtor must satisfy the court that the proposal is reasonable. The court is authorized to only approve proposals which are reasonable and calculated to benefit the general body of creditors. The court should also consider the payment terms of the proposal and whether the distributions provided for are adequate to meet the requirements of commercial morality and maintaining the integrity of the bankruptcy system. For a discussion on this point, see *Lofchik*, *supra*, and *Farrell* , *supra*.

23 In this case, the Applicants submit that, if the Consolidated Proposal is sanctioned, they would be in a position to satisfy all other conditions precedent to closing on or prior to the date of the proposal ("Proposal Implementation Date").

24 With respect to the treatment of the Collective Bargaining Agreements, the Applicants and the CAW brought a joint application before the Ontario Labour Relations Board ("OLRB") on an expedited basis seeking the OLRB's consent to an early termination of the Collective Bargaining Agreements. Further, the CAW has agreed to abandon its collective bargaining rights in connection with the Collective Bargaining Agreements.

25 With respect to the terms and conditions of a Senior Secured Loan Agreement between Budd Canada and TK Finance dated as of December 22, 2010, TK Finance provided a secured creditor facility to the Applicants to fund certain working capital requirements before and during the *BIA* proposal proceedings. As a result of the approval of the Consolidated Proposal at the meeting of creditors, TK Finance agreed to provide additional credit facilities to Budd Canada such that the Applicants would be in a position to pay all amounts required to be paid by or on behalf of the Applicants in connection with the Consolidated Proposal.

26 On the issue as to whether creditors will receive greater recovery under the Consolidated Proposal than they would receive in the bankruptcy, it is noted that creditors with Pension Claims are unaffected by the Consolidated Proposal. The Consolidated Proposal provides for the satisfaction of Pension Claims in full as a condition precedent to implementation.

27 With respect to Affected Creditors, the Applicants submit that they will receive far greater recovery from distributions under the Consolidated Proposal than the Affected Creditors would receive in the event of the bankruptcies of the Applicants. (See Sanction Affidavit of Mr. Aziz at para. 61.)

28 The Proposal Trustee has stated that the Consolidated Proposal is advantageous to creditors for the reasons outlined in its Report and, in particular:

> (a) the recoveries to creditors with claims in respect of OPEBs are considerably greater under the Amended Proposal than in a bankruptcy;
>
> (b) payments under the Amended Proposal are expected in a timely manner shortly after the implementation of the Amended Proposal;
>
> (c) the timing and quantum of distributions pursuant to the Amended Proposal are certain while distributions under a bankruptcy are dependent on the results of litigation, which cannot be predicted with certainty; and
>
> (d) the Pension Plans (as described in the Proposal Trustee's Report) will be fully funded with funds from the Pension Escrow (as described in the Proposal Trustee's Report) and, if necessary, additional funding from an affiliate of the Companies if the funds in the Pension Escrow are not sufficient. In a bankruptcy, the Pension Plans may not be fully funded.

29 The Applicants take the position that the Consolidated Proposal meets the requirements of commercial morality and maintains the integrity of the bankruptcy system, in light of the superior coverage to be afforded to the Applicants' creditors under the Consolidated Proposal than in the event of bankruptcy.

30 The Applicants also submit that substantive consolidation inherent in the proposal will not prejudice any of the Affected Creditors and is appropriate in the circumstances. Although not expressly contemplated under the *BIA*, the Applicants submit that the court may look to its incidental, ancillary and auxiliary jurisdiction under s. 183 of the *BIA* and its equitable jurisdiction to grant an order for substantive consolidation. See *Ashley v. Marlow Group Private Portfolio Management Inc.* (2006), 22 C.B.R. (5th) 126 (Ont. S.C.J. [Commercial List]). In deciding whether to grant substantive consolidation, courts have held that it should not be done at the expense of, or possible prejudice of, any particular creditor. See *Ashley* , *supra*. However, counsel submits that this court should take into account practical business considerations in applying the *BIA*. See *A. & F. Baillargeon Express Inc., Re* (1993), 27 C.B.R. (3d) 36 (C.S. Que.).

31 In this case, the Applicants submit that substantive consolidation inherent in the Consolidated Proposal is appropriate in the circumstances due to, among other things, the intertwined nature of the Applicants' assets and liabilities. Each Applicant had substantially the same creditor base and known liabilities (other than certain Excluded Claims). In addition, KFL had no cash or cash equivalents and the Applicants are each dependant on the Escrow Funds and borrowings under the Restated Senior Secured Loan Agreement to fund the same underlying pension and OPEB obligations and costs relating to the Proposal Proceedings.

32 The Applicants submit that creditors in neither estate will be materially prejudiced by substantive consolidation and based on the fact that no creditor objected to the substantial consolidation, counsel submits the Consolidated Proposal ought to be approved.

33 With respect to whether the Consolidated Proposal is calculated to benefit the general body of creditors, TK Finance would be entitled to priority distributions out of the estate in a bankruptcy scenario. However, the Applicants and their affiliates have agreed to forego recoveries under the Consolidated Proposal on account of their secured and unsecured intercompany claims in the amount of approximately $120 million, thus enhancing the level of recovery for the Affected Creditors, virtually all of whom are OPEB creditors. It is also noted that TK Finance will be contributing over $35 million to fund the Consolidated Proposal.

34 On this basis, the Applicants submit that the Consolidated Proposal is calculated to benefit the general body of creditors.

35 With respect to the requirement of the proposal being made in good faith, the debtor must satisfy the court that it has provided full disclosure to its creditors of its assets and encumbrances against such assets.

TAB 6

2015 ONSC 6562
Ontario Superior Court of Justice

Mustang GP Ltd., Re

2015 CarswellOnt 16398, 2015 ONSC 6562, 259 A.C.W.S. (3d) 623, 31 C.B.R. (6th) 130

In the Matter of the Notice of Intention to Make a Proposal of Mustang GP Ltd.

In the Matter of the Notice of Intention to Make a Proposal of Harvest Ontario Partners Limited Partnership

In the Matter of the Notice of Intention to Make a Proposal of Harvest Power Mustang Generation Ltd.

H.A. Rady J.

Heard: October 19, 2015
Judgment: October 28, 2015
Docket: 35-2041153, 35-2041155, 35-2041157

Counsel: Harvey Chaiton, for Mustang GP Ltd., Harvest Ontario Partners Limited Partnership and Harvest Power Mustang Generation Ltd.
Joseph Latham, for Harvest Power Inc.
Jeremy Forrest, for Proposal Trustee, Deloitte Restructuring Inc.
Robert Choi, for Badger Daylighting Limited Partnership
Curtis Cleaver, for StormFisher Ltd.

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.4 Approval by court
VI.4.a General principles
Headnote
Bankruptcy and insolvency --- Proposal — Approval by court — General principles
In September 2015, debtors filed intention to make proposal — Debtors were indirect subsidiaries of HP Inc. — SE Ltd. was competitor of HP Inc., and it expressed interest in purchasing debtors' business as going concern — SE Ltd. offered to make DIP loan of up to $1 million to fund projected shortfall in cash flow — Debtors brought motion for orders consolidating their proposal proceeding, authorizing debtors to enter into an interim financing term sheet with SE Ltd. as DIP lender, approving DIP term sheet and granting SE Ltd. super priority charge to secure all of debtors' obligations to SE Ltd. under DIP term sheet, granting charge not to exceed $150,000 in favour of debtors' legal counsel to secure payment of their reasonable fees and disbursements, granting charge up to $2,000,000 in favour of debtors' directors and officers, approving process for sale and marketing of debtors' business and assets, approving agreement of purchase and sale between SE Ltd. and debtors and granting debtors extension of time to make proposal to their creditors — Motion granted — Consolidation of debtors' notice of intention proceedings was appropriate — It avoided multiplicity of proceedings, associated costs and need to file three sets of motion materials — Three debtors were closely aligned and shared accounting, administration, human resources and financial functions — Debtors' assets were to be marketed together and form single purchase and sale transaction — DIP term sheet was approved and super priority granted — Administration charge was granted — Involvement of professional advisors was critical to successful restructuring — Process was reasonably complex and their assistance was self evidently necessary to navigate to completion — Debtors had limited means to obtain that professional assistance — Directors' of officers' charge was warranted — It was only required in event that sale was not concluded and wind down of facility was required — Directors

and officers whose participation in process was critical might not continue their involvement if relief was not granted — Sale process and stalking horse agreement were approved — It permitted sale of debtors' business as going concern — Stalking horse bid established floor price for debtors' assets — Process seemed fair and transparent and there was no viable alternative — Proposal trustee supported process and agreement — Time to file proposal was extended so sale process could be carried out.

Table of Authorities

Cases considered by *H.A. Rady J.*:

Brainhunter Inc., Re (2009), 2009 CarswellOnt 8207, 62 C.B.R. (5th) 41 (Ont. S.C.J. [Commercial List]) — followed

Colossus Minerals Inc., Re (2014), 2014 ONSC 514, 2014 CarswellOnt 1517, 14 C.B.R. (6th) 261 (Ont. S.C.J.) — considered

Comstock Canada Ltd., Re (2013), 2013 ONSC 4756, 2013 CarswellOnt 9796, 4 C.B.R. (6th) 47, 25 C.L.R. (4th) 175 (Ont. S.C.J.) — considered

Electro Sonic Inc., Re (2014), 2014 ONSC 942, 2014 CarswellOnt 1568, 14 C.B.R. (6th) 256 (Ont. S.C.J. [Commercial List]) — considered

Indalex Ltd., Re (2013), 2013 SCC 6, 2013 CarswellOnt 733, 2013 CarswellOnt 734, D.T.E. 2013T-97, 96 C.B.R. (5th) 171, 354 D.L.R. (4th) 581, 20 P.P.S.A.C. (3d) 1, 439 N.R. 235, 301 O.A.C. 1, 8 B.L.R. (5th) 1, *(*sub nom. *Sun Indalex Finance LLC v. United Steelworkers)* [2013] 1 S.C.R. 271, 2 C.C.P.B. (2nd) 1 (S.C.C.) — considered

Meta Energy Inc. v. Algatec Solarwerke Brandenberg GmbH (2012), 2012 ONSC 175, 2012 CarswellOnt 2891 (Ont. S.C.J.) — considered

P.J. Wallbank Manufacturing Co., Re (2011), 2011 ONSC 7641, 2011 CarswellOnt 15300, 88 C.B.R. (5th) 281 (Ont. S.C.J.) — considered

Statutes considered:

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

Generally — referred to

s. 13 — considered

s. 14 — considered

s. 15 — considered

s. 16 — considered

s. 17 — considered

s. 50.4 [en. 1992, c. 27, s. 19] — considered

s. 50.4(9) [en. 1992, c. 27, s. 19] — considered

s. 50.6 [en. 2005, c. 47, s. 36] — considered

s. 50.6(1) [en. 2005, c. 47, s. 36] — considered

s. 50.6(3) [en. 2005, c. 47, s. 36] — considered

s. 50.6(5) [en. 2005, c. 47, s. 36] — considered

s. 64.1 [en. 2005, c. 47, s. 42] — considered

s. 64.2(1) [en. 2005, c. 47, s. 42] — considered

s. 64.2(2) [en. 2005, c. 47, s. 42] — considered

s. 65.13 [en. 2005, c. 47, s. 44] — considered

A partial credit bid for a purchase price equal to: (i) $250,000 of the debtors' total secured obligations to StormFisher Environmental Ltd. (plus the DIP loan described below); (ii) any amounts ranking in priority to StormFisher Environmental Ltd.'s security, including the amounts secured by: (a) the administration charge; (b) the D&O charge (both described below); and (c) the amount estimated by the proposal trustee to be the aggregate fees, disbursements and expenses for the period from and after closing of the transaction for the sale the debtors' business to the completion of the *BIA* proceedings and the discharge of Deloitte Restructuring Inc. as trustee in bankruptcy of estate of the debtors.

