File No. CI 12-01-76323

THE QUEEN'S BENCH
Winnipeg Centre

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO ARCTIC GLACIER INCOME FUND, ARCTIC GLACIER INC., ARCTIC GLACIER INTERNATIONAL INC. and the ADDITIONAL APPLICANTS LISTED ON SCHEDULE "A" HERETO

(collectively, the "APPLICANTS")

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

MOTION BRIEF OF THE MONITOR

(Motion for Stay Extension and Appointment of Claims Officers)

DATE OF HEARING: THURSDAY, MARCH 7, 2013, AT 10 A.M.
BEFORE THE HONOURABLE MADAM JUSTICE SPIVAK

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INDEX

PART I LIST OF DOCUMENTS TO BE RELIED UPON

1. The Notice of Motion with the Proposed Order attached as Appendix "1";

2. The Tenth Report of the Monitor; and

3. Such further and other materials as counsel may advise and this Court may permit.

PART II STATUTORY PROVISIONS AND AUTHORITIES TO BE RELIED UPON

Tab

1	*Companies' Creditors Arrangement Act*, R.S.C., c. C-36, as amended (hereinafter "CCAA") ss. 11, 11.02 and 20
2	*Re ScoZinc Ltd.* (2009), 53 C.B.R. (5th) 96
3	*2012 Annotated Bankruptcy and Insolvency Act*, Holden, Morawetz and Sarra, Note N§143(1)
4	*Pine Valley Mining Corp. (Re)* (2008),41 C.B.R. (5th) 43
5	*Canwest Global Communications Corp.*, 2011 ONSC 2215 (CanLII)
6	*Re ScoZinc Ltd.* Claims Procedure Order (Feb. 18, 2009), without Schedules
7	*Re Canwest Global Communications Corp.* Claims Procedure Order (Oct. 14, 2009)
8	*Worldspan Marine Inc. (Re)*, 2011 BCSC 1758

PART III LIST OF POINTS TO BE ARGUED

1. This motion is for an Order:

(a) approving the time for service of the Notice of Motion and supporting materials such that the motion is properly returnable on March 7, 2013 at 10:00 a.m. and dispensing with further service thereof;

(b) approving the appointment of the Claims Officers and empowering the Claims Officers to adjudicate Claims and DO&T Claims as necessary as outlined further in the Tenth Report of the Monitor (the "**Tenth Report**");

(c) extending the stay period ("**Stay Period**") defined in paragraph 30 of the Order of the Honourable Madam Justice Spivak made February 22, 2012 (the "**Initial Order**") until June 13, 2013; and

(d) releasing and discharging the Direct Purchasers' Advisors' Charge set out in the Order of this Court dated May 15, 2012.

2. The key points to be argued on this motion are as follows:

(a) *Claims Officers*: An order appointing Claims Officers and establishing their powers, rights, protections and obligations is appropriate because it will permit the Monitor to continue to administer the Claims Process previously approved by the Court;

(b) *Stay of Proceedings*: An order extending the stay of proceedings is appropriate to enable the Monitor to conduct the Claims Process for the

benefit of the stakeholders and to deal with other matters incidental to the administration of the Applicants' estates; and

(c) *Other Relief:* An order is required to release a redundant charge.

The Proposed Order Appointing Claims Officers Should Be Approved

3. On September 5, 2012, this Honourable Court issued a Claims Procedure Order that approved the Claims Process (both as defined and described in the Tenth Report). The Claims Procedure Order does not provide a specific method of adjudicating Claims that cannot be resolved on a consensual basis. Instead, it provides that, to the extent that Dispute Notices are received from Creditors that cannot be resolved, the Monitor will seek further advice and direction from the Court.

4. The Monitor has received Proofs of Claims and DO&T Proofs of Claim in accordance with the Claims Procedure Order. The Monitor has reviewed the Proofs of Claim that have been received and is of the view that certain Claims may not be resolved on a consensual basis without the assistance of a third party adjudicator.

5. While CCAA s. 20 provides guidance as to the determination and admission of claims, the statute does not set out a formal claims administration process. The Courts therefore rely on the broad authority granted under the CCAA as well as inherent jurisdiction to establish a claims process and appoint claims officers. For example, the Nova Scotia Supreme Court in *Re ScoZinc* acknowledged that using a claims officer "appears to be a well accepted practice" and "is a valid exercise of the court's inherent jurisdiction":

> 18. ....as noted by McElcheran in *Commercial Insolvency in Canada* (LexisNexis Canada Inc., Markham, Ontario, 2005 at p. 279-80) the *CCAA* does not set out a process for identification or determination of claims; instead, the Court creates a claims process by court order....
>
> 23 The practice has arisen for the court to create by order a claims process that is both flexible and expeditious. The Monitor identifies, by review of the debtor's records, all potential claimants and sends to them a claim package. To ensure that all creditors come forward and participate on a timely basis, there is a provision in the claims process order requiring creditors to file their claims by a fixed date. If they do not, subject to further relief provided by the claims process order, or by the court, the creditor's claim is barred.
>
> 24 If the Monitor disagrees with the claim, and the disagreement cannot be resolved, ***then a claimant can present its case to a claims officer who is usually given the power to adjudicate disputed claims, with the right of appeal to a judge of the court overseeing the CCAA proceedings***.
>
> 25 ***The establishment of a claims process utilizing the monitor and or a claims officer by court order appears to be a well accepted practice...***
>
> 29 In my opinion, whatever process may be appropriate and necessary to adjudicate disputed claims that ultimately end up before a judge of the superior court, ***the determination by the court that claims must initially be identified and assessed by the Monitor, and heard first by a Claims Officer, is a valid exercise of the court's inherent jurisdiction*** (emphasis added, citations omitted).

(**Tab 2** – *Re ScoZinc Ltd.* (2009), 53 C.B.R. (5th) 96 (hereinafter referred to as "*ScoZinc*") at paras. 18-29)

(**Tab 3** – *2012 Annotated Bankruptcy and Insolvency Act*, Houlden, Morawetz and Sarra, Note N§143(1): "It is usual to appoint a claims officer who will be given power to adjudicate disputed claims with the right of appeal to the judge administering the *CCAA* proceedings.")

(**Tab 4** - *Pine Valley Mining Corp. (Re)* (2008),41 C.B.R. (5th) 43 at paras. 8-9)

6. The Monitor, in consultation with the Applicants, proposes to appoint two Claims Officers: (a) Mr. Dave Hill, an experienced litigator ranked in *The Best Lawyers in Canada 2013* in the areas of alternative dispute resolution and corporate and commercial litigation, who is based in Winnipeg, Manitoba; and (b) the Honourable Mr.

Jack Ground, a retired Ontario Superior Court Judge with extensive insolvency, commercial and corporate experience, who is based in Toronto, Ontario.

> (**Tab 5** – *Canwest Global Communications Corp.*, 2011 ONSC 2215 (CanLII), at para. 3)

7. The Monitor proposes that Claims Officers appointed by, or in accordance with, the proposed draft Order be empowered to determine:

(a) the validity and value of disputed Claims and/or DO&T Claims, as the case may be; and

(b) all procedural matters which may arise in respect of his or her determination of these matters.

Such powers are consistent with the jurisprudence and powers granted to claims officers in other CCAA proceedings. See, for example, the powers granted to the claims officer by the Nova Scotia Supreme Court in *Re ScoZinc*:

> 34 Any person who wished to dispute a Notice of Revision or Disallowance was required to file a notice to the monitor and to the Claims Officer no later than April 6, 2009. The Claims Officer was designated to be Richard Cregan, Q.C., serving in his personal capacity and not as Registrar in Bankruptcy. Subject to the direction of the court, ***the Claims Officer was given the power to determine how evidence would be brought before him and any other procedural matters that may arise with respect to the claim.*** A claimant or the Monitor may appeal the Claims Officer's decision to the court (emphasis added).

(**Tab 2** –*ScoZinc* at para. 34)

(**Tab 6** - *Re ScoZinc Ltd.* Claims Procedure Order (Feb. 18, 2009))

(**Tab 7** - *Re Canwest Global Communications Corp.* Claims Procedure Order (Oct. 14, 2009))

8. As the Nova Scotia Supreme Court in *Re ScoZinc* pointed out, it is usual to give parties a "right of appeal to a judge of the court overseeing the *CCAA* proceedings." The Monitor proposes that any party impacted by a Claims Officer's determination may appeal to this Court by filing a notice of appeal within fourteen Calendar Days of notification of the Claims Officer's determination. The Monitor proposes that such an appeal be initially returnable within fourteen Calendar Days of filing the notice of appeal and that such an appeal be based on the record before the Claims Officer and not a hearing *de novo*. If no such appeal is initiated within fourteen Calendar Days, then the Claims Officer's determination shall be final and binding.

(**Tab 2** –*ScoZinc Ltd.* at para. 24)

9. The Monitor submits that appointing the Claims Officers and authorizing their proposed rights, powers, protections and obligations is a valid exercise of both the Court's inherent jurisdiction and the authority conferred on it pursuant to CCAA s. 11, and will advance the restructuring objectives of the Applicants and facilitate the administration of the Applicants' estates.

The Stay of Proceedings Should Be Extended

10. The existing stay expires on March 15, 2013. To enable the Monitor to conduct the proposed Claims Process and to deal with other estate matters, it is necessary to extend the stay. CCAA s. 11.02 gives the Court discretion to grant or extend a stay of

proceedings. Section 11.02(2) applies when a stay of proceedings is requested other than on an initial application. It provides as follows:

> **11.02**(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,
>
> > *(a)* staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)*(a)*;
> >
> > *(b)* restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
> >
> > *(c)* prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.
>
> (**Tab 1** – CCAA, s. 11.02(2))

11. According to section 11.02(3) of the CCAA, the Court must be satisfied that: (a) circumstances exist that make the order appropriate; and (b) the applicant has acted and is acting in good faith and with due diligence.

> (**Tab 1** – CCAA, s. 11.02(3))

12. In considering whether circumstances exist that make the order appropriate, the Court "must be satisfied that an extension of the Initial Order and stay will further the purposes of the CCAA." Arctic Glacier has completed the Sale Transaction which preserved the value of the business as a going concern for the benefit of all stakeholders. In the Monitor's opinion, Arctic Glacier has acted and continues to act with due diligence and in good faith in these CCAA Proceedings. The Monitor

believes that an extension of the Stay Period until June 13, 2013 is appropriate, as it should allow sufficient time for the Monitor, in consultation with the Applicants, to make enquiries and request additional information in respect of certain Claims, address certain outstanding litigation issues, attempt to negotiate the resolution of Claims and obtain a response from the insurers in respect of those Claims which may be covered by the Applicants' insurance policies. The proposed Stay extension should also allow the Monitor to assist the Applicants in completing and filing their tax returns and to deal with other matters related to the administration of the Applicants' estates.

(**Tab 8** – *Worldspan Marine Inc. (Re)*, 2011 BCSC 1758 at paras. 13-15)

Other Relief

13. As detailed in the Monitor's Tenth Report, there is a redundant charge – the Direct Purchasers' Advisors' Charge – that ought to be released because it has been paid in full.

CONCLUSION

14. It is respectfully submitted that this Honourable Court ought to grant the proposed order as it is consistent with the underlying purposes of the CCAA and will benefit the Applicants' estate and stakeholders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of March, 2013.

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TAB 1

General power of court

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

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

Rights of suppliers

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

(*a*) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(*b*) requiring the further advance of money or credit.

2005, c. 47, s. 128.

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

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

(*a*) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(*a*);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

(*a*) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(*b*) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

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

Determination of amount of claims

20. (1) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor is to be determined as follows:

(*a*) the amount of an unsecured claim is the amount

(i) in the case of a company in the course of being wound up under the *Winding-up and Restructuring Act*, proof of which has been made in accordance with that Act,

(ii) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, proof of which has been made in accordance with that Act, or

(iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is not admitted by the company, the amount is to be determined by the court on summary application by the company or by the creditor; and

(*b*) the amount of a secured claim is the amount, proof of which might be made under the *Bankruptcy and Insolvency Act* if the claim were unsecured, but the amount if not admitted by the company is, in the case of a company subject to pending proceedings under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, to be established by proof in the same manner as an unsecured claim under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, as the case may be, and, in the case of any other company, the amount is to be determined by the court on summary application by the company or the creditor.

Admission of claims

(2) Despite subsection (1), the company may admit the amount of a claim for voting purposes under reserve of the right to contest liability on the claim for other purposes, and nothing in this Act, the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act* prevents a secured creditor from voting at a meeting of secured creditors or any class of them in respect of the total amount of a claim as admitted.

R.S., 1985, c. C-36, s. 20; 2005, c. 47, s. 131; 2007, c. 36, s. 70.

TAB 2

Case Name:

ScoZinc Ltd. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF a Plan of Compromise or Arrangement of ScoZinc Ltd., Applicant

[2009] N.S.J. No. 187

2009 NSSC 136

277 N.S.R. (2d) 251

53 C.B.R. (5th) 96

2009 CarswellNS 229

Docket: Hfx No. 305549

Registry: Halifax

Nova Scotia Supreme Court
Halifax, Nova Scotia

D.R. Beveridge J.

Heard: April 3, 2009.
Oral judgment: April 3, 2009.
Released: April 28, 2009.

(49 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Directions -- Monitors -- Powers, duties and functions -- Upon motion by monitor in proceedings under the Companies' Creditors Arrangement Act, the monitor was held to have the necessary authority to allow a revision of a claim after the claim's bar date but before the date set for the monitor to complete its assessment of claims -- To suggest the monitor did not have the authority to receive evidence and submissions and to consider them was to say it did

not have any real authority to carry out its court-appointed role to assess the claims that had been submitted.

Motion by monitor in proceedings under the Companies' Creditors Arrangement Act seeking directions from the court on whether it had the necessary authority to allow a revision of a claim after the claim's bar date but before the date set for the monitor to complete its assessment of claims. On Dec. 22, 2008, ScoZinc Ltd. had been granted protection by means of a stay of proceedings of all claims against it. The determination of creditors' claims was set by a claims procedure order of Feb. 18, 2009 setting dates for the submission of claims to the monitor, and for the monitor to assess the claims. The monitor was directed to review all proofs of claim filed on or before March 16, 2009 and accept, revise or disallow the claims. In three cases, revised proofs of claim were filed after this date.

HELD: Order granted. The monitor had the necessary authority. The Act gave no specific guidance to the court on how to determine the existence, nature, validity or extent of a claim against a debtor company. The determination that the claims must initially be identified and assessed by the monitor, and heard first by a claims officer, was a valid exercise of the court's inherent jurisdiction. It was not only logical, but eminently practical that the monitor, as an officer of the court, be directed by court order to fulfil the analogous role to that of the trustee under the Bankruptcy and Insolvency Act. The Feb. 18, 2009 order accomplished this. It did not matter that revised claims were submitted after the claims bar date. In essence, the monitor simply acted to revise the proofs of claim already submitted to conform with the evidence elicited by the monitor, or submitted to it. The monitor had the necessary authority to revise the claims, either as to classification or amount. To suggest the monitor did not have the authority to receive evidence and submissions and to consider them was to say it did not have any real authority to carry out its court-appointed role to assess the claims that had been submitted.

Statutes, Regulations and Rules Cited:

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

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11, s. 11.7, s. 12

Probate Act, R.S.N.S. 1900, c. 158,

Counsel:

John G. Stringer, Q.C., and Mr. Ben R. Durnford, for the applicant.

Robert MacKeigan, Q.C., for Grant Thornton.

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1 **D.R. BEVERIDGE J.** (orally):-- On December 22, 2008, ScoZinc Ltd. was granted protection by way of a stay of proceedings of all claims against it pursuant to s. 11 of the *Companies' Creditors Arrangement Act* R.S.C. 1985, c. C-36. The stay has been extended from time to time. Grant Thornton was appointed as the Monitor of the business and financial affairs of ScoZinc pursuant to s. 11.7 of the *CCAA*.

2 The determination of creditors' claims was set by a Claims Procedure Order. This order set dates for the submission of claims to the Monitor, and for the Monitor to assess the claims. The Monitor brought a motion seeking directions from the court on whether it has the necessary authority to allow a revision of a claim after the claim's bar date but before the date set for the Monitor to complete its assessment of claims.

3 The motion was heard on April 3, 2009. At the conclusion of the hearing of the motion I concluded that the Monitor did have the necessary authority. I granted the requested order with reasons to follow. These are my reasons.

BACKGROUND

4 The procedure for the identification and quantification of claims was established pursuant to my order of February 18, 2009. Any persons asserting a claim was to deliver to the Monitor a Proof of Claim by 5:00 p.m. on March 16, 2009, including a statement of account setting out the full details of the claim. Any claimant that did not deliver a Proof of Claim by the claims bar date, subject to the Monitor's agreement or as the court may otherwise order, would have its claim forever extinguished and barred from making any claim against ScoZinc.

5 The Monitor was directed to review all Proofs of Claim filed on or before March 16, 2009 and to accept, revise or disallow the claims. Any revision or disallowance was to be communicated by Notice of Revision or Disallowance, no later than March 27, 2009. If a creditor disagreed with the assessment of the Monitor, it could dispute the assessment before a Claims Officer and ultimately to a judge of the Supreme Court.

6 The three claims that have triggered the Monitor's motion for directions were submitted by Acadian Mining Corporation, Royal Roads Corp., and Komatsu International (Canada) Inc.

7 ScoZinc is 100% owned by Acadian Mining Corp. These two corporations share office space, managerial staff, and have common officers and directors. Acadian Mining is a substantial shareholder in Royal Roads and also have some common officers and directors.

8 Originally Royal Roads asserted a claim as a secured creditor on the basis of a first charge security held by it on ScoZinc's assets for a loan in the amount of approximately $2.3 million. Acadian Mining also claimed to be a secured creditor due to a second charge on ScoZinc's assets securing approximately $23.5 million of debt. Both Royal Roads and Acadian Mining have released their security. Each company submitted Proofs of Claim dated March 4, 2009 as unsecured creditors.

9 Royal Roads claim was for $579,964.62. The claim by Acadian Mining was for $23,761.270.20. John Rawding, Financial Officer for Acadian Mining and ScoZinc, prepared the Proofs of Claim for both Royal Roads and Acadian Mining. It appears from the affidavit and materials submitted, and the Monitor's fifth report dated March 31, 2009 that there were errors in each of the Proofs of Claim.

10 Mr. Rawding incorrectly attributed $1,720,035.38 as debt by Acadian Mining to Royal Roads when it should have been debt owed by ScoZinc to Royal Roads. In addition, during year end audit procedures for Royal Roads, Acadian Mining and ScoZinc, other erroneous entries were discovered. The total claim that should have been advanced by Royal Roads was $2,772,734.19.

11 The appropriate claim that should have been submitted by Acadian Mining was $22,041,234.82, a reduction of $1,720,035.38. Both Royal Roads and Acadian Mining submitted revised Proofs of Claim on March 25, 2009 with supporting documentation.