20 The debtors and the proposal trustee prepared a cash flow forecast for September 25, 2015 to December 25, 2015. It shows that the debtors will require additional funds in order to see them through this process, while still carrying on business.

21 StormFisher Environmental Ltd. has offered to make a DIP loan of up to $1 million to fund the projected shortfall in cash flow. In return, the DIP lender requires a charge that ranks in priority to all other claims and encumbrances, except the administration and D&O charges. The administration charge protects the reasonable fees and expenses of the debtors' professional advisors. The D&O charge is to indemnify the debtors for possible liabilities such as wages, vacation pay, source deductions and environmental remedy issues. The latter may arise in the event of a wind-down or shut down of the plant and for which existing insurance policies may be inadequate. According to Mr. Davis, the risk if such a charge is not granted is that the debtors' directors and officers might resign, thereby jeopardizing the proceedings.

22 The debtors have other creditors. Harvest Power Partners had arranged for an irrevocable standby letter of credit, issued by the Bank of Montreal to fund the payment that might be required to the Ministry of Environment arising from any environment clean up that might become necessary.

23 Searches of the *PPSA* registry disclosed the following registrations:

(a) *Harvest Ontario Partners:*

(i) FCC in respect of all collateral classifications other than consumer goods. On August 12, 2015, change statement filed to reflect the assignment of FCC's Debt and Security to 2478223;

(ii) BMO in respect of accounts.

(b) *Harvest Power Mustang Generation Ltd.*

(i) FCC in respect of all collateral classifications other than consumer goods. On August 12, 2015, change statement filed to reflect the assignment of FCC's Debt and Security to 2478223;

(ii) BMO in respect of accounts; and

(iii) Roynat Inc. in respect of certain equipment.

24 There are two registrations on title to 1087 Green Valley Road. The first is for $11 million in favour of FCC dated February 28, 2012 and transferred to 2478223 on October 8, 2015. The second is a construction lien registered by Badger Daylighting Limited Partnership on July 2, 2015 for $239,191. The validity and priority of the lien claim is disputed by the debtors and 2478223.

Analysis

a) the administrative consolidation

25 The administration order, consolidating the debtors' notice of intention proceedings is appropriate for a variety of reasons. First, it avoids a multiplicity of proceedings, the associated costs and the need to file three sets of motion materials. There is no substantive merger of the bankruptcy estates but rather it provides a mechanism to achieve the just, most expeditious and least expensive determination mandated by the *BIA General Rules*. The three debtors are closely aligned and share accounting,

administration, human resources and financial functions. The sale process contemplates that the debtors' assets will be marketed together and form a single purchase and sale transaction. Harvest Ontario Partners and Harvest Power Mustang Generation Ltd. have substantially the same secured creditors and obligations. Finally, no prejudice is apparent. A similar order was granted in *Electro Sonic Inc., Re*, 2014 ONSC 942 (Ont. S.C.J. [Commercial List]).

b) the DIP agreement and charge

26 S. 50.6 of the *BIA* gives the court jurisdiction to grant a DIP financing charge and to grant it a super priority. It provides as follows:

> **50.6(1)** ***Interim Financing:*** 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(b)(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.
>
> **50.6(3)** ***Priority:*** The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.

27 S. 50.6(5) enumerates a list of factors to guide the court's decision whether to grant DIP financing:

> **50.6(5)** ***Factors to be considered:*** In deciding whether to make an order, the court is to consider, among other things,
>
> (a) the period during which the 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.

28 This case bears some similarity to *P.J. Wallbank Manufacturing Co., Re*, 2011 ONSC 7641 (Ont. S.C.J.). The court granted the DIP charge and approved the agreement where, as here, the evidence was that the debtors would cease operations if the relief were not granted. And, as here, the DIP facility is supported by the proposal trustee. The evidence is that the DIP lender will not participate otherwise.

29 The Court in *Wallbank* also considered any prejudice to existing creditors. While it is true that the DIP loan and charge may affect creditors to a degree, it seems to me that any prejudice is outweighed by the benefit to all stakeholders in a sale of the business as a going concern. I would have thought that the potential for creditor recovery would be enhanced rather than diminshed.

30 In *Comstock Canada Ltd., Re*, 2013 ONSC 4756 (Ont. S.C.J.), Justice Morawetz was asked to grant a super priority DIP charge in the context of a *Companies' Creditors Arrangement Act* proceeding. He referred to the moving party's factum, which quoted from *Indalex Ltd., Re*, 2013 SCC 6 (S.C.C.) as follows:

> [I]t is important to remember that the purpose of CCAA proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent. As my colleague, Deschamps J. observed in *Century Services*, at para. 15:
>
> > ...the purpose of the *CCAA*... is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.
>
> In the same decision, at para. 59, Deschamps J. also quoted with approval the following passage from the reasons of Doherty J.A. in *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57 (dissenting):
>
> > The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
> >
> > . . .
> >
> > Given that there was no alternative for a going-concern solution, it is difficult to accept the Court of Appeal's sweeping intimation that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust. There is no evidence in the record that gives credence to this suggestion. Not only is it contradicted by the CCAA judge's findings of fact, but case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries. The reasons given by Morawetz J. in response to the first attempt of the Executive Plan's members to reserve their rights on June 12, 2009 are instructive. He indicated that any uncertainty as to whether the lenders would withhold advances or whether they would have priority if advances were made did "not represent a positive development". He found that, in the absence of any alternative, the relief sought was "necessary and appropriate".
> >
> > [Emphasis in original]

31 I recognize that in the *Comstock* decision, the court was dealing with a *CCAA* proceeding. However, the comments quoted above seem quite apposite to this case. After all, the *CCAA* is an analogous restructuring statute to the proposal provisions of the *BIA*.

c) administration charge

32 The authority to grant this relief is found in s. 64.2 of the *BIA*.

> **64.2 (1)** ***Court may order security or charge to cover certain costs:*** On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of
>
> > (a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;
> >
> > (b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and
> >
> > (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.

> **64.2 (2)** ***Priority:*** The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

33 In this case, notice was given although it may have been short. There can be no question that the involvement of professional advisors is critical to a successful restructuring. This process is reasonably complex and their assistance is self evidently necessary to navigate to completion. The debtors have limited means to obtain this professional assistance. See also *Colossus Minerals Inc., Re*, 2014 ONSC 514 (Ont. S.C.J.) and the discussion in it.

d) the D & O charge

34 The *BIA* confers the jurisdiction to grant such a charge at s. 64.1, which provides as follows:

> **64.1 (1)** On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is 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 property of the person is subject to a security or charge — in an amount that the court considers appropriate in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.
>
> (3) The court may not make the order if in its opinion the person could obtain adequate indemnification insurance for the director or officer at a reasonable cost.
>
> (4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional default.

35 I am satisfied that such an order is warranted in this case for the following reasons:

- the D & O charge is available only to the extent that the directors and officers do not have coverage under existing policies or to the extent that those policies are insufficient;
- it is required only in the event that a sale is not concluded and a wind down of the facility is required;
- there is a possibility that the directors and officers whose participation in the process is critical, may not continue their involvement if the relief were not granted;
- the proposal trustee and the proposed DIP lender are supportive;

e) the sale process and the stalking horse agreement of purchaser sale

36 The court's power to approve a sale of assets in the context of a proposal is set out in s. 65.13 of the *BIA*. However, the section does not speak to the approval of a sale process.

37 In *Brainhunter Inc., Re* (2009), 62 C.B.R. (5th) 41 (Ont. S.C.J. [Commercial List]), Justice Morawetz considered the criteria to be applied on a motion to approve a stalking horse sale process in a restructuring application under the *CCAA* and in particular s. 36, which parallels s. 65.13 of the *BIA*. He observed:

> 13. The use of a stalking horse bid process has become quite popular in recent CCAA filings. In *Nortel Networks Corp., Re*, [2009] O.J. No. 3169(Ont. S.C.J. [Commercial List]), I approved a stalking horse sale process and set out four factors (the "Nortel Criteria") the court should consider in the exercise of its general statutory discretion to determine whether to authorize a sale process:

TAB 7

2012 ONSC 948
Ontario Superior Court of Justice [Commercial List]

Timminco Ltd., Re

2012 CarswellOnt 1466, 2012 ONSC 948, 211 A.C.W.S. (3d) 881, 86 C.B.R. (5th) 171, 95 C.C.P.B. 222

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

In the Matter of a Plan of Compromise or Arrangement of Timminco Limited and Bécancour Silicon Inc. (Applicants)

Morawetz J.