12 The third claim is by Komatsu. Its initial Proof of Claim was dated March 16, 2009 for both secured and unsecured claims of $4,245,663.78. The initial claim did not include a secured claim for the equipment that had been returned to Komatsu, nor include a claim for equipment that was still being used by ScoZinc. A revised Proof of Claim was filed by Komatsu on March 26, 2009.

13 The Monitor, sets out in its fifth report dated March 31, 2009, that after reviewing the relevant books and records, the errors in the Proofs of Claim by Royal Roads, Acadian Mining and Komatsu were due to inadvertence. For all of these claims it issued a Notice of Revision or Disallowance on March 27, 2009, allowing the claims as revised "if it is determined by the court that the Monitor has the power to do so".

14 The request for directions and the circumstances pose the following issue:

ISSUE

15 Does the Monitor have the authority to allow the revision of a claim by increasing it based on evidence submitted by a claimant within the time period set for the monitor to carry out its assessment of claims?

ANALYSIS

16 The jurisdiction of the Monitor stems from the jurisdiction of the court granted to it by the *CCAA*. Whenever an order is made under s. 11 of the *CCAA* the court is required to appoint a monitor. Section 11.7 of the *CCAA* provides:

> 11.7 (1) When an order is made in respect of a company by the court under section 11, the court shall at the same time appoint a person, in this section and in section 11.8 referred to as "the monitor", to monitor the business and financial affairs of the company while the order remains in effect.
>
> (2) Except as may be otherwise directed by the court, the auditor of the company may be appointed as the monitor.
>
> (3) The monitor shall
>
> (a) for the purposes of monitoring the company's business and financial affairs, have access to and examine the company's property, including the premises, books, records, data, including data in electronic form, and other financial documents of the company to the extent necessary to adequately assess the company's business and financial affairs;
>
> (b) file a report with the court on the state of the company's business and financial affairs, containing prescribed information,
>
> (i) forthwith after ascertaining any material adverse change in the company's projected cash-flow or financial circumstances,
> (ii) at least seven days before any meeting of creditors under section 4 or 5, or
> (iii) at such other times as the court may order;

(c) advise the creditors of the filing of the report referred to in paragraph (b) in any notice of a meeting of creditors referred to in section 4 or 5; and

(d) carry out such other functions in relation to the company as the court may direct.

...

17 It appears that the purpose of the *CCAA* is to grant to an insolvent company protection from its creditors in order to permit it a reasonable opportunity to restructure its affairs in order to reach a compromise or arrangement between the company and its creditors. The court has the power to order a meeting of the creditors or class of creditors for them to consider a compromise or arrangement proposed by the debtor company (s. 4, 5). Where a majority of the creditors representing two thirds value of the creditors or class of creditors agree to a compromise or arrangement, the court may sanction it and thereafter such compromise or arrangement is binding on all creditors, or class of creditors (s. 6).

18 Section 12 of the *Act* defines a claim to mean "any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*." However, as noted by McElcheran in *Commercial Insolvency in Canada* (LexisNexis Canada Inc., Markham, Ontario, 2005 at p. 279-80) the *CCAA* does not set out a process for identification or determination of claims; instead, the Court creates a claims process by court order.

19 The only guidance provided by the *CCAA* is that in the event of a disagreement the amount of a claim shall be determined by the court on summary application by the company or by the creditor. Section 12(2) of the *Act* provides:

Determination of amount of claim

(2) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor shall be determined as follows:

(a) the amount of an unsecured claim shall be the amount

(i) in the case of a company in the course of being wound up under the Winding-up and Restructuring Act, proof of which has been made in accordance with that Act,

(ii) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, proof of which has been made in accordance with that Act, or

(iii) in the case of any other company, proof of which might be made under the Bankruptcy and Insolvency Act, but if the amount so provable is not admitted by the company, the amount shall be determined by the court on summary application by the company or by the creditor; and

(b) the amount of a secured claim shall be the amount, proof of which might be made in respect thereof under the Bankruptcy and Insolvency Act if the claim were unsecured, but the amount if not admitted by the company shall, in the case of a company subject to pending proceedings under the Winding-up and Restructuring Act or the Bankruptcy and Insolvency Act, be established by proof in the same manner as an unsecured claim under the Winding-up and Restructuring Act or the Bankruptcy and Insolvency Act, as the case may be, and in the case of any other company the amount shall be determined by the court on summary application by the company or the creditor.

20 The only parties who appeared on this motion were the Monitor, ScoZinc and Komatsu. No specific submissions were requested nor made by the parties with respect to the nature of the court's jurisdiction to determine the mechanism and time lines to classify and quantify claims against the debtor company.

21 Under the *Bankruptcy and Insolvency Act* the Trustee is the designated gatekeeper who first determines whether a Proof of Claim submitted by a creditor is valid. The trustee may admit the claim or disallow it in whole or in part (s. 135(2) *BIA)*. A creditor who is dissatisfied with a decision by the trustee may appeal to a judge of the Bankruptcy Court.

22 In contrast, the *CCAA* does not set out the procedure beyond the language in s. 12. The language only accomplishes two things. The first is that the debtor company can agree on the amount of a secured or unsecured claim; and secondly, if there is a disagreement, then on application of either the company or the creditor, the amount shall be determined by the court on "summary application".

23 The practice has arisen for the court to create by order a claims process that is both flexible and expeditious. The Monitor identifies, by review of the debtor's records, all potential claimants and sends to them a claim package. To ensure that all creditors come forward and participate on a timely basis, there is a provision in the claims process order requiring creditors to file their claims by a fixed date. If they do not, subject to further relief provided by the claims process order, or by the court, the creditor's claim is barred.

24 If the Monitor disagrees with the claim, and the disagreement cannot be resolved, then a claimant can present its case to a claims officer who is usually given the power to adjudicate disputed claims, with the right of appeal to a judge of the court overseeing the *CCAA* proceedings.

25 The establishment of a claims process utilizing the monitor and or a claims officer by court order appears to be a well accepted practice (See for example *Federal Gypsum Co., (Re)* 2007 NSSC 384; *Olympia & York Developments Ltd. (Re)* (1993), 17 C.B.R. (3d) 1 (Ont. S.C.J.); *Air Canada, (Re)* (2004) 2 C.B.R. (5th) 23 (Ont. S.C.J.); *Triton Tubular Components v. Steelcase Inc.*, [2005] O.J. No. 3926 (Ont. S.C.J.); *Muscletech Research & Development Inc.,(Re)*, [2006] O.J. No. 4087 (Ont. S.C.J.); *Pine Valley Mining Corp., (Re)* 2008 BCSC 356; *Blue Range Resource Corp.*, Re 2000 ABCA 285; *Carlen Transport Inc. v. Juniper Lumber Co. (Monitor of)* (2001), 21 C.B.R. (4th) 222 (N.B.Q.B.).)

26 I could find no reported case that doubt the authority of the court to create a claims process. Kenneth Kraft in his article "The CCAA and the Claims Bar Process", (2000), 13 Commercial In-

solvency Reporter 6, endorsed the utilization of a claims process on the basis of reliance on the court's inherent jurisdiction, provided the process adhered to the specific mandates of the *CCAA*. In unrelated contexts, caution has been expressed with respect to reliance on the inherent jurisdiction of the superior court as the basis for dealing with the myriad issues that can arise under the *CCAA* (See: *Clear Creek Contracting v. Skeena Cellulous Inc.*,(2003), 43 C.B.R (4th) 187) (B.C.C.A.) and *Stelco Inc.(Re)*, [2005] O.J. No. 1171 (CA.)).

27 Sir J.H. Jacob, Q.C. in his seminal article "The Inherent Jurisdiction of the Court", (1970) Current Legal Problems 23, concluded that it has been clear law from the earliest times that superior courts of justice, as part of their inherent jurisdiction, have the power to control their own proceedings and process. He wrote:

> Under its inherent jurisdiction, the court has power to control and regulate its process and proceedings, and it exercises this power in a great variety of circumstances and by many different methods. Some of the instances of the exercise of this power have been of far-reaching importance, others have dealt with matters of detail or have been of transient value. Some have involved the exercise of administrative powers, others of judicial powers. Some have been turned into rules of law, others by long usage or custom may have acquired the force of law, and still others remain mere rules of practice. The exercise of this power has been pervasive throughout the whole legal machinery and has been extended to all stages of proceedings, pre-trial, trial and post-trial. Indeed, it is difficult to set the limits upon the powers of the court in the exercise of its inherent jurisdiction to control and regulate its process, for these limits are coincident with the needs of the court to fulfil its judicial functions in the administration of justice.
>
> p. 32-33

28 The *CCAA* gives no specific guidance to the court on how to determine the existence, nature, validity or extent of a claim against a debtor company. As noted earlier, the only reference is in s. 12 of the *Act* that if there is a dispute as to the amount of a claim, then the amount shall be determined by the court "on summary application". In *Re Freeman Estate*, [1922] N.S.J. No. 15, [1923] 1 D.L.R. 378 (en banc) the court considered the words "on summary application" as they appeared in the *Probate Act* R.S.N.S. 1900 c. 158. Harris C.J. wrote:

> [17] The words "summary application" do not mean without notice, but simply imply that the proceedings before the Court are not to be conducted in the ordinary way, but in a concise way.
>
> [18] The Oxford Dictionary p. 140 gives as one of the meanings of "summary" dispensing with needless details or formalities -- done with despatch.
>
> [19] In the case of the Western &c R. Co. v. Atlanta (1901), 113 Ga. 537, the meaning of the words "summary proceeding" is discussed at some length and the Court held at pp. 543-544:--

> "In a summary manner does not at all mean that they may be abated without notice or hearing, but simply that it may be done without a trial in the ordinary forms prescribed by law for a regular judicial procedure."
>
> [20] I cite this not because it is a binding authority, but because its reasoning commends itself to my judgment and I adopt it.

29 In my opinion, whatever process may be appropriate and necessary to adjudicate disputed claims that ultimately end up before a judge of the superior court, the determination by the court that claims must initially be identified and assessed by the Monitor, and heard first by a Claims Officer, is a valid exercise of the court's inherent jurisdiction.

30 The *CCAA* gives to the court the express and implied jurisdiction to do a variety of things. They need not all be enumerated. The court is required to appoint a monitor (s. 11.7). Once appointed, the monitor is required to monitor the company's business and financial affairs. The *Act* mandates that the monitor have access to and examine the company's property including all records. The monitor must file a report with the court on the state of the company's business and financial affairs and contain prescribed information. In addition, the monitor shall carry out such other functions in relation to the company as the court may direct (s. 11.7(3)(d)).

31 In these circumstances, it is not only logical, but eminently practical that the monitor, as an officer of the court, be directed by court order to fulfil the analogous role to that of the trustee under the *BIA*. The Claims Procedure Order of February 18, 2009 accomplishes this.

POWER OF THE MONITOR

32 The Monitor was required by the Order to publish a notice to claimants in the newspaper regarding the claims procedure. It was also required to send a claims package to known potential claimants identified by the Monitor through its review of the books and records of ScoZinc. The claims bar date was set as March 16, 2009, or such later date as may be ordered by the court.

33 The duties of the Monitor, once a claim was received by it, were set out in paragraphs 9 and 10 of the Claims Procedure Order. They provide as follows:

> 9. Upon receipt of a Proof of Claim:
>
> a. The Monitor is hereby authorized and directed to use reasonable discretion as to the adequacy of compliance as to the manner in which Proofs of Claim are completed and executed and may, where it is satisfied that a Claim has been adequately proven, waive strict compliance with the requirements of this Order as to the completion and the execution of a Proof of Claim. A Claim which is accepted by the Monitor shall constitute a Proven Claim;
> b. the Monitor and ScoZinc may attempt to consensually resolve the classification and amount of any Claim with the claimant prior to accepting, revising or disallowing such Claim; and
>
> ...

> 10. The Monitor shall review all Proofs of Claim filed on or before the Claims Bar Date. The Monitor shall accept, revise or disallow such Proofs of Claim as contemplated herein. The Monitor shall send a Notice of Revision or Disallowance and the form of Notice of Dispute to the Claimant as soon as the Claim has been revised or disallowed but in any event no later than 11:59 p.m. (Halifax time) on March 27, 2009 or such later date as the Court may order. Where the Monitor does not send a Notice of Revision or Disallowance by the aforementioned date to a Claimant who has submitted a Proof of Claim, the Monitor shall be deemed to have accepted such Claim.

34 Any person who wished to dispute a Notice of Revision or Disallowance was required to file a notice to the monitor and to the Claims Officer no later than April 6, 2009. The Claims Officer was designated to be Richard Cregan, Q.C., serving in his personal capacity and not as Registrar in Bankruptcy. Subject to the direction of the court, the Claims Officer was given the power to determine how evidence would be brought before him and any other procedural matters that may arise with respect to the claim. A claimant or the Monitor may appeal the Claims Officer's decision to the court.

35 The Monitor suggests that the power given to it under paragraph 9(a) and 10 is sufficient to permit it to accept the revised Proofs of Claim filed after the claim's bar date of March 16, 2009, but before its assessment date of March 27, 2009.

36 Reliance is also placed on the decision of the Alberta Court of Appeal in *Blue Range Resource Corp.* 2000 ABCA 285. As noted by the Monitor, the decision in *Blue Range* did not directly deal with the issue on which the Monitor here seeks directions. In *Blue Range*, the claims procedure established by the court set the claims bar date of June 15, 1999. Claims of creditors not proven in accordance with the procedures set out were deemed to be forever barred. Some creditors filed their Notice of Claim after the claims bar date. The monitor disallowed their claims. There were a second group of creditors who filed their Notice of Claim prior to the applicable claims bar date, but then sought to amend their claims after the claims bar date had passed. The monitor also disallowed these claims as late. What is not clear from the reported decisions is whether this second group of creditors requested amendments of their claims during the time period granted to the Monitor to carry out its assessment.

37 The chambers judge allowed the late and amended claims to be filed, [1999] A.J. No. 1308. Enron Capital Corp. and the creditor's committee sought leave to appeal that decision. Leave to appeal was granted on January 14, 2000 with respect to the following question:

> What criteria in the circumstances of these cases should the Court use to exercise its discretion in deciding whether to allow late claimants to file claims which, if proven, may be recognized, notwithstanding a previous claims bar order containing a claims bar date which would otherwise bar the claim of the late claimants, and applying the criteria to each case, what is the result?

Re Blue Range Resources Corp., 2000 ABCA 16

38 Wittmann J.A. delivered the judgment of the court. He noted that all counsel conceded that the court had the authority to allow the late filing of claims and that the appeal was really a matter of what criteria the court should use in exercising that power. Accordingly, a Claims Procedure Or-

der that contains a claims bar date should not purport to forever bar a claim without a saving provision. Wittmann J.A. set out the test for determining when a late claim may be included to be as follows:

> [26] Therefore, the appropriate criteria to apply to the late claimants is as follows:
>
> 1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?
> 2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?
> 3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?
> 4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?
>
> [27] In the context of the criteria, "inadvertent" includes carelessness, negligence, accident, and is unintentional. I will deal with the conduct of each of the respondents in turn below and then turn to a discussion of potential prejudice suffered by the appellants.
>
> 2000 ABCA 285

39 The appellants claimed that they would be prejudiced if the late claims were allowed because if they had known the late claims would be allowed they would have voted differently. This assertion was rejected by the chambers judge. With respect to what is meant by prejudiced, Wittmann J.A. wrote:

> 40 In a CCAA context, as in a BIA context, the fact that Enron and the other Creditors will receive less money if late and late amended claims are allowed is not prejudice relevant to this criterion. Re-organization under the CCAA involves compromise. Allowing all legitimate creditors to share in the available proceeds is an integral part of the process. A reduction in that share can not be characterized as prejudice: Re Cohen (1956), 36 C.B.R. 21 (Alta. C.A.) at 30-31. Further, I am in agreement with the test for prejudice used by the British Columbia Court of Appeal in 312630 British Columbia Ltd., [1995] B.C.J. No. 1600. It is: did the creditor(s) by reason of the late filings lose a realistic opportunity to do anything that they otherwise might have done? Enron and the other creditors were fully informed about the potential for late claims being permitted, and were specifically aware of the existence of the late claimants as creditors. I find, therefore, that Enron and the Creditors will not suffer any relevant prejudice should the late claims be permitted.

40 In considering how the Monitor should carry out its duties and responsibilities under the Claims Procedure Order it is important to note that the Monitor is an officer of the court and is

obliged to ensure that the interests of the stakeholders are considered including all creditors, the company and its shareholders (See *Laidlaw Inc. Re* (2002), 34 C.B.R. (4th) 72 (Ont. S.C.J.).

41 In a different context Turnball J.A. in *Siscoe & Savoie v. Royal Bank* (1994), 29 C.B.R. (3d) 1 commented that the monitor is an agent of the court and as a result is responsible and accountable to the court, owing a fiduciary duty to all of the parties (para. 28).

42 In my opinion, para. 9(a) is not of assistance in determining the authority of the Monitor to revise upward a claim filed after the claim's bar date but before the assessment date. Paragraph 9(a) authorizes the Monitor to use reasonable discretion as to the adequacy of compliance as to **the manner** to which Proofs of Claim are completed and executed. If it satisfied that the claim has been adequately proven it may waive strict compliance with the requirements of the order as to **completion** and the **execution** of a Proof of Claim.

43 Paragraph 10 of the Claims Procedure Order mandates the Monitor shall review all Proofs of Claim filed on or before the claims bar date. It shall "accept, revise or disallow such Proofs of Claim as contemplated herein". While normally a monitor's revision would be to reduce a Proof of Claim, there is in fact nothing in the Claims Procedure Order that so restricts the Monitor's authority. It is obviously contemplated by para. 10 that the monitor is to carry out some assessment of the claims that are submitted.

44 In my view, the Proofs of Claim that are filed act both as a form of pleading and an opportunity for the claimant to provide supporting documents to evidence its claim. In the case before me, the creditors discovered that the claims they had submitted were inaccurate and further evidence was tendered to the Monitor to demonstrate. The Monitor, after reviewing the evidence, accepted the validity of the claims.

45 Courts in a general way are engaged in dispensing justice. They do so by setting up and applying procedural rules to ensure that litigants are afforded a fair hearing. The resolution of disputes through the litigation process, including the ultimate hearing, is fundamentally a truth-seeking process to determine the facts and to apply the law to those facts. Can it be any different where the process is not in the court but under its supervision pursuant to a claims process under the *CCAA.?*

46 To suggest that the monitor does not have the authority to receive evidence and submissions and to consider them is to say that it does not have any real authority to carry out its court appointed role to assess the claims that have been submitted. The notion that the monitor cannot look at documentary evidence on its own initiative or at the instance of a claimant, and even consider submissions, is to deny it any real power to consider and make a preliminary determination of the merits of a claim.