Heard: January 27, 2012; February 6, 2012
Judgment: February 9, 2012
Docket: CV-12-9539-00CL

Counsel: A. J. Taylor, M. Konyukhova, for Applicants
K. Stuebing, D. Wray, for Communications, Energy and Paperworkers' Union of Canada ("CEP")
L. Rogers, for FTI Consulting Canada Inc.
D. Bish, for QSI Partners Ltd.
C. Sinclair, for United Steelworkers' Union ("USW")
S. Scharbach, D. McPhail, for FSCO
H. Meredith, for AMG Advance Metallurgical Group NV
B. Boake, for Dow Corning
A. Kauffman, for Investissement Quebec
J. Orr, M. Spencer, for Class Action Plaintiffs

Subject: Insolvency; Corporate and Commercial
Related Abridgment Classifications
Bankruptcy and insolvency
I Bankruptcy and insolvency jurisdiction
I.1 Constitutional jurisdiction of Federal government and provinces
I.1.c Paramountcy of Federal legislation
Bankruptcy and insolvency
X Priorities of claims
X.1 Secured claims
X.1.b Forms of secured interests
X.1.b.xii Miscellaneous
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.1 General principles
XIX.1.c Application of Act
XIX.1.c.iv Miscellaneous
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
Pensions
I Private pension plans
I.2 Payment of pension

I.2.l Bankruptcy or insolvency of employer
I.2.l.iv Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Application of Act — Miscellaneous

Relationship between Act and provincial pensions acts — Pension plans sponsored by insolvent companies were underfunded at time proceedings under Companies' Creditors Arrangement Act (CCAA) were initiated — Insolvent companies negotiated with several parties and eventually obtained DIP agreement with Q Ltd. (DIP lender) — Agreement was conditional on court approval and priority charge in favour of DIP lender (DIP charge) ahead of all security interests, including deemed trusts under provincial pensions acts, other than two charges granted by earlier decision — DIP facility would provide sufficient liquidity to conduct orderly marketing process of insolvent companies' business — Insolvent companies brought motion for order approving DIP facility and granting priority charge in favour of DIP lender — Motion granted — DIP facility was approved — DIP charge was granted with super priority, behind only two specified charges — Court had jurisdiction to override provisions of provincial pensions acts to extent of approving DIP charge — It was necessary to invoke doctrine of paramountcy such that provisions of CCAA overrode those of provincial acts — Relevant analysis was found in earlier decision in CCAA proceedings of same insolvent companies, granting super priority to two charges — Without approval of DIP facility and DIP charge, there would be no money available, and would likely result in bankruptcy proceedings.

Bankruptcy and insolvency --- Bankruptcy and insolvency jurisdiction — Constitutional jurisdiction of Federal government and provinces — Paramountcy of Federal legislation

Pension plans sponsored by insolvent companies were underfunded at time proceedings under Companies' Creditors Arrangement Act (CCAA) were initiated — Insolvent companies negotiated with several parties and eventually obtained DIP agreement with Q Ltd. (DIP lender) — Agreement was conditional on court approval and priority charge in favour of DIP lender (DIP charge) ahead of all security interests, including deemed trusts under provincial pensions acts, other than two charges granted by earlier decision — DIP facility would provide sufficient liquidity to conduct orderly marketing process of insolvent companies' business — Insolvent companies brought motion for order approving DIP facility and granting priority charge in favour of DIP lender — Motion granted — DIP facility was approved — DIP charge was granted with super priority, behind only two specified charges — Court had jurisdiction to override provisions of provincial pensions acts to extent of approving DIP charge — It was necessary to invoke doctrine of paramountcy such that provisions of CCAA overrode those of provincial acts — Relevant analysis was found in earlier decision in CCAA proceedings of same insolvent companies, granting super priority to two charges — Without approval of DIP facility and DIP charge, there would be no money available, and would likely result in bankruptcy proceedings.

Pensions --- Payment of pension — Bankruptcy or insolvency of employer — Miscellaneous

Priority of DIP financing charge over pension payments — Pension plans sponsored by insolvent companies were underfunded at time proceedings under Companies' Creditors Arrangement Act (CCAA) were initiated — Insolvent companies negotiated with several parties and eventually obtained DIP agreement with Q Ltd. (DIP lender) — Agreement was conditional on court approval and priority charge in favour of DIP lender (DIP charge) ahead of all security interests, including deemed trusts under provincial pensions acts, other than two charges granted by earlier decision — DIP facility would provide sufficient liquidity to conduct orderly marketing process of insolvent companies' business — Insolvent companies brought motion for order approving DIP facility and granting priority charge in favour of DIP lender — Motion granted — DIP facility was approved — DIP charge was granted with super priority, behind only two specified charges — Court had jurisdiction to override provisions of provincial pensions acts to extent of approving DIP charge — Relevant analysis was found in earlier decision in CCAA proceedings of same insolvent companies, granting super priority to two charges — It was unrealistic to expect that commercially motivated party would make advances to insolvent companies for purpose of making special payments to pension plans — Without approval of DIP facility and DIP charge, there would be no money available, and would likely result in bankruptcy proceedings.

Bankruptcy and insolvency --- Priorities of claims — Secured claims — Forms of secured interests — Miscellaneous

DIP financing — Companies' Creditors Arrangement Act — Pension plans sponsored by insolvent companies were underfunded at time proceedings under Companies' Creditors Arrangement Act (CCAA) were initiated — Insolvent companies negotiated with several parties and eventually obtained DIP agreement with Q Ltd. (DIP lender) — Agreement was conditional on court approval and priority charge in favour of DIP lender (DIP charge) ahead of all security interests, including deemed trusts under

provincial pensions acts, other than two charges granted by earlier decision — DIP facility would provide sufficient liquidity to conduct orderly marketing process of insolvent companies' business — Insolvent companies brought motion for order approving DIP facility and granting priority charge in favour of DIP lender — Motion granted — DIP facility was approved — DIP charge was granted with super priority, behind only two specified charges — Section 11.2 of CCAA provided court with express jurisdiction to grant DIP financing charge — Considering facts and factors in s. 11.2 of CCAA, DIP facility was necessary — Requirements of s. 11.2 of CCAA were satisfied — Not granting requested relief, as submitted by unions, would do nothing to improve position of union's members — Without approval of DIP facility and DIP charge, there would be no money available, and would likely result in bankruptcy.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

DIP financing — Super priority — Pension plans sponsored by insolvent companies were underfunded at time proceedings under Companies' Creditors Arrangement Act (CCAA) were initiated — Insolvent companies negotiated with several parties and eventually obtained DIP agreement with Q Ltd. (DIP lender) — Agreement was conditional on court approval and priority charge in favour of DIP lender (DIP charge) ahead of all security interests, including deemed trusts under provincial pensions acts, other than two charges granted by earlier decision — DIP facility would provide sufficient liquidity to conduct orderly marketing process of insolvent companies' business — Insolvent companies brought motion for order approving DIP facility and granting priority charge in favour of DIP lender — Motion granted — DIP facility was approved — DIP charge was granted with super priority, behind only two specified charges — Alternative of DIP charge without super priority was not realistic — It was unrealistic to expect that commercially motivated DIP lender would advance funds without receiving super priority — It was essential and necessary to grant super priority DIP charge, in order to provide opportunity for restructuring plan — Objectives of CCAA would be frustrated if super priority was not granted — Failure to grant super priority would likely result in cessation of operations, leading to bankruptcy proceedings, which would be prejudicial to all stakeholders, including pensions members.

Table of Authorities

Cases considered by *Morawetz J.*:

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

Timminco Ltd., Re (2012), 2012 ONSC 506, 2012 CarswellOnt 1263 (Ont. S.C.J. [Commercial List]) — followed

Statutes considered:

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

Generally — referred to

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

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

s. 11.2(2) [en. 1997, c. 12, s. 124] — considered

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

Pension Benefits Act, R.S.O. 1990, c. P.8

Generally — referred to

Régimes complémentaires de retraite, Loi sur les, L.R.Q., c. R-15.1

en général — referred to

MOTION by insolvent companies for order approving DIP facility and granting priority charge in favour of DIP lender.

***Morawetz J.*:**

1 Timminco Limited and Bécancour Silicon Inc. (together, the "Timminco Entities") brought this motion for an order approving the DIP Facility (defined below) and granting a priority charge on the current and future assets, undertakings and properties of the Timminco Entities in favour of the DIP Lender (defined below).

2 CEP and USW opposed the motion, especially the request to grant super priority to the DIP Lender.

45 I have taken the above findings into consideration, as well as the factors set out at [34] above. A review of these factors leads to the conclusion that the DIP Facility is necessary. The requirements of s. 11.2 of the CCAA have, in my view, been satisfied.

46 It is unrealistic to expect that any commercially motivated DIP Lender will advance funds without receiving the priority that is being requested on this motion. It is also unrealistic to expect that any commercially motivated party would make advances to the Timminco Entities for the purpose of making special payments or other payments under the pension plans.

47 The alternative proposed by CEP — of a DIP Charge without super priority — is not, in my view, realistic, nor is directing the Monitor to investigate alternative financing without providing super priority. If there is going to be any opportunity for the Timminco Entities to put forth a restructuring plan, it seems to me that it is essential and necessary for the DIP Financing to be approved and the DIP Charge granted. The alternative is a failed CCAA process.

48 This underscores the lack of other viable options that was fully considered in the first Timminco endorsement (*Timminco Ltd., Re*, 2012 ONSC 506 (Ont. S.C.J. [Commercial List])). The situation has not changed. The reality, in my view, is that there is no real alternative. The position being put forth by CEP does not, in my view, satisfactorily present any viable alternative. In this respect, it seems to me that the challenge of the unions to the position being taken by the Timminco Entities is suspect, as the only alternative is a shutdown. It is impossible for me to reach any conclusion other than the fact that there simply is no other viable alternative.

49 In the absence of the court granting the requested super priority, the objectives of the CCAA would be frustrated. It is neither reasonable nor realistic to expect a commercially motivated DIP lender to advance funds in a DIP facility without super priority. The outcome of a failure to grant super priority would, in all likelihood, result in the Timminco Entities having to cease operations, which would likely result in the CCAA proceedings coming to an abrupt halt, followed by bankruptcy proceedings. Such an outcome would be prejudicial to all stakeholders, including CEP and USW.

50 The analysis in the present motion is the same as that set out in *Timminco Ltd., Re*, 2012 ONSC 506 (Ont. S.C.J. [Commercial List])). The outcome of this motion is consistent with that analysis. I am satisfied that bankruptcy is not the answer and, in order to ensure that the objectives of the CCAA are fulfilled, it is necessary to invoke the doctrine of paramountcy such that the provisions of the CCAA override those of the QSPPA and the OPBA.

51 On the facts before me, I am satisfied that it is both necessary and appropriate to approve the DIP Facility. It is also, in my view, both necessary and appropriate to grant the D&O Charge and to provide that the D&O Charge has priority over the Encumbrances, including without limitation any deemed trust created under the OPBA or the QSPPA.

52 The motion is, therefore, granted. The DIP Facility is approved and the DIP Charge is granted with the requested super priority.

Motion granted.

Appendix A

CITATION: Timminco Limited (Re), 2012 ONSC 506

COURT FILE NO.: CV-12-9539-00CL

DATE: 20120202

SUPERIOR COURT OF JUSTICE — ONTARIO

(COMMERCIAL LIST)

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

TAB 8

2013 ONSC 1780
Ontario Superior Court of Justice [Commercial List]

Northstar Aerospace Inc., Re

2013 CarswellOnt 4056, 2013 ONSC 1780, 227 A.C.W.S. (3d) 929

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

In the Matter of a Plan of Compromise or Arrangement of Northstar Aerospace, Inc., Northstar Aerospace (Canada) Inc., 2007775 Ontario Inc. and 3024308 Nova Scotia Company Applicants

Morawetz J.

Judgment: April 9, 2013
Docket: CV-12-9761-00CL

Counsel: C.J. Hill, J. Szumski for Court-Appointed Monitor, Ernst & Young Inc.
J. Wall for Her Majesty the Queen in Right of Ontario, as Represented by the Ministry of the Environment
P. Guy, K. Montpetit for Former Directors and Officers Group
Steven Weisz for Fifth Third Bank

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
Applicant companies obtained protection from their creditors under Companies' Creditors Arrangement Act (CCAA) — Court-appointed monitor of applicants brought motion for approval of adjudication process — Monitor also sought final determination as to whether two claims were valid claims for which former directors and officers of applicants ("D&Os") were indemnified pursuant to indemnity contained in initial order — If they were so indemnified, D&Os may have been entitled to benefit of certain funds held in reserve by monitor (D&O charge reserve) to satisfy such claims — Two claims in issue were described in proofs of claim filed by provincial Crown as represented by Ministry of Environment (MOE) and by other party on behalf of certain of D&Os — Motion granted; adjudication process approved; D&Os were not entitled to benefit of D&O charge reserve; D&O charge reserve was to be paid to pre-filing agent — To determine that proofs of claim were claims for which D&Os were entitled to be indemnified under Director's Indemnity would wrongly and inequitably affect priority of claims as between Ministry and bank — It would lead to inconsistent results if MOE could, in CCAA proceedings, improve its unsecured position against bank by issuing Director's Order after commencement of CCAA proceedings, based on environmental condition which occurred long before CCAA proceedings — This would result in Ministry achieving indirectly in these CCAA proceedings that which it could not achieve directly — In CCAA proceedings, Ministry claim was unsecured claim and did not entitle Ministry to obtain remedy sought.
Table of Authorities
Cases considered by *Morawetz J.*:
Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) — referred to
Canwest Publishing Inc./Publications Canwest Inc., Re (2010), 63 C.B.R. (5th) 115, 2010 CarswellOnt 212, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) — referred to

Northstar Aerospace Inc., Re (2012), 2012 ONSC 3974, 2012 CarswellOnt 8605 (Ont. S.C.J. [Commercial List]) — referred to

Northstar Aerospace Inc., Re (2012), 91 C.B.R. (5th) 268, 2012 CarswellOnt 9607, 2012 ONSC 4423 (Ont. S.C.J. [Commercial List]) — followed

Northstar Aerospace Inc., Re (2012), 2012 ONSC 6362, 2012 CarswellOnt 14149 (Ont. S.C.J. [Commercial List]) — followed

Statutes considered:

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

Generally — referred to

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

s. 11.51(1) [en. 2005, c. 47, s. 128] — considered

s. 11.51(2) [en. 2005, c. 47, s. 128] — considered

Environmental Protection Act, R.S.O. 1990, c. E.19

Generally — referred to

MOTION by court-appointed monitor of applicant companies for approval of adjudication process and for final determination with respect to validity of claims and indemnity.

***Morawetz J.*:**

Motion Overview

1 This is a motion brought by Ernst & Young Inc., in its capacity as court-appointed Monitor (the "Monitor") of Northstar Aerospace, Inc. ("Northstar Inc."), Northstar Aerospace (Canada) Inc., 2007775 Ontario Inc. and 3024308 Nova Scotia Company (collectively, the "Applicants"), for approval of an adjudication process and for a final determination with respect to whether two claims submitted in the claims procedure (the "Claims Procedure") authorized by order of August 2, 2012 (the "Claims Procedure Order") are valid claims for which the former directors and officers of the Applicants (the "D&Os") are indemnified pursuant to the indemnity (the "Directors' Indemnity") contained in paragraph 23 of the Initial Order dated June 14, 2012 [2012 CarswellOnt 8605 (Ont. S.C.J. [Commercial List])] (the "Initial Order").

2 If they are so indemnified, the D&Os may be entitled to the benefit of certain funds held in a reserve by the Monitor (the "D&O Charge Reserve") to satisfy such claims. If they are not, then there are no claims against the D&O Charge Reserve and the funds can be released to Fifth Third Bank, in its capacity as agent for itself, First Merit Bank, N.A. and North Shore Community Bank & Trust Company (in such capacity, the "Pre-Filing Agent").

3 For the following reasons, I have determined that the adjudication process should be approved and that the D&Os are not entitled to the benefit of the D&O Charge Reserve.

4 In my view, for the purposes of determining this motion, it is not necessary to determine whether the claims filed by the MOE and the D&Os are pre-filing or post-filing claims. References in this endorsement to "MOE Pre-Filing D&O Claim", "MOE Post-Filing D&O Claim" and "WeirFoulds Post-Filing D&O Claim" have been taken from the materials filed by the parties. This endorsement includes references to those terms for identification purposes, but no determination is being made as to whether these claims are pre-filing or post-filing claims.

5 The two claims at issue are described in proofs of claim (collectively, "the Proofs of Claim") filed by Her Majesty the Queen in Right of the Province of Ontario as Represented by the Ministry of the Environment (the "MOE") and by WeirFoulds LLP ("WeirFoulds") on behalf of certain of the D&Os ("WeirFoulds D&Os").

6 The MOE proof of claim (the "MOE Proof of Claim") asserts, among other things, a "Pre-Filing D&O Claim" (the "MOE Pre-Filing D&O Claim") and a "Post-Filing D&O Claim" (the "MOE Post-Filing D&O Claim") (collectively, the "MOE D&O

for determination as to whether any claim asserted in the Claims Procedure is a post-filing D&O claim which constitutes a claim for which the D&Os are indemnified under the Directors' Indemnity.

Issues to Consider

24 The D&Os are bringing a motion on April 18, 2013 to determine the proper venue for the adjudication of the Post-Filing D&O Claims. There is considerable overlap between the issues raised on this motion and the issues raised on the pending motion.

25 In my view, it is appropriate for this endorsement to exclusively address the narrow issue raised in this motion, namely, whether the Proofs of Claims are valid claims for which the D&Os are indemnified pursuant to the Directors' Indemnity contained in the Initial Order. A consideration of whether the claims are pre-filing claims or post-filing claims, with respect to the D&Os, is better addressed in the motion returnable on April 18, 2013.

26 The Monitor's counsel appropriately sets out the issues of this motion, as follows:

> (a) Whether the court should approve the proposed adjudication process and issue a determination as to whether the disputed post-filing D&O claims constitute valid claims for which the D&Os are indemnified under the Directors' Indemnity;
>
> (b) Whether the MOE Post-Filing D&O Claim is a valid claim for which the D&Os are indemnified under the Directors' Indemnity;
>
> (c) Whether the WeirFoulds Post-Filing D&O Claim is a valid claim for which the D&Os are indemnified under the Directors' Indemnity; and
>
> (d) Whether the D&O Charge Reserve should be released and paid over to the Pre-Filing Agent.

Analysis and Conclusion

27 I conclude, for the following reasons, that (a) the adjudication process should be approved; (b) the MOE Post-Filing D&O Claims are not claims for which the D&Os are indemnified under paragraph 23 of the Initial Order; (c) the WeirFoulds Post-Filing D&O Claims are not claims for which the D&Os are indemnified under paragraph 23 of the Initial Order; and (d) the D&O Charge Reserve should be paid over to the Pre-Filing Agent.

28 The Directors' Charge, as contemplated by section 11.51 of the CCAA, is appropriate in the current circumstances (notwithstanding it being a discretionary and extraordinary provision, as outlined above) because it is directly tailored to the purposes of creating a charge, and its impact is limited.

29 The purpose of a section 11.51 charge is twofold: (1) to keep the directors and officers in place during the restructuring to avoid a potential destabilization of the business; and (2) to enable the CCAA applicants to benefit from experienced board of directors and experienced senior management. Courts have accepted that, without certain protections, officers and directors will often discontinue their service in CCAA restructurings. See *Canwest Global Communications Corp., Re* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) and *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]).

30 In this case, the Applicants' basis for seeking the Directors' Charge is set out in the affidavit of Mr. Yuen, sworn June 13, 2012, which was filed in support of the Initial Order application. He described the purpose of the Directors' Charge as:

> To ensure the ongoing stability of the CCAA Entities' business during the CCAA period, the CCAA Entities require the continued participation of the CRO and the CCAA Entities' officers and executives who manage the business and commercial activities of the CCAA Entities.

TAB 9

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

Canwest Global Communications Corp., Re

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

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

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

Pepall J.

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

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

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.e Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Miscellaneous

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

Table of Authorities

Cases considered by *Pepall J.*:

Cadillac Fairview Inc., Re (1995), 1995 CarswellOnt 36, 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List]) — referred to
Calpine Canada Energy Ltd., Re (2006), 19 C.B.R. (5th) 187, 2006 ABQB 153, 2006 CarswellAlta 446 (Alta. Q.B.) — referred to
General Publishing Co., Re (2003), 39 C.B.R. (4th) 216, 2003 CarswellOnt 275 (Ont. S.C.J.) — referred to
Global Light Telecommunications Inc., Re (2004), 2004 BCSC 745, 2004 CarswellBC 1249, 2 C.B.R. (5th) 210, 33 B.C.L.R. (4th) 155 (B.C. S.C.) — referred to
Grant Forest Products Inc., Re (2009), 2009 CarswellOnt 4699, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) — followed
Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to
Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed
Smurfit-Stone Container Canada Inc., Re (2009), 50 C.B.R. (5th) 71, 2009 CarswellOnt 391 (Ont. S.C.J. [Commercial List]) — referred to
Stelco Inc., Re (2004), 48 C.B.R. (4th) 299, 2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List]) — referred to
Stelco Inc., Re (2004), 2004 CarswellOnt 2936 (Ont. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to
Bankruptcy Code, 11 U.S.C.
Chapter 15 — referred to
Canada Business Corporations Act, R.S.C. 1985, c. C-44
Generally — referred to

s. 106(6) — referred to

s. 133(1) — referred to

s. 133(1)(b) — referred to

s. 133(3) — referred to
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — considered

s. 2 "debtor company" — referred to

s. 11 — considered

s. 11(2) — referred to

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

s. 11.2(1) [en. 2005, c. 47, s. 128] — referred to

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

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

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

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

(f) Directors' and Officers' Charge

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

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

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

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

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

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

(g) Key Employee Retention Plans

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

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

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

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

Annual Meeting

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

TAB 10

2014 ONSC 514
Ontario Superior Court of Justice

Colossus Minerals Inc., Re

2014 CarswellOnt 1517, 2014 ONSC 514, 14 C.B.R. (6th) 261, 237 A.C.W.S. (3d) 584

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

In the Matter of the Notice of Intention of Colossus Minerals Inc., of the City of Toronto in the Province of Ontario

H.J. Wilton-Siegel J.