47 The Claims Procedure Order contains a number of provisions that anticipate the exchange of information between the Monitor, the company and a creditor. Paragraph 9(b) authorizes the Monitor and ScoZinc to attempt to consensually resolve the classification and the amount of any claim with a claimant prior to accepting, revising or disallowing such claim. Paragraph 17 of the Claims Procedure Order directs that the Monitor shall at all times be authorized to enter into negotiations with claimants and settle any claim on such terms as the Monitor may consider appropriate.

48 In my opinion, it does not matter that revised claims were submitted after the claims bar date. In essence, the Monitor simply acted to revise the Proofs of Claim already submitted to con-

form with the evidence elicited by the Monitor, or submitted to it. The Monitor had the necessary authority to revise the claims, either as to classification or amount.

49 If a claimant seeks to revise or amend its claim after the assessment date set out in the Claims Procedure Order, different considerations may come into play. The appropriate procedure will depend on the provisions of the Claims Procedure Order. In addition, the court, as the ultimate arbiter of disputed claims under s. 12 of the *CCAA*, should always be viewed as having the jurisdiction to permit appropriate revision of claims.

D.R. BEVERIDGE J.

TAB 3

N§143 — Claims of Creditors

Previously, s. 19 specified that ss. 65 and 66 of the *Winding-up and Restructuring Act* did not apply to a compromise or arrangement under the *CCAA*. When the amendments were proclaimed in force, the current s. 19 was repealed and the new provision set out in s. 41 (2007, c. 36, in force September 18, 2009). See N§204 "Sections 65 and 66 of *Winding-up and Restructuring Act* Do Not Apply".

Section 19 contains provisions in respect of compromise of claims that align with provisions under the *BIA*. Claims that may be dealt with by a compromise or arrangement in respect of a debtor company are claims that relate to debts or liabilities, present or future, to which the company is subject or may become subject on commencement of *CCAA* proceedings or proposal proceedings under the *BIA*: s. 19(1) (in force September 18, 2009). If the company filed a notice of intention under s. 50.4 of the *BIA* or commenced proceedings under the *CCAA* with the consent of inspectors referred to in s. 116 of the *BIA*, claims dealt with are from the date of the initial bankruptcy event within the meaning of s. 2: s. 19(1) (2007, c. 36, in force September 18, 2009). The plan may deal with claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the same dates: s. 19(2) (2007, c. 36, in force September 18, 2009). There is an exception for specified claims.

For the purposes of the *CCAA*, "claim" means indebtedness, liability or obligation that would be provable under the *BIA*. The amount represented by a claim of any secured or unsecured creditor is determined as the following. Where a company is being wound up under *WURA* or liquidated under the *BIA*, proof is in accordance with those statutes: s. 20(1) and see N§145 "Determination of Amount of Claims".

The debtor can admit the amount. If not, the court can determine the value of the claim on summary application by either the company or a creditor. Nothing in the *WURA* or *BIA* prevents a secured creditor from voting at a meeting of secured creditors or any class of them in respect of the total amount of a claim as admitted. The 2009 amendments renumbered and clarified the language of the provisions, as well as adding specified claims that are not compromised by a plan, in order to align the *CCAA* with the *BIA*. However, the cases below referring to former section 12 are still relevant in most instances. A debtor company may admit the amount of a claim for voting purposes and reserve its right to contest liability on the claim for other purposes: s. 20(2). Section 20(2) specifies that nothing prevents a secured creditor from voting at a meeting of secured creditors or any class of them in respect of the total amount of a claim as admitted. The law of set-off or compensation applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be: s. 21 (2007, c. 36, in force September 18, 2009).

The Alberta Court of Queen's Bench denied the debtors' motion authorizing interim distribution of funds to a major secured creditor. Romaine J. held that while orders allowing interim distributions to creditors are not without precedent, an application for an interim distribution to one creditor must be carefully scrutinized and found to be justifiable for good and sustainable reasons, recognizing that it may create a preference. Here, it appeared that the debtors' right of subrogation and indemnity may not be enforceable against other borrowers or guarantors unless all indebtedness to the lenders was paid in full and it appeared that the right to contribution from other members of the enterprise group may be limited under U.S. law. Romaine J. held that an interim distribution would give rise to the possibility that unsecured creditors may be prejudiced and that such potential for prejudice outweighed the benefits of an early payment on the guarantee to the lenders. It is not necessarily the case that

a distribution of funds from the Canadian estate must await the resolution of the Chapter 11 proceedings, as *CCAA* proceedings may advance at a different pace if the court is satisfied by the evidence before it that it is appropriate to do so. The application was adjourned *sine die* with leave to the applicants and the lenders to reapply with more current information if it became apparent that the potential prejudice identified by the unsecured creditors was unlikely to materialize or could be avoided by other measures or that the balance of prejudice and benefit had shifted: *Re SemCanada Crude Co.* (2009), 2009 CarswellAlta 167, 52 C.B.R. (5th) 131 (Alta. Q.B.); leave to appeal refused (2009), 2009 CarswellAlta 972, 55 C.B.R. (5th) 48 (Alta. C.A. [In Chambers]).

The creditor has the burden of proving its claims: *Re Pine Valley Mining Corp.* (2008), 2008 CarswellBC 579, 41 C.B.R. (5th) 43; additional reasons at (2008), 2008 CarswellBC 712, 41 C.B.R. (5th) 49 (B.C. S.C.).

Two parties that were judgment creditors moved for directions as to whether the terms of the "release," which was part of a *CCAA* plan sanction order of the Ontario Superior Court, was part of the approval of a plan. The Ontario Superior Court held that the Ontario Court did not have the jurisdiction to deal with the real issue as between the parties, namely whether the bailiff was authorized or negligent in turning property proceeds in a Québec proceeding into asset-backed commercial paper, as that was a matter for the Québec court. It was, however, appropriate that the Ontario Court address the narrow issue of whether the parties were covered by the release terms in the ABCP plan sanction order. The parties who had bargained for ABCP releases were those who could be sued by noteholders. Neither judgment creditor had had any dealings with the company that purchased the ABCP and Campbell J. held that it would be inequitable to preclude them from pursuing a claim against the bailiff for failure to pay over amounts owing on a court-ordered process: *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 5255, 46 C.B.R. (5th) 195 (Ont. S.C.J. [Commercial List]). In another judgment, Campbell J. considered the monitor's report, which calculated the vote both on the basis previously approved and on the basis of dollar value and was satisfied that a reclassification would not alter the strong majority voting in favour of the plan: *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 3523, 43 C.B.R. (5th) 269 (Ont. S.C.J. [Commercial List]); affirmed (2008), 2008 CarswellOnt 4811, 45 C.B.R. (5th) 163 (Ont. C.A.); leave to appeal to S.C.C. refused (2008), 2008 CarswellOnt 5432, 2008 CarswellOnt 5433 (S.C.C.).

The onus is on any claimant to prove its claim. Where a contingent claimant seeks to prove its claim, it must show that the claim is not speculative or remote; however, it need not establish that success is probable: *Re Air Canada (CUPE contingent claim appeal)* (2004), 2004 CarswellOnt 3320, 2 C.B.R. (5th) 23 (Ont. S.C.J. [Commercial]).

The amendments specify that the court has the authority to fix a deadline for creditors to file claims, often referred to as a claims bar date for the purposes of voting and for distribution under a compromise or arrangement: s. 12 (2007, c. 36, in force September 18, 2009).

A claim determined to be valid under Part III of the *Canada Labour Code* becomes a judgment debt and will be determined at an amount of 100% of the claim. The judgment creditor in turn becomes an unsecured debt holder and may determine whether or not, in a *CCAA* procedure, it wishes to support or reject the plan. If the plan is rejected, then Part III creditors will be free to pursue whatever remedies they may have to collect their judgment debt: *Re Air Canada (Canada Labour Code Claims)* (2004), 2004 CarswellOnt 2946, 2 C.B.R. (5th) 18 (Ont. S.C.J. [Commercial]).

The court can determine the valuation of claims summarily, but in an appropriate case, the court can direct the trial of an issue in which production and discovery would be available: *Algoma Steel Corp. v. Royal Bank* (1992), 11 C.B.R. (3d) 11, 8 O.R. (3d) 449 (C.A.). In

Algoma Steel Corp. v. Royal Bank (1992), 11 C.B.R. (3d) 11, Farley J. (Ont. Gen. Div.) held that the holder of a guarantee given by the debtor company could prove a claim for the full amount of the debt owing by the principal debtor. The holder of the guarantee need not, however, file a claim but can proceed against the principal debtor without being affected by a plan made under the *CCAA*.

In *Confederation Financial Services (Canada) Ltd. v. Confederation Treasury Services Ltd.* (2003), 40 C.B.R. (4th) 10, 2003 CarswellOnt 1104 (Ont. S.C.J.), under the *CCAA* plan of arrangement, the debtor entered into a trust indenture pursuant to which what were called residue certificates were issued to creditors in satisfaction of their claims. The holders of the certificates were paid in full together with accrued interest. Certain certificate holders had not proved their claims. After payment of the claims of creditors, there remained a substantial surplus. The Public Guardian and Trustee of Ontario contended that all residue certificates not claimed by the holders were escheated and forfeited to the Crown as *bona vacantia*. The court held that the unclaimed moneys were not *bona vacantia*, since property that is undistributed under a trust is not *bona vacantia*. The debtor company did not wish to receive the surplus funds. The court amended the trust indenture to distribute the surplus funds between the holders of residue certificates and the professional advisors who had worked on the plan. The professional advisors, the court said, had achieved a highly successful result beyond all reasonable expectations and were entitled to a premium.