Heard: January 16, 2014
Judgment: February 7, 2014
Docket: CV-14-10401-00CL

Counsel: S. Brotman, D. Chochla for Applicant, Colossus Minerals Inc.
L. Rogers, A. Shalviri for DIP Agent, Sandstorm Gold Inc.
H. Chaiton for Proposal Trustee
S. Zweig for Ad Hoc Group of Noteholders and Certain Lenders

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XX Miscellaneous
Headnote
Bankruptcy and insolvency --- Miscellaneous
Applicant filed notice of intention to make proposal under s. 50.4(1) of Bankruptcy and Insolvency Act (Can.) (BIA) on January 13, 2014 — Main asset of applicant was 75 percent interest in gold and platinum project in Brazil, which was held by subsidiary — Project was nearly complete — However, there was serious water control issue that urgently required additional de-watering facilities to preserve applicant's interest in project — As none of applicant's mining interests, including project, were producing, it had no revenue and had been accumulating losses — Applicant sought orders granting various relief under BIA — Application granted — Court granted approval of debtor-in-possession loan (DIP Loan) and DIP charge dated January 13, 2014 with S Inc. and certain holders of applicant's outstanding gold-linked notes in amount up to $4 million, subject to first-ranking charge on applicant`s property, being DIP charge — Court also approved first-priority administration charge in maximum amount of $300,000 to secure fees and disbursements of proposal trustee and counsel — Proposed services were essential both to successful proceeding under BIA as well as for conduct of sale and investor solicitation process — Court approved indemnity and priority charge to indemnify applicant`s directors and officers for obligations and liabilities they may incur in such capacities from and after filing of notice of intention to make proposal — Remaining directors and officers would not continue without indemnification — Court also approved sale and investor solicitation process and engagement letter with D Ltd. for purpose of identifying financing and/or merger and acquisition opportunities available to applicant — Time to file proposal under BIA was extended.
Table of Authorities
Statutes considered:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 50.4(1) [en. 1992, c. 27, s. 19] — considered

s. 50.4(8) [en. 1992, c. 27, s. 19] — considered

s. 50.4(9) [en. 1992, c. 27, s. 19] — referred to

s. 50.6(1) [en. 2005, c. 47, s. 36] — considered

s. 50.6(5) [en. 2007, c. 36, s. 18] — considered

s. 64.1 [en. 2005, c. 47, s. 42] — considered

s. 64.2 [en. 2005, c. 47, s. 42] — considered

s. 65.13 [en. 2005, c. 47, s. 44] — referred to

s. 65.13(1) [en. 2005, c. 47, s. 44] — considered

s. 65.13(4) [en. 2005, c. 47, s. 44] — considered

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

Generally — referred to

APPLICATION by debtor for various orders under *Bankruptcy and insolvency.*

***H.J. Wilton-Siegel J.*:**

1 The applicant, Colossus Minerals Inc. (the "applicant" or "Colossus"), seeks an order granting various relief under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA"). The principal secured creditors of Colossus were served and no objections were received regarding the relief sought. In view of the liquidity position of Colossus, the applicant was heard on an urgent basis and an order was issued on January 16, 2014 granting the relief sought. This endorsement sets out the Court's reasons for granting the order.

Background

2 The applicant filed a notice of intention to make a proposal under s. 50.4(1) of the BIA on January 13, 2014. Duff & Phelps Canada Restructuring Inc. (the "Proposal Trustee") has been named the Proposal Trustee in these proceedings. The Proposal Trustee has filed its first report dated January 14, 2014 addressing this application, among other things. The main asset of Colossus is a 75% interest in a gold and platinum project in Brazil (the "Project"), which is held by a subsidiary. The Project is nearly complete. However, there is a serious water control issue that urgently requires additional de-watering facilities to preserve the applicant's interest in the Project. As none of the applicant's mining interests, including the Project, are producing, it has no revenue and has been accumulating losses. To date, the applicant has been unable to obtain the financing necessary to fund its cash flow requirements through to the commencement of production and it has exhausted its liquidity.

DIP Loan and DIP Charge

3 The applicant seeks approval of a Debtor-in-Possession Loan (the "DIP Loan") and DIP Charge dated January 13, 2014 with Sandstorm Gold Inc. ("Sandstorm") and certain holders of the applicant's outstanding gold-linked notes (the "Notes") in an amount up to $4 million, subject to a first-ranking charge on the property of Colossus, being the DIP Charge. The Court has the authority under section 50.6(1) of the BIA to authorize the DIP Loan and DIP Charge, subject to a consideration of the factors under section 50.6(5). In this regard, the following matters are relevant.

4 First, the DIP Loan is to last during the currency of the sale and investor solicitation process ("SISP") discussed below and the applicant has sought an extension of the stay of proceedings under the BIA until March 7, 2014. The applicant's cash flow statements show that the DIP Loan is necessary and sufficient to fund the applicant's cash requirements until that time.

5 Second, current management will continue to operate Colossus during the stay period to assist in the SISP. Because Sandstorm has significant rights under a product purchase agreement pertaining to the Project and the Notes represent the

applicant's largest debt obligation, the DIP Loan reflects the confidence of significant creditors in the applicant and its management.

6 Third, the terms of the DIP Loan are consistent with the terms of DIP financing facilities in similar proceedings.

7 Fourth, Colossus is facing an imminent liquidity crisis. It will need to cease operations if it does not receive funding. In such circumstances, there will be little likelihood of a viable proposal.

8 Fifth, the DIP Loan is required to permit the SISP to proceed, which is necessary for any assessment of the options of a sale and a proposal under the BIA. It will also fund the care and maintenance of the Project without which the asset will deteriorate thereby seriously jeopardizing the applicant's ability to make a proposal. This latter consideration also justifies the necessary adverse effect on creditors' positions. The DIP Charge will, however, be subordinate to the secured interests of Dell Financial Services Canada Limited Partnership ("Dell") and GE VFS Canada Limited Partnership ("GE") who have received notice of this application and have not objected.

9 Lastly, the Proposal Trustee has recommended that the Court approve the relief sought and supports the DIP Loan and DIP Charge.

10 For the foregoing reasons, I am satisfied that the Court should authorize the DIP Loan and the DIP Charge pursuant to s. 50.6(1) of the BIA.

Administration Charge

11 Colossus seeks approval of a first-priority administration charge in the maximum amount of $300,000 to secure the fees and disbursements of the Proposal Trustee, the counsel to the Proposal Trustee, and the counsel to the applicant in respect of these BIA proceedings.

12 Section 64.2 of the BIA provides jurisdiction to grant a super-priority for such purposes. The Court is satisfied that such a charge is appropriate for the following reasons.

13 First, the proposed services are essential both to a successful proceeding under the BIA as well as for the conduct of the SISP.

14 Second, the quantum of the proposed charge is appropriate given the complexity of the applicant's business and of the SISP, both of which will require the supervision of the Proposal Trustee.

15 Third, the proposed charge will be subordinate to the secured interests of GE and Dell.

Directors' and Officers' Charge

16 Colossus seeks approval of an indemnity and priority charge to indemnify its directors and officers for obligations and liabilities they may incur in such capacities from and after the filing of the Notice of Intention (the "D&O Charge"). It is proposed that the D&O Charge be in the amount of $200,000 and rank after the Administration Charge and prior to the DIP Charge.

17 The Court has authority to grant such a charge under s. 64.1 of the BIA. I am satisfied that it is appropriate to grant such relief in the present circumstances for the following reasons.

18 First, the Court has been advised that the existing directors' and officers' insurance policies contain certain limits and exclusions that create uncertainty as to coverage of all potential claims. The order sought provides that the benefit of the D&O Charge will be available only to the extent that the directors and officers do not have coverage under such insurance or such coverage is insufficient to pay the amounts indemnified.

19 Second, the applicant's remaining directors and officers have advised that they are unwilling to continue their services and involvement with the applicant without the protection of the D&O Charge.

20 Third, the continued involvement of the remaining directors and officers is critical to a successful SISP or any proposal under the BIA.

21 Fourth, the Proposal Trustee has stated that the D&O Charge is reasonable and supports the D&O Charge.

The SISP

22 The Court has the authority to approve any proposed sale under s. 65.13(1) of the BIA subject to consideration of the factors in s. 65.13(4). At this time, Colossus seeks approval of its proposed sales process, being the SISP. In this regard, the following considerations are relevant.

23 First, the SISP is necessary to permit the applicant to determine whether a sale transaction is available that would be more advantageous to the applicant and its stakeholders than a proposal under the BIA. It is also a condition of the DIP Loan. In these circumstances, a sales process is not only reasonable but also necessary.

24 Second, it is not possible at this time to assess whether a sale under the SISP would be more beneficial to the creditors than a sale under a bankruptcy. However, the conduct of the SISP will allow that assessment without any obligation on the part of the applicant to accept any offer under the SISP.

25 Third, the Court retains the authority to approve any sale under s. 65.13 of the BIA.

26 Lastly, the Proposal Trustee supports the proposed SISP.

27 Accordingly, I am satisfied that the SISP should be approved at this time.

Engagement Letter with the Financial Advisor

28 The applicant seeks approval of an engagement letter dated November 27, 2013 with Dundee Securities Limited ("Dundee") (the "Engagement Letter"). Dundee was engaged at that time by the special committee of the board of directors of the applicant as its financial advisor for the purpose of identifying financing and/or merger and acquisition opportunities available to the applicant. It is proposed that Dundee will continue to be engaged pursuant to the Engagement Letter to run the SISP together with the applicant under the supervision of the Proposal Trustee.

29 Under the Engagement Letter, Dundee will receive certain compensation including a success fee. The Engagement Letter also provides that amounts payable thereunder are claims that cannot be compromised in any proposal under the BIA or any plan of arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA").

30 Courts have approved success fees in the context of restructurings under the CCAA. The reasoning in such cases is equally applicable in respect of restructurings conducted by means of proposal proceedings under the BIA. As the applicant notes, a success fee is both appropriate and necessary where the debtor lacks the financial resources to pay advisory fees on any other basis.

31 For the following reasons, I am satisfied that the Engagement Letter, including the success fee arrangement, should be approved by the Court and that the applicant should be authorized to continue to engage Dundee as its financial advisor in respect of the SISP.

32 Dundee has considerable industry experience as well as familiarity with Colossus, based on its involvement with the company prior to the filing of the Notice of Intention.