The Tax Court of Canada has exclusive jurisdiction to determine a disputed tax liability assessment, even where the debtor is operating under *CCAA* protection: *Re CCI Industries Ltd.* (2005), 2005 CarswellAlta 1261, 15 C.B.R. (5th) 180 (Alta. Q.B.).

In *Re Cage Logistics Inc.* (2002), 50 C.B.R. (4th) 169, 2002 CarswellAlta 1896 (Alta. Q.B.); leave to appeal refused (2003), 2003 CarswellAlta 123, 40 C.B.R. (4th) 165 (Alta. C.A.), a credit agreement provided for the payment of "breakage costs" in the event of the pre-payment of a loan. The court found that the debtors were not obliged to pay those costs where the creditors were paid the principal owed, plus interest and other applicable charges under the credit arrangement as part of a plan of arrangement. The obligation to pay the breakage fee did not arise, pursuant to the contract, unless the pre-payment was with the tacit consent of the debtor.

Products liability actions had been stayed in both the *CCAA* and U.S. Chapter 15 proceedings, and there was a claims process set up that involved a first assessment of claims by the monitor; a process for resolving disputed claims; and a claims bar date. The court held that the *CCAA* process and notice adequately protected the interests of the potential claimants and they chose not to utilize the process. The court declined to exercise its discretion to allow the representative claims or lift the stay to permit certification motions to proceed in the U.S. The court held that changing and increasing the landscape of claimants after the claims bar date and after the settlement of thirty claims could cause prejudice to the eventual success of the *CCAA* process. The process gave adequate opportunity for anyone with a claim to file a proof of claim; the forms were accessible and in plain language; the products liability claimants all managed to make individual claims, even where they were involved in class actions; and hence the court concluded that to allow representative or class claims at this date would be prejudicial to the entire claims process and would impair the integrity of the *CCAA* process: *Re Muscletech Research & Development Inc.* (2006), 2006 CarswellOnt 4929, 25 C.B.R. (5th) 218; additional reasons at (2006), 2006 CarswellOnt 5484, 25 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]).

A monetary penalty under the *Aeronautics Act* issued against Air Canada prior to its *CCAA* proceedings was a claim in the *CCAA* proceedings and was thus a compromised debt after

the plan had received court sanction: *Re Air Canada* (2006), 2006 CarswellOnt 8175, 28 C.B.R. (5th) 317 (Ont. S.C.J. [Commercial List]).

Where debtors in a *CCAA* proceeding had obtained an order permitting them to market debentures they owned with provisions requiring them to identify and process claims purporting to differentiate rights, privileges and entitlements associated with the debentures ("bond differentiation claims"), the court dismissed an application by U.S. debtors to vary the order. The court held that the amendments proposed by U.S. debtors were not refinement or clarification, but would result in real change in effect and scope of the order by exempting from its application any defences the U.S. debtors may have to any proof of claim in U.S. court proceedings. The court held that it had jurisdiction to make determinations relating to bond differentiation claims and there was no evidence before it that a jurisdictional issue had arisen and the court held that it must necessarily make determinations regarding the status and enforceability of the principal claims outstanding in the *CCAA* proceeding: *Re Calpine Canada Energy Ltd.* (2006), 2006 CarswellAlta 1313, 26 C.B.R. (5th) 77 (Alta Q.B). See Howard Gorman, "Calpine: Cross-Border Review and Approval of Inter-Debtor Claims", in J. Sarra, ed. *Annual Review of Insolvency Law, 2007* (Carswell, 2008).

A franchisor that was a subsidiary of a group of companies that filed under the *CCAA* had a general security agreement (GSA) over the assets of its franchises. The franchisor's parent corporation in the same proceeding had a subordination agreement with the bank, but the franchisor itself had never made an agreement. During the *CCAA* proceeding, the debtor parent sold the franchise agreements and the GSA to a purchaser pursuant to approval and a vesting procedure free and clear of any security interests. The court granted a motion by the purchaser for a declaration that the GSA had priority over the bank's GSA on the basis that the order was clear, the bank was party to the proceedings two years' prior and had failed to claim priority at the time, and the matters resolved by the order were *res judicata*. The court held that the *CCAA* objective of providing a mechanism for the efficient restructuring of insolvent companies would be seriously undermined if parties that fail to assert their rights at the time are permitted to subsequently return to court to undo past transactions: *Extreme Retail (Canada) Inc. v. Bank of Montréal* (2007), 2007 CarswellOnt 5520, 37 C.B.R. (5th) 90 (Ont. S.C.J. [Commercial List]).

In a *CCAA* proceeding, the Québec Superior Court held that the debtor companies could satisfy the claims of a strategic buyer of distressed debt by paying the distressed debt buyer the sums that the distressed debt buyer had paid to acquire the distressed debt. The court has jurisdiction to take into account the circumstances under which distressed debt is acquired in insolvency proceedings, especially in situations where the purchaser of such distressed debt is pursuing a hidden agenda, is acting in bad faith, or "tramples on the rights and expectations of others". The debtors had sought a "white knight" to buy out the bank's interest at a steep discount in order to allow the debtor to fund a plan of arrangement. A falling out among the principals resulted in the white knight purchasing claims in order to control the class of creditors and defeat the debtor's restructuring efforts. In finding that the distressed debt buyer was a "rogue white knight", the court held that "threatening to hijack the project and frustrate a plan intended to bring a measure of relief to many creditors, including the purchasers of units, does not square with the good faith conduct required of contracting parties by article 1375 C.C.Q." Based on the particular facts, the court decided to treat the claims of the white knight as if they were "litigious rights" because that was what the parties intended at the time that the bank debt was acquired at a discount. In Québec, the person from whom litigious rights are claimed is fully discharged by paying to the buyer of such rights the sale price, the costs related to the sale, and interest on the price computed from the day on which the buyer paid it. Consequently, the court ordered that the debtor could satisfy

and discharge all claims owing to the white knight by paying it, in the context of its plan of arrangement, the amount that the white knight had itself paid to acquire the subject debt claims. On such payment, the white knight would be deemed to have accepted the debtor's plan of arrangement: *Minco-Division Construction Inc. v. 9170-6929 Québec Inc.* (2007), 2007 CarswellQue 420, 29 C.B.R. (5th) 165 (Que. S.C. [Commercial Div.]); leave to appeal to C.A. refused (29 January 2007), Montréal 500-09-017423-070 and 500-09-017419-078 (Que. C.A.). For a discussion of this judgment, see article by Mark Meland, "Rogue White Knights and Strategic Buyers of Distressed Debt in Canadian Insolvency Proceedings" and Janis Sarra, "Distressed Debt Purchasers in Canadian Restructuring Proceedings — The Québec Court's Recent Consideration of Rogue White Knights", INSOL Newsletter, July 2007.

The Ontario Court of Appeal held that a pre-*CCAA* claim for arrears of rent under a lease may be asserted in full against the reorganized *CCAA* company following its emergence from *CCAA* proceedings where the lease in question was not repudiated as part of the *CCAA* proceedings; the claimant never received notice of the *CCAA* proceedings or of a claims procedure order; and the provisions of the order sanctioning the debtor company's plan of reorganization and the plan itself make it clear that: (1) a real property lease that has not been repudiated or terminated and in respect of which there has been no written agreement to allow a claim is an "unaffected obligation" under the plan; (2) the debtor company is deemed to have ratified each unexpired lease to which it is a party, unless such lease was previously repudiated or terminated or previously expired or terminated pursuant to its own terms; and (3) any agreement to which the debtor company is a party as at the effective date of the plan shall be and remain in full force and effect unamended: *Ivorylane Corp. v. Country Style Realty Ltd.* (2005), 2005 CarswellOnt 2516, 11 C.B.R. (5th) 230 (Ont. C.A.).

In the context of a *CCAA* plan, the British Columbia Court of Appeal held that an employment contract was an executory contract and therefore a "claim" that was compromised in the plan of arrangement. Levine J.A. held that the first step in determining whether a claim for damages for breach of an employment contract represented a contingent liability was to consider the meaning of that term. The Supreme Court of Canada in *McLarty v. R.* (2008), 2008 CarswellNat 1380, 2008 CarswellNat 1381, [2008] 2 S.C.R. 79 referred to the "well-accepted test for a contingent liability" as described by Lord Guest in *Winter v. Inland Revenue Commissioners* (1961), [1963] A.C. 235, [1961] 3 All E.R. 855 (U.K. H.L.), as an event that may or may not occur, and the contingent liability is a liability that depends for its existence on an event that may or may not happen. Levine J.A. concluded that, although there is the potential of a claim for damages, there can be no liability, contingent or otherwise, where there is no present cause of action. Until there is a breach of contract, there is no legal basis for any claim or any corresponding liability. Levine J.A. concluded that the liability to pay damages if an employment contract was breached for failing to give reasonable notice of termination was not a contingent liability within the ordinary meaning of that term. Until the termination of employment without adequate notice, there was no injury. Justice Levine also held that the applicant's employment contract was, at the filing date, an executory contract that fell within the definition of "claim" in the plan: *Re West Bay SonShip Yachts Ltd.* (2009), 2009 CarswellBC 139, 49 C.B.R. (5th) 159 (B.C. C.A.).