33 As mentioned, the SISP is necessary to permit an assessment of the best option for stakeholders.

34 In addition, the success fee is necessary to incentivize Dundee but is reasonable in the circumstances and consistent with success fees in similar circumstances.

TAB 11

2021 SCC 30, 2021 CSC 30
Supreme Court of Canada

Canada v. Canada North Group Inc.

2021 CarswellAlta 1780, 2021 CarswellAlta 1781, 2021 SCC 30, 2021 CSC 30, [2021] 10 W.W.R. 1, [2021] 5 C.T.C. 111, [2021] A.W.L.D. 3408, [2021] A.W.L.D. 3521, 19 B.L.R. (6th) 1, 2021 D.T.C. 5080, 2021 D.T.C. 5081, 28 Alta. L.R. (7th) 1, 333 A.C.W.S. (3d) 23, 460 D.L.R. (4th) 309, 91 C.B.R. (6th) 1, EYB 2021-397318

Her Majesty The Queen in Right of Canada (Appellant) and Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., DJ Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd., 1919209 Alberta Ltd., Ernst & Young Inc. in its capacity as monitor and Business Development Bank of Canada (Respondents) and Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals (Interveners)

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

Heard: December 1, 2020
Judgment: July 28, 2021
Docket: 38871

Proceedings: affirming *Canada v. Canada North Group Inc.* (2019), *(*sub nom. *The Queen v. Canada North Group Inc.)* 2019 D.T.C. 5111, 11 P.P.S.A.C. (4th) 157, [2019] 12 W.W.R. 635, 93 Alta. L.R. (6th) 29, 437 D.L.R. (4th) 122, 72 C.B.R. (6th) 161, 2019 ABCA 314, 2019 CarswellAlta 1815, 95 B.L.R. (5th) 222, Frederica Schutz J.A., Patricia Rowbotham J.A., Thomas W. Wakeling J.A. (Alta. C.A.); affirming *Canada North Group Inc (Companies' Creditors Arrangement Act)* (2017), 2017 ABQB 550, 2017 CarswellAlta 1631, [2018] 2 W.W.R. 731, 60 Alta. L.R. (6th) 103, 52 C.B.R. (6th) 308, J.E. Topolniski J. (Alta. Q.B.)

Counsel: Michael Taylor, Louis L'Heureux, for Appellant
Darren R. Bieganek, Q.C., Brad Angove, for Respondents, Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., DJ Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd., 1919209 Alberta Ltd. and Ernst & Young Inc. in its capacity as Monitor
Jeffrey Oliver, Mary I. A. Buttery, Q.C., for Respondent, Business Development Bank of Canada
Kelly J. Bourassa, for Intervener, Insolvency Institute of Canada
Randal Van de Mosselaer, for Intervener, Canadian Association of Insolvency and Restructuring Professionals

Subject: Civil Practice and Procedure; Estates and Trusts; Income Tax (Federal); Insolvency; Tax — Miscellaneous
Related Abridgment Classifications
Bankruptcy and insolvency
X Priorities of claims
X.5 Claims of Crown
X.5.a Federal
X.5.a.iv Income tax, unemployment insurance, and Canada Pension Plan
X.5.a.iv.B Creation of statutory trust
Tax
II Income tax
II.22 Special rules
II.22.d Bankruptcy
II.22.d.i Corporations
Headnote
Tax --- Income tax — Special rules — Bankruptcy — Corporations

In debtors' restructuring proceedings under Companies' Creditors Arrangement Act (CCAA), court granted "super-priority" or priming charges in favour of interim financier and others — Motion by Canada Revenue Agency (CRA) for order that such court-ordered interests did not take priority over statutory deemed trusts for unremitted source deductions was dismissed on basis that CCAA allowed court to rank priority charges necessary for restructuring ahead of CRA's interest — Crown's appeal was dismissed — Crown appealed — Appeal dismissed — CCAA generally empowers supervising judges to order super-priority charges with priority over all other claims, even those protected by deemed trusts, and financing was critical aspect of CCAA regime premised on restructuring to preserve debtors' greater value as going concerns — Most important feature of CCAA was broad discretionary power vested in supervising court by s. 11 — Preservation by s. 37(2) of CCAA of deemed trusts created by s. 227(4.1) of Income Tax Act (ITA) does not modify their characteristics — Section 227(4.1) of ITA does not establish proprietary interest because Crown's claim does not attach to any specific asset — Deemed removal of property from debtor's estate does not prevent judge from ordering super priority — There was no conflict between CCAA and ITA, as deemed trust created by ITA has priority only over defined set of security interests into which super-priority charge ordered under s. 11 of CCAA does not fall — Section 227(4.1) of ITA does not create true trust because there is no certainty of subject matter, so Crown's beneficial ownership was weaker than under common law and its content could not be inferred solely from ITA — Broad discretionary power under s. 11 of CCAA permits court to rank priming charges ahead of deemed trust for unremitted source deductions, as s. 6(3) of CCAA gives specific effect to Crown's deemed trust for CCAA purposes by requiring plan of compromise to pay Crown in full Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s 11; Income Tax Act, s 227(4.1).

Bankruptcy and insolvency --- Priorities of claims — Claims of Crown — Federal — Income tax, unemployment insurance, and Canada Pension Plan — Creation of statutory trust

Taxation --- Impôt sur le revenu — Règles spéciales — Faillite — Sociétés

Dans le cadre des procédures de restructuration des débitrices en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC), le tribunal a accordé des charges super prioritaires en faveur du prêteur intérimaire et d'autres personnes — Requête de l'Agence du revenu du Canada (ARC) en vue d'une ordonnance déclarant qu'une telle sûreté ou charge super prioritaire accordée par le tribunal n'avait pas priorité sur les fiducies réputées créées par la loi pour les retenues à la source non versées a été rejetée au motif que la LACC permettait aux tribunaux d'accorder aux charges prioritaires nécessaires au processus de restructuration un rang supérieur à la sûreté de l'ARC — Appel interjeté par la Couronne a été rejeté — Couronne a formé un pourvoi — Pourvoi rejeté — LACC habilite de façon générale les juges surveillants à faire passer des charges super prioritaires devant toutes les autres créances, y compris celles qui sont protégées par des fiducies réputées, et l'obtention d'un financement constituait un aspect fondamental de ce régime fondé sur la prémisse qu'une compagnie débitrice est susceptible de posséder une plus grande valeur lorsqu'elle poursuit ses activités — Caractéristique la plus importante de la LACC est le vaste pouvoir discrétionnaire qu'elle confère au tribunal de surveillance par l'art. 11 — Que l'art. 37(2) de la LACC permette aux fiducies réputées créées par l'art. 227(4.1) de la Loi de l'impôt sur le revenu (LIR) de continuer à produire leurs effets ne modifie en rien les caractéristiques de ces fiducies — Article 227(4.1) de la LIR ne crée pas d'intérêt à titre de propriétaire, parce que la créance de Sa Majesté ne se rattache à aucun bien spécifique — Que des biens soient réputés soustraits au patrimoine du débiteur n'empêche pas un juge d'ordonner des charges super prioritaires — Il n'y avait pas de conflit entre la LACC et la LIR, car la fiducie réputée créée en vertu de la LIR n'a priorité que sur un ensemble bien précis de garanties dont la charge super prioritaire constituée en vertu de l'art. 11 de la LACC ne fait partie — Article 227(4.1) de la LIR ne crée pas une fiducie véritable puisqu'il n'existe aucune certitude quant à sa matière, de sorte que le droit de bénéficiaire de la Couronne était plus faible que le sens qui lui est généralement donné en common law, et la teneur du droit de la Couronne dans un contexte d'insolvabilité ne peut être déduite uniquement du texte de la LIR — Vaste pouvoir discrétionnaire conféré par l'art. 11 de la LACC permet au tribunal de faire passer les charges super prioritaires devant la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées, car l'art. 6(3) de la LACC donne explicitement effet à la fiducie réputée de la Couronne pour les fins de l'application de la LACC en exigeant que le plan de transaction prévoit le paiement intégral à la Couronne.

Faillite et insolvabilité --- Priorité des créances — Réclamations de la Couronne — Fédérale — Impôt sur le revenu, assurance-chômage, et Régime de pensions du Canada — Création de fiducies statutaires

In restructuring proceedings under the Companies' Creditors Arrangement Act (CCAA), debtor companies received interim financing and the court granted three super-priority charges in favour of the interim financier and the administrators of the monitor, counsel and restructuring officer for their fees, and the debtors' directors and officers for liabilities incurred after the

commencement of the proceedings. The motion by the Canada Revenue Agency (CRA) for an order that such court-ordered super-priority security interests or priming charges did not take priority over the statutory deemed trusts in favour of the Minister or the CRA for unremitted source deductions was dismissed. The motion judge found that the CCAA gave the court the ability to rank priority charges necessary for the restructuring ahead of the CRA's security interest arising out of the deemed trusts. The Crown's appeal was dismissed by the majority of the Court of Appeal. The Crown appealed.

Held: The appeal was dismissed.

Per Côté J. (Wagner C.J.C., Kasirer J. concurring): As previously held, the CCAA generally empowers supervising judges to order super-priority charges with priority over all other claims, including claims protected by deemed trusts. The view underlying the entire CCAA regime was that debtors would retain more value as going concerns than in liquidation scenarios, and financing was a critical aspect of this system that required the protection of these priming charges. The most important feature of the CCAA, which enabled it to be adapted so readily to each reorganization, is the broad discretionary power vested in the supervising court by s. 11 of the CCAA. The preservation by s. 37(2) of the CCAA of the deemed trusts created by s. 227(4.1) of the Income Tax Act (ITA) does not modify the characteristics of these trusts. Section 227(4.1) of the ITA does not establish a proprietary interest because the Crown's claim does not attach to any specific asset. By choosing not to protect the Crown's claim to any particular asset, Parliament protected the Crown from the risks associated with asset ownership, including damage, depreciation and loss. The statement in s. 227(4.1) of the ITA that property is deemed to be removed from the debtor's estate does not prevent a judge from ordering a super-priority charge over the debtor's property. This interpretation is supported by the existence of s. 227(4.2) of the ITA that specifically anticipates other interests taking priority over the deemed trust, which would be impossible if there was an ownership interest. There was no conflict between the CCAA and the ITA, as the deemed trust created by the ITA has priority only over a defined set of security interests. A super-priority charge ordered under s. 11 of the CCAA does not fall within the definition in s. 224(1.3) of the ITA. As the Crown had been repaid and the case was technically moot, it was not critical to review the basis in this case for subordinating the Crown's claim to the super-priority charges.

Per Karakatsanis J. (concurring) (Martin J. concurring): Defining the Crown's entitlement as a "security" or "propriety" interest did not resolve the issues in the case. The meaning of "beneficially owned" in s. 227(4.1) of the ITA could only be understood in the specific statutory context. Section 227(4.1) of the ITA does not create a true trust because there is no certainty of subject matter, and so the Crown's beneficial ownership was weaker than would be generally understood by that term at common law. Section 227(4.1) of the ITA is structured as a security interest but also uses the mechanism of deemed trust. The content of the Crown's right for the purposes of insolvency could not be inferred solely from the text of the ITA. Interim financing is crucial to the restructuring process under the CCAA. Section 37(2) of the CCAA continues the Crown's statutory deemed trust but does not explain what to do with that right. Section 11 of the CCAA gives the court broad discretion to consider and give effect to the Crown's interest, while s. 6(3) of CCAA gives specific effect to the Crown's right by barring the court from sanctioning a plan of compromise unless it pays the Crown in full for unremitted source deductions within six months of the plan's approval or the Crown agrees otherwise. The CCAA thus gives the deemed trust concrete meaning for its purposes, namely that a plan of compromise has to pay the Crown in full. The Crown's interest did not fit within the relevant statutory definition of "secured creditor" under the CCCA as required for ss. 11.2, 11.51 and 11.52 of the CCAA, but the broad discretionary power under s. 11 of the CCAA permits the court to rank priming charges ahead of the deemed trust for unremitted source deductions.

Per Brown, Rowe JJ. (dissenting) (Abella J. concurring): The text of the ITA and other fiscal statutes is clear and gives ultimate priority to the deemed trusts for source deductions over all security interests, notwithstanding the CCAA or any other Act. The priming charges are "security interests" within the meaning of s. 224(1.3) of the ITA such that the Crown's interest under the deemed trust enjoys priority over them pursuant to s. 227(4.2) of the ITA. The fiscal statutes operated harmoniously with the CCAA, since s. 37(2) of the CCAA restricted the court's powers under s. 11 of the CCAA. Section 6(3) of the CCAA protects different reasons than those captured by the deemed trusts. Policy reasons did not support a different interpretation where Parliament chose to prioritize the integrity of the tax system over the interests of secured creditors, and the majority's view that interim financing would simply end without priming charges was not supported by evidence.

Per Moldaver J. (dissenting): While the analysis and conclusions of Brown and Rowe JJ. were largely agreed with, it was unnecessary to define the particular nature or operation of the Crown's interest under s. 227(4.1) of the ITA and whether it amounted to an ownership interest. Further, s. 37(2) of the CCAA does not amount to an explicit and unambiguous restriction on s. 11 of the CCAA but merely preserves the Crown's deemed trust under s. 227(4.1) of the ITA. As such, using s. 11 of the CCAA to prioritize the priming charges over the Crown's deemed trust would conflict with s. 227(4.1) of the ITA. Such

direct conflict would trigger the "notwithstanding [. . .] any other enactment of Canada" language in s. 227(4.1) of the ITA that imposes an external restriction on the court's power under s. 11 of the CCAA. Section 6(3) of the CCAA does not give effect to the absolute supremacy of the Crown's deemed trust claim over priming charges.

Dans le cadre de procédures de restructuration sous le régime de la Loi sur les arrangements avec les créanciers des compagnies (LACC), les compagnies débitrices ont obtenu du financement intérimaire et le tribunal a accordé trois charges super prioritaires en faveur du prêteur intérimaire et des administrateurs du contrôleur, des avocats et du directeur de la restructuration pour les frais qu'ils ont engagés, et des administrateurs et dirigeants des débitrices pour les dettes accumulées depuis le début des procédures. La requête de l'Agence du revenu du Canada (ARC) en vue d'une ordonnance déclarant qu'une telle sûreté ou charge super prioritaire accordée par le tribunal n'avait pas priorité sur les fiducies réputées créées par la loi en faveur du ministre ou de l'ARC pour les retenues à la source non versées a été rejetée. Le juge des requêtes a conclu que la LACC conférait au tribunal le pouvoir d'accorder aux charges prioritaires nécessaires au processus de restructuration un rang supérieur à la sûreté de l'ARC découlant des fiducies réputées. L'appel interjeté par la Couronne a été rejeté par les juges majoritaires de la Cour d'appel. La Couronne a formé un pourvoi.

Arrêt: Le pourvoi a été rejeté.

Côté, J. (Wagner, J.C.C., Kasirer, J., souscrivant à son opinion) : Ainsi que la Cour l'a déjà jugé, la LACC habilite de façon générale les juges surveillants à faire passer des charges super prioritaires devant toutes les autres créances, y compris celles qui sont protégées par des fiducies réputées. La vision sous-jacente au régime de la LACC est qu'une compagnie débitrice est susceptible de posséder une plus grande valeur lorsqu'elle poursuit ses activités que lorsqu'elle est liquidée, et l'obtention d'un financement est un aspect fondamental de ce système, ce qui exige que ces charges super prioritaires soient protégées. La caractéristique la plus importante de la LACC, et celle qui la rend assez souple pour s'adapter si aisément à chaque réorganisation, est le vaste pouvoir discrétionnaire qu'elle confère au tribunal de surveillance par l'art. 11 de la LACC. Le fait que l'art. 37(2) de la LACC permet aux fiducies réputées créées par l'art. 227(4.1) de la Loi de l'impôt sur le revenu (LIR) de continuer à produire leurs effets ne modifie en rien les caractéristiques de ces fiducies. L'article 227(4.1) de la LIR ne crée pas d'intérêt à titre de propriétaire, parce que la créance de Sa Majesté ne se rattache à aucun bien spécifique. En décidant de n'associer la créance de Sa Majesté à aucun bien en particulier, le législateur a protégé Sa Majesté des risques que comporte la propriété d'un bien, y compris l'endommagement, la dépréciation et la perte. L'affirmation énoncée à l'art. 227(4.1) de la LIR selon laquelle des biens sont réputés soustraits au patrimoine du débiteur n'empêche pas un juge de grever les biens du débiteur de charges super prioritaires. Cette interprétation est appuyée par l'existence de l'art. 227(4.2) de la LIR, qui prévoit expressément que d'autres intérêts prennent rang devant la fiducie réputée, ce qui serait impossible s'il existait un intérêt à titre de propriétaire. Il n'y a pas de conflit entre la LACC et la LIR, car la fiducie réputée créée en vertu de la LIR n'a priorité que sur un ensemble bien précis de garanties. La charge super prioritaire constituée en vertu de l'art. 11 de la LACC ne répond pas à la définition de l'art. 224(1.3) de la LIR. Puisque Sa Majesté a été payée et que l'affaire est en fait devenue théorique, il n'était pas essentiel d'analyser les fondements permettant, dans la présente affaire, de subordonner la créance de Sa Majesté à des charges super prioritaires.

Karakatsanis, J. (souscrivant à l'opinion des juges majoritaires) (Martin, J., souscrivant à son opinion) : Qualifier le droit de la Couronne de « garantie » ou de « droit propriétal » n'était pas d'une grande utilité dans la présente analyse. Le sens du terme « droit de bénéficiaire » utilisé à l'art. 227(4.1) de la LIR ne peut être saisi que dans le contexte législatif précis et pertinent où il est employé. L'article 227(4.1) de la LIR ne crée pas une fiducie véritable puisqu'il n'existe aucune certitude quant à sa matière, de sorte que le droit de bénéficiaire de la Couronne était plus faible que le sens qui lui est généralement donné en common law. L'article 227(4.1) de la LIR est structuré comme une garantie, mais utilise également le mécanisme d'une fiducie réputée. La teneur du droit de la Couronne dans un contexte d'insolvabilité ne peut être déduite uniquement du texte de la LIR. Le financement temporaire est essentiel au processus de restructuration sous le régime de la LACC. L'article 37(2) de la LACC maintient la fiducie réputée créée par la loi, mais n'explique pas quoi faire de ce droit. L'article 11 de la LACC confère au tribunal un vaste pouvoir discrétionnaire pour examiner l'intérêt reconnu à la Couronne, tandis que l'art. 6(3) de la LACC donne explicitement effet au droit que possède la Couronne en empêchant un tribunal d'homologuer un plan de transaction qui ne prévoit pas le paiement intégral à la Couronne des retenues à la source non versées dans les six mois suivant l'homologation, à supposer que la Couronne n'en ait pas convenu autrement. La LACC donne ainsi à la fiducie réputée un sens concret qui convient à ses fins, soit qu'un plan de transaction doit prévoir le paiement intégral des sommes dues à la Couronne. L'intérêt de la Couronne n'entre pas dans la définition applicable de « créancier garanti » contenue dans la LACC, selon ce qui est exigé en vertu des art. 11.2, 11.51 et 11.52 de la LACC, mais le vaste pouvoir discrétionnaire conféré par l'art. 11 de la LACC permet

au tribunal de faire passer les charges super prioritaires devant la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées.

Brown, Rowe, JJ. (dissidents) (Abella, J., souscrivant à leur opinion) : Le texte de la LIR et d'autres lois fiscales est non équivoque et accorde à la fiducie réputée créée à l'égard des retenues à la source priorité absolue sur toute garantie, nonobstant la LACC ou toute autre loi. Les charges super prioritaires sont des « garanties » au sens de l'art. 224(1.3) de la LIR de telle sorte que le droit conféré à la Couronne par la fiducie réputée a préséance sur ces charges en vertu de l'art. 227(4.2) de la LIR. Les lois fiscales s'appliquent harmonieusement avec la LACC, puisque l'art. 37(2) de la LACC impose une limite au pouvoir que l'art. 11 de la LACC confère au tribunal. L'article 6(3) de la LACC protège des droits différents de ceux visés par la fiducie réputée. Des considérations de politique générale n'appuient pas une interprétation différente dans laquelle le législateur a choisi d'accorder à l'intégrité du régime fiscal la priorité sur les droits des créanciers garantis, et l'opinion des juges majoritaires selon laquelle le financement temporaire prendrait tout simplement fin sans les charges super prioritaires n'était pas étayée par la preuve.