Where parties entered into an agreement for a shareholder to pay USD 20 million to purchase USD 10 million of the debtor company's income tax refund, the agreement required the debtor to hold the tax refund in trust for the shareholder. The debtor did not deliver the transfer document, in breach of the agreement, and then filed under the *CCAA*. The shareholder successfully argued that the funds were held in trust; and on appeal, the appellate court held that the circumstances of the case made it appropriate to apply the equi-

table maxim that "equity looks on that as done which ought to be done". It would be inequitable for the debtor to take advantage of its own breach of agreement by contending that its failure to deliver the transfer excused it from its contractual obligation. It was not inequitable to require secured creditors to live with the agreement they helped make and that they influenced the debtor company to breach: *Re Grant Forest Products Inc.* (2010), 2010 CarswellOnt 3001, 101 O.R. (3d) 383, 67 C.B.R. (5th) 23 (Ont. C.A.).

(1) — Claims Barring Procedure

In *CCAA* proceedings, a claims bar order can be made by the judge in charge of the proceedings. The purpose of the order is, amongst other things, to enable creditors to meaningfully assess and vote on a plan of arrangement and to ensure a timely and orderly completion of the *CCAA* proceedings.

Under a claims bar order, creditors are required to file their claims by a fixed date. The debtor company is directed to send notice of the order to all creditors. The court may also order publication in a newspaper.

It is usual to appoint a claims officer who will be given power to adjudicate disputed claims with the right of appeal to the judge administering the *CCAA* proceedings. In some orders, a creditor is given the right to by-pass the claims officer and to apply directly to the judge for a ruling on its claim.

In *Re Blue Range Resource Corp.* (2000), 15 C.B.R. (4th) 192, 2000 CarswellAlta 30 (C.A. [In Chambers]) a claims bar order was made by the court. Two creditors did not file their claims in the time period fixed by the order. The creditors applied for and were granted an extension of time for filing their claims. A large creditor applied for leave to appeal. A judge of the Alberta Court of Appeal granted leave to appeal on the issue whether the lower court judge had erred in exercising the discretion to extend the time for creditors to file their claims. The Court of Appeal dismissed the appeal: see *Re Blue Range Resource Corp.* (2000), 2000 CarswellAlta 1145 (C.A.); additional reasons at (2001), 2001 CarswellAlta 1059 (C.A.); leave to appeal refused (2001), 2001 CarswellAlta 1209, 2001 CarswellAlta 1210 (S.C.C.). The Court of Appeal held that in determining whether or not to grant permission for late filing of claims, the court should apply the following tests:

> 1. Was the delay in filing caused by inadvertence and if so, was the creditor acting in good faith? Inadvertence includes carelessness, negligence and accident but the conduct must be unintentional.
>
> 2. What is the effect of extending the time for filing in terms of the existence and impact of any relevant prejudice caused by the late filing? The test for prejudice is: did the creditors who filed on time lose as a result of the late filing a realistic opportunity to do anything that they might otherwise have done? The fact that the amount available for distribution to creditors has been reduced does not constitute prejudice.
>
> 3. If the late filing has caused relevant prejudice, can it be alleviated by attaching appropriate conditions to the order permitting the late filing?
>
> 4. If relevant prejudice has been caused, which cannot be alleviated, are there any other consideration which could nonetheless warrant an order for late filing?

Leave to file a late dispute notice may be granted where it will not cause hardship to any interested party or prejudice the debtor's reorganization; which is not to say that an extension will usually be granted. Corrective action must be taken forthwith to address delays upon the error being realised, and lying in the weeds is not an option: *Re Air Canada [Late Dispute Notice]* (2004), 49 C.B.R. (4th) 175, 2004 CarswellOnt 1843 (Ont. S.C.J. [Commercial]).

The Alberta Court of Appeal held that to further the goal of enabling a company to deal with creditors in order to carry on business, the *CCAA* proceedings seek to resolve matters and obtain finality without undue delay, and a claims bar date is one means of bringing disputed claims to an end and allowing a company to move forward: *Hurricane Hydrocarbons Ltd. v. Komarnicki* (2007), 2007 CarswellAlta 1521, 37 C.B.R. (5th) 1 (Alta. C.A.).

In considering whether claims could be considered when they were submitted after a claims bar date, the Newfoundland and Labrador Supreme Court extended the time for filing of certain claims on the basis that the trustee had not set out any real prejudice that would arise if the claims were allowed; the proposal itself contemplated that there would be additional claimants; there was evidence of an overall intent to determine and assess the claims of unknown victims of abuse; there was no inordinate delay by each of the applicants that could prejudice the process; and the trustee had not pointed to anything greater than the inadvertence claimed by the claimants that would minimize the existence of good faith on their behalf: *Re Roman Catholic Episcopal Corp. of St. George's* (2007), 2007 CarswellNfld 198, 32 C.B.R. (5th) 302 (N.L. T.D.).

The court has the jurisdiction to admit late-filed, or otherwise irregular, claims in a previously approved *CCAA* plan. Pursuant to a *CCAA* plan, a trust was established for the purpose of holding, administering and distributing an "HIV Fund" in satisfaction of claims of persons ("HIV Claimants") who were infected with the HIV virus from receiving blood supplied by the debtor. As a result of problems and litigation, no distributions had been made from the HIV Trust in the eight years since the plan had been approved. Late applications were received from persons who were either infected persons, or persons with derivative claims as members of the families of infected persons, where they did not receive notice. The court's considerations in the exercise of its jurisdiction in this case were: the structure of the *CCAA* plan with its provision of a separate fund for HIV Claimants; the fact that no distributions had been made; the absence of prejudice that would be suffered by the debtor and other claimants; the uncertainty created by the limitations issues; the circumstances of the claimants that distinguish them from commercial creditors; the fact that adequate notice to them was essential if the plan was to be effective; the application forms provided to the HIV Claimants were not clear; and the methods of disseminating notice of the deadline may have been affected, and unduly limited, by a misapprehension as to the number of potential claimants: *Re Canadian Red Cross Society/Société Canadienne de la Croix-Rouge* (2008), 2008 CarswellOnt 6105, 48 C.B.R. (5th) 41 (Ont. S.C.J.). See Vern W. DaRe, "Risks Inherent in the Settlement of Tort Claims: Recent Direction from the Red Cross Case", in J. Sarra, ed., *Annual Review of Insolvency Law, 2008* (Toronto: Carswell, 2009).

The monitor brought a motion seeking directions as to whether it has the necessary authority to allow a revision of a claim after the claims bar date but before the date set for the monitor to complete its assessment of claims. The monitor was of the view that errors in the proofs of claim were due to inadvertence and for all of the claims it issued a notice of revision, allowing the claims as revised if the court determined that it had the power to do so. The court held that the monitor as an officer of the court, is obliged to ensure that the interests of the stakeholders are considered, including all creditors, the company and its shareholders; and the monitor had the necessary authority to revise the claims, either as to classification or amount: *Re ScoZinc Ltd.* (2009), 2009 CarswellNS 229, 53 C.B.R. (5th) 96 (N.S. S.C.).

The British Columbia Court of Appeal upheld two decisions in proceedings under the *CCAA* involving pre-sale purchasers of residential condominiums, who argued that they had certain remedial rights under the *Real Estate Marketing and Development Act (REMDA)* that were sufficient to give them status as creditors in the *CCAA* proceeding. The Court held that there was nothing in the *REMDA* that suggested that the legislature intended that the "identity of

the developer" changes if corporate ownership and control change. Levine J.A. held that the appellants had no rights of rescission or to return of their deposits because their pre-sale agreements were unenforceable under the *REMDA*; thus, there was no basis for them to claim that they were creditors in the *CCAA* proceeding. The appellate court affirmed the supervising judge's approval of an extension of the completion date of the pre-sale agreements because of construction delays, observing that the customary way of determining delay claims is after the project has been completed. In this case, there was not that luxury, and the court proceeded to decide them and ordered the extension: *Re Jameson House Properties Ltd* (2009), 2009 CarswellBC 1904, 57 C.B.R. (5th) 21 (B.C. C.A.).

An issue arose during *CCAA* proceedings as to whether a document constituted a promissory note within the meaning of the *Bills of Exchange Act*. The Alberta Court of Appeal held that it was not a promissory note as it was not unconditional in nature; and the provision that was titled "promissory note" was included as part of a contract, the terms of which conditioned payment of obligation. The provision could not be construed independently from other provisions of the purchase contract. Hence the chambers judge was correct in her determination that the document did not contain an unconditional promise to pay: *Re Fairmont Resort Properties Ltd.* (2009), 2009 CarswellAlta 1589, 60 C.B.R. (5th) 55 (Alta. C.A.).