Moldaver, J. (dissident) : Bien que l'on partageât, pour l'essentiel, l'analyse et les conclusions des juges Brown et Rowe, il n'était pas nécessaire de définir la nature ou le fonctionnement particulier du droit que l'art. 227(4.1) de la LIR confère à la Couronne ou de déterminer s'ils peuvent être assimilés à une certaine forme d'intérêt propriétal. De plus, l'art. 37(2) de la LACC ne constitue pas une restriction explicite et non équivoque à l'application de l'art. 11 de la LACC, mais vise simplement à maintenir la fiducie réputée de la Couronne en vertu de l'art. 227(4.1) de la LIR. Dans cet ordre d'idée, recourir à l'art. 11 de la LACC pour faire passer une charge super prioritaire devant la réclamation de la Couronne au titre d'une fiducie réputée entrerait en conflit direct avec l'art. 227(4.1) de la LIR. Ce conflit direct entraînerait l'application du libellé de l'art. 227(4.1) de la LIR, à savoir « [m]algré [. . .] tout autre texte législatif fédéral », lequel impose une limite externe au pouvoir que l'art. 11 de la LACC confère au tribunal. L'article 6(3) de la LACC n'entraîne pas la primauté absolue de la fiducie réputée de la Couronne sur les autres charges super prioritaires.

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Cases considered by *Côté J.*:

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Sched. B — referred to

Rules considered by *Brown, Rowe JJ.* (dissenting):

Rules of the Supreme Court of Canada, SOR/2002-156

Sched. B — referred to

Rules considered by *Moldaver J.* (dissenting):

Rules of the Supreme Court of Canada, SOR/2002-156

Sched. B — referred to

Regulations considered by *Côté J.*:

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

Income Tax Regulations, C.R.C. 1978, c. 945

s. 2201(1) "prescribed security interest" — referred to

Regulations considered by *Karakatsanis J.*:

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

Income Tax Regulations, C.R.C. 1978, c. 945

s. 2201(1) "prescribed security interest" — referred to

APPEAL by Crown from judgment reported at *Canada v. Canada North Group Inc.* (2019), 2019 ABCA 314, 2019 CarswellAlta 1815, 72 C.B.R. (6th) 161, 437 D.L.R. (4th) 122, 93 Alta. L.R. (6th) 29, 95 B.L.R. (5th) 222, [2019] 12 W.W.R. 635, 11 P.P.S.A.C. (4th) 157, 2019 D.T.C. 5111 (Alta. C.A.), dismissing its appeal from ruling that court could rank super-priority charges ahead of statutory deemed trusts for unremitted source deductions.

POURVOI formé par la Couronne à l'encontre d'un jugement publié à *Canada v. Canada North Group Inc.* (2019), 2019 ABCA 314, 2019 CarswellAlta 1815, 72 C.B.R. (6th) 161, 437 D.L.R. (4th) 122, 93 Alta. L.R. (6th) 29, 95 B.L.R. (5th) 222, [2019] 12 W.W.R. 635, 11 P.P.S.A.C. (4th) 157, 2019 D.T.C. 5111 (Alta. C.A.), ayant rejeté l'appel que cette dernière a interjeté à l'encontre d'une décision selon laquelle un tribunal avait le pouvoir de faire passer les charges super prioritaires devant les fiducies réputées créées par la loi pour les retenues à la source non versées.

***Côté J.* (Wagner C.J.C., Kasirer J. concurring):**

I. Overview

1 The Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (“CCAA”), has a long and storied history. From its origins in the Great Depression to its revival and reinvention during the 1970s and 1980s, the *CCAA* has played an important role in Canada's economy. Today, the *CCAA* provides an opportunity for insolvent companies with more than $5,000,000 in liabilities to restructure their affairs through a plan of arrangement. The goal of the *CCAA* process is to avoid bankruptcy and maximize value for all stakeholders.

2 In order to facilitate the restructuring process, courts supervising *CCAA* restructurings may authorize an insolvent company to incur certain critical costs associated with this process. Supervising courts may also secure payment of these costs by ordering a super-priority charge against the insolvent company's assets. Today, our Court is called upon to determine whether a supervising court may order super-priority charges over assets that are subject to a claim of Her Majesty protected by a deemed trust created by s. 227(4.1) of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) (“ITA”).

3 The Crown raises two arguments as to why a supervising court should be unable to subordinate Her Majesty's interest to super-priority charges. First, the Crown says that s. 227(4.1) creates a proprietary interest in a debtor's assets and a court cannot attach a super-priority charge to assets subject to Her Majesty's interest. Second, the Crown says that even if s. 227(4.1) does not create a proprietary interest, it creates a security interest that has statutory priority over all other security interests, including super-priority charges.

> to play in advancing the legislative purpose" (p. 158). This principle is often invoked by courts to resolve ambiguity or to determine the scope of general words.

(Para. 36, quoting R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 158; see also Placer Dome Canada Ltd. v. Ontario (Minister of Finance), 2006 SCC 20, [2006] 1 S.C.R. 715, at para. 45.)

65 The *ITA* contains two definitions of "security interest", in s. 224(1.3) and s. 18(5). For the purposes of computing taxpayer income, Parliament chose to define "security interest" in s. 18(5) in nearly the same manner as in s. 224(1.3), but without listing the ten specific security instruments: "*security interest*, in respect of a property, means an interest in, or for civil law a right in, the property that secures payment of an obligation". The presumption against tautology means that we must presume that Parliament included the specific additional words in s. 224(1.3) because they "have a specific role to play in advancing the legislative purpose" (*Placer Dome*, at para. 45, quoting R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 159). Applying the presumption against tautology demonstrates that Parliament intended interpretive weight to be placed on the examples.

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

67 Finally, if Parliament had wanted to include court-ordered super-priority charges in the definition of "security interest", it would have said so specifically. Parliament must be taken to have legislated with the operation of the *CCAA* in mind. In the words of Professor Sullivan, "The legislature is presumed to know its own statute book and to draft each new provision with regard to the structures, conventions, and habits of expression as well as the substantive law embodied in existing legislation" (Sullivan (2014), at p. 422 (footnote omitted)). Given that, in *Indalex*, this Court has already found that granting super-priority charges is critical as "a key aspect of the debtor's ability to attempt a workout", one would expect Parliament to use clearer language where such a definition could jeopardize the operation of another one of its Acts. I am therefore in total disagreement with my colleagues Justices Brown and Rowe that "nothing in the definition of security interest in the *ITA* precludes the inclusion of an interest that is designed to operate to the benefit of all creditors" (para. 210). To the contrary, everything hints at priming charges being excluded from the definition of security interest.

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

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

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

70 As discussed above, a supervising court's authority to order super-priority charges is grounded in its broad discretionary power under s. 11 of the CCAA and also in the more specific grants of authority under ss. 11.2, 11.4, 11.51 and 11.52. Those

provisions authorize the court to grant certain priming charges that rank ahead of the claims of "any secured creditor". While I have already concluded that Her Majesty does not have a proprietary interest as a result of Her deemed trust, it is less certain whether Her Majesty is a "secured creditor" under the *CCAA*. Professor Wood is of the view that Her Majesty is not a "secured creditor" under the *CCAA* by virtue of Her deemed trust interest; rather, ss. 37 to 39 of the CCAA create "two distinct approaches — one that applies to a deemed trust, the other that applies when a statute gives the Crown the status of a secured creditor" (p. 96). Therefore, the ranking of a priming charge ahead of the deemed trust would fall outside the scope of the express priming charge provisions. I do not need to definitively determine if Her Majesty falls within the definition of "secured creditor" under the *CCAA* by virtue of Her trust. Instead, I would ground the supervising court's power in s. 11, which "permits courts to create priming charges that are not specifically provided for in the *CCAA*" (p. 98). I respectfully disagree with the suggestion of my colleagues Brown and Rowe JJ. that Professor Wood or any other author has suggested that s. 11 is limited by the specific provisions that follow it (para. 228). To the contrary, this Court said in *Century Services*, at paras. 68-70, that s. 11 provides a very broad jurisdiction that is not restricted by the availability of more specific orders.

71 My colleagues Brown and Rowe JJ. also argue that "priming charges cannot supersede the Crown's deemed trust claim because they may attach *only* to *the property of the debtor's company*" (para. 223 (emphasis in original)). With respect, this argument cannot stand because, although ss. 11.2, 11.51 and 11.52 of the CCAA contain this restriction, there is no such restriction in s. 11. As Lalonde J. recognized, [TRANSLATION] "In exercising the authority conferred by the *CCAA*, including inherent powers, the courts have not hesitated to use this jurisdiction to intervene in contractual relationships between a debtor and its creditors, even to make orders affecting the rights of third parties" (*Triton Électronique*, at para. 31). There may be circumstances where it is appropriate for a court to attach charges to property that does not belong to the debtor — if, for instance, this deemed trust were to be equivalent to a proprietary interest. However, that circumstance does not arise in this case because the property subject to Her Majesty's deemed trust remains the property of the debtor, as the deemed trust does not create a proprietary interest. My colleagues' reliance on s. 37(2) of the CCAA is similarly ill-founded. As I said earlier, s. 37(2) simply preserves the status quo. It does not alter Her Majesty's interest. It merely continues that interest and excludes it from the operation of s. 37(1), which would otherwise downgrade it to the interest of an ordinary creditor.

72 That said, courts should still recognize the distinct nature of Her Majesty's interest and ensure that they grant a charge with priority over the deemed trust only when necessary. In creating a super-priority charge, a supervising judge must always consider whether the order will achieve the objectives of the *CCAA*. When there is the spectre of a claim by Her Majesty protected by a deemed trust, the judge must also consider whether a super priority is necessary. The record before us contains no reasons for the Initial Order, so this is difficult to determine in this case. Given that Her Majesty has been paid and that the case is in fact moot, it is not critical for us to determine whether the supervising judge believed it was necessary to subordinate Her Majesty's claim to the super-priority charges. Based on Justice Topolniski's reasons for denying the Crown's motion to vary the Initial Order, it is clear that she would have found that the super-priority charges deserved priority over Her Majesty's interest (paras. 100-104). However, I wish to say a few words on when it may be necessary for a supervising judge to subordinate Her Majesty's interest to super-priority charges.

73 It may be necessary to subordinate Her Majesty's deemed trust where the supervising judge believes that, without a super-priority charge, a particular professional or lender would not act. This may often be the case. On the other hand, I agree with Professor Wood that, although subordinating super-priority charges to Her Majesty's claim will often increase the costs and complexity of restructuring, there will be times when it will not. For instance, when Her Majesty's claim is small or known with a high degree of certainty, commercial parties will be able to manage their risks and will not need a super priority. After all, there is an order of priority even amongst super-priority charges, and therefore it is clear that these parties are willing to have their claims subordinated to some fixed claims. A further example of where different considerations may be in play is in so-called liquidating *CCAA* proceedings. As this Court recently recognized, *CCAA* proceedings whose fundamental objective is to liquidate — rather than to rescue a going concern — have a legitimate place in the *CCAA* regime and have been accepted by Parliament through the enactment of s. 36 (*Callidus Capital*, at paras. 42-45). Liquidating *CCAA* proceedings often aim to maximize returns for creditors, and thus the subordination of Her Majesty's interest has less justification beyond potential unjust enrichment arguments.