The Ontario Superior Court of Justice declined to establish a claims bar date in respect of claims made under special purpose provincial legislation. The court reviewed the basis for establishing such a process and concluded, in this case, that there would be no prejudice to the claimant if the motion was dismissed on a without prejudice basis to the claimant to request similar relief at a time in the future. The Attorneys General for Canada, the MRQ and six provincial Crowns had filed notices of claim in respect of this claims bar order, the aggregate Crown smuggling claims against the debtor company totalled many billions of dollars. British Columbia had enacted the *Tobacco Damages and Health Care Cost Recovery Act* (*TDHCCRA)* and delivered a notice of claim to the debtor company and the monitor, seeking the present value of the past and future costs of government health care benefits on an aggregate basis provided for its population resulting from tobacco related disease as a result of smoking cigarettes. The proposed order would fix a claims bar date. Justice Cumming held that those provinces that have enacted and proclaimed in force TDHCCRA-type legislation have a cause of action and consequently, have claims "provable in bankruptcy". Justice Cumming held that it was inappropriate to attempt to determine "provable claims" at this early stage. He did acknowledge the provinces' submission that all provisions of the TDHCCRA-type legislation operated retroactively, including the section of each statute that creates a cause of action. Justice Cumming concluded that the claims arising out of allegations of smuggling of contraband tobacco products were distinguishable from the situation with the putative health care cost recovery (HCCR) claims. Each cause of action existed at the time the claims bar order was sought. The existing claims bar order relating to the Crown smuggling claims did not impair or challenge the jurisdiction of any legislature to enact legislation in the future. Rather, the claims bar order simply required that any such existing smuggling claims of governments be filed by a fixed date, so as to give notice to preserve their existing claims for purposes of the *CCAA* proceedings. Justice Cumming concluded that there was no prejudice to B.C., or to any other province that may choose to advance an HCCR claim. The existing HCCR claims were proceeding having been unaffected (with the stay lifted) by these *CCAA* proceedings. There are no limitation of action issues in respect of the HCCR claims. Justice Cumming went on to note that the existing and anticipated HCCR claims would involve multiple defendants, both domestic and foreign, and would necessarily have to proceed in the civil courts. It might well unnecessarily complicate and delay the HCCR proceedings, as well as the *CCAA* proceeding, to make a Crown HCCR claims bar order at this time relating to HCCR claims against the company. It was premature to set a bar

date and establish a procedure for the determination of HCCR claims. The existing B.C. claim was proceeding before the Supreme Court of British Columbia and was being case managed. It was obvious that it would be both efficient and expeditious to have a single trial in respect of all HCCR claims rather than one in each province: *Re JTI-MacDonald Corp.* (2009), 2009 CarswellOnt 6614, 61 C.B.R. (5th) 117 (Ont. S.C.J. [Commercial List]).

The Alberta Court of Queen's Bench denied the motion of a creditor to have a late amended proof of claim accepted in a *CCAA* proceeding. The issue was whether the creditor, having initially filed a claim that it characterized as fully secured, was entitled to file a late amended claim alleging that a large portion of its claim was unsecured. The criteria to accept late claims include: (a) was the delay caused by inadvertence and if so, did the claimant act in good faith; (b) what is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay; (c) if relevant prejudice is found, can it be alleviated by attaching appropriate conditions to an order permitting late filing; (d) if relevant prejudice is found that cannot be alleviated, are there any other considerations that may nonetheless warrant an order permitting late filing? In this case, the creditor filed a late revised claim after months of relative lack of diligence with respect to the value of its security, at a time when it had become apparent that the distribution to unsecured creditors under a proposed plan would be substantial. The court concluded that, on the facts, it would not be fair or equitable to accept the late amended claim: *Re BA Energy Inc.* (2010), 2010 CarswellAlta 1598, 70 C.B.R. (5th) 24 (Alta. Q.B.).

The Québec Superior Court declined to grant a *CCAA* claims bar order in respect of a bankrupt debtor who was no longer under *CCAA* protection. The court held that there was no jurisdiction under the *CCAA* to make such an order as the *BIA* now applied. Justice Gascon held that the most appropriate approach to determine a court's authority during a *CCAA* proceeding is a hierarchical one, where courts must first rely on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction. Applying these guidelines, Gascon J. was of the view that there were simply no provisions in the *CCAA* that would support the court's authority to issue a claims procedure order solely aimed at potential claims that may be raised against the beneficiaries of *CCAA* charges affecting the property of an entity no longer under *CCAA* protection. The claims covered by s. 12 of the *CCAA* concerned the creditors of the debtor company under *CCAA* protection, nothing more. Justice Gascon held that the mere fact that these *CCAA* charges existed, were valid, and may entail potential claims as secured creditors, was not sufficient to justify the court exercising any alleged statutory jurisdiction, discretionary power or inherent jurisdiction to grant the claims procedure and the bar orders: *Re AbitibiBowater inc.* (2011), 2011 CarswellQue 1645, 2011 QCCS 766 (Que. S.C.).

See N. MacParland, "How Close is Too Close? The Treatment of Related Party Claims in Canadian Restructurings", *Annual Review of Insolvency Law, 2004* (Carswell, 2005) 355–398.

(2) — Proof of Claim

In the context of a *CCAA* proceeding, the Alberta Court of Queen's Bench held that a secured creditor's interest secured under the British Columbia *PPSA* that had lapsed ranked behind that of another secured creditor that registered its security after the lapse and before the security was reregistered. To determine priorities, the court must determine which party holds the earliest perfected interest. The only way that the secured creditor could have priority was if it had perfected its possession before the second creditor filed under the *PPSA*. Here the creditor gave up actual physical possession to another company to secure credit advances and thus was not in possession at the relevant time: *Re Fairmont Resort Properties*

Ltd. (2009), 2009 CarswellAlta 1210, 56 C.B.R. (5th) 235 (Alta. Q.B.); leave to appeal refused (2009), 2009 CarswellAlta 1725, 59 C.B.R. (5th) 233 (Alta. C.A.).

(3) — Negotiation and Mediation of Claims

An experienced mediator under a *CCAA* proceeding should be given the highest degree of flexibility in his or her approach to and handling of a mediation between all stakeholders of an insolvent corporation; and if the monitor feels it appropriate, it may recommend a third party's proposal for the stakeholders' consideration, in addition to the monitor's proposal. If any stakeholder does not voluntarily participate in the mediation, then the monitor, at the mediator's request, may move for an order that such participation be directed and ordered by the court: *Re Stelco Inc.* (2005), 2005 CarswellOnt 2010, 11 C.B.R. (5th) 163 (Ont. S.C.J. [Commercial List]).

N§144 — Claims that Cannot be Comprised under a Plan

Unless the compromise or arrangement explicitly provides for the claim's compromise and the creditor in relation to that debt has voted for acceptance of the compromise or arrangement, a compromise or arrangement in respect of a debtor company may not deal with any claim that relates to any fine, penalty, restitution order or similar order imposed by a court in respect of an offence; any award of damages by a court in civil proceedings in respect of bodily harm intentionally inflicted, sexual assault, or wrongful death; any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in Québec, as a trustee or an administrator of the property of others; any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability of the company that arises from an equity claim: s. 19(2) (2007, c. 36, in force September 18, 2009).

20. (1) Determination of amount of claims — For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor is to be determined as follows:

(a) the amount of an unsecured claim is the amount

(i) in the case of a company in the course of being wound up under the *Winding-up and Restructuring Act*, proof of which has been made in accordance with that Act,

(ii) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, proof of which has been made in accordance with that Act, or

(iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is not admitted by the company, the amount is to be determined by the court on summary application by the company or by the creditor; and

(b) the amount of a secured claim is the amount, proof of which might be made under the *Bankruptcy and Insolvency Act* if the claim were unsecured, but the amount if not admitted by the company is, in the case of a company subject to pending proceedings under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, to be established by proof in the same manner as an unsecured claim under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, as the case may be, and, in the case of any other company, the

amount is to be determined by the court on summary application by the company or the creditor.

(2) Admission of claims — Despite subsection (1), the company may admit the amount of a claim for voting purposes under reserve of the right to contest liability on the claim for other purposes, and nothing in this Act, the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act* prevents a secured creditor from voting at a meeting of secured creditors or any class of them in respect of the total amount of a claim as admitted.

(3) [Repealed 2007, c. 36, s. 70.]

2005, c. 47, s. 131; 2007, c. 36, s. 70

N§145 — Determination of Amount of Claims

The amount represented by a claim of any secured or unsecured creditor is to be determined as follows. The amount of an unsecured claim is the amount in the case of a company in the course of being wound up or liquidated under the *WURA* or the *BIA* is proof in accordance with those statutes. The secured claim is the amount, proof of which might be made under the *BIA* if the claim were unsecured, but the amount if not admitted by the company is, in the case of a company subject to pending proceedings under the *WURA* or the *BIA*, to be established by proof in the same manner as an unsecured claim under those statutes, and, in the case of any other company, the amount is to be determined by the court on summary application by the company or the creditor (2007, c. 36, in force September 18, 2009). The secured creditor is not prevented from voting at a meeting of secured creditors or any class of them in respect of the total amount of a claim.

N§146 — Debtor Right to Reserve Right to Contest Claim

The debtor company may admit the amount of a claim for voting purposes under reserve of the right to contest liability on the claim for other purposes: s. 21(2) (2007, c. 36, in force September 18, 2009).

21. Law of set-off or compensation to apply — The law of set-off or compensation applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be.

1997, c. 12, s. 126; 2005, c. 47, s. 131

N§147 — Set-Off

The cases and commentary on set-off were moved to this section when the 2009 amendments coming into force. The set-off provision became s. 21 of the *CCAA* and s. 18.1 was repealed. Section 21 specifies that the law of set-off or compensation applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant (2007, c. 36, in force September 18, 2009).

The Supreme Court of Canada set out the principles applicable to equitable set-off: 1) the party relying on a set-off must show some equitable ground for being protected against its adversary's demands; 2) the equitable ground must go to the very root of the plaintiff's claim; 3) a cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into

TAB 4

Case Name:

Pine Valley Mining Corp. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF the Business Corporations Act, R.S.B.C. 2002, c. 57, as amended
IN THE MATTER OF Pine Valley Mining Corporation, Falls Mountain Coal Inc., Pine Valley Coal Inc., and Globaltex Gold Mining Corporation, Petitioners

[2008] B.C.J. No. 510

2008 BCSC 356

41 C.B.R. (5th) 43

2008 CarswellBC 579

165 A.C.W.S. (3d) 842

Docket: S066791

Registry: Vancouver

British Columbia Supreme Court
Vancouver, British Columbia

N.J. Garson J.

Oral judgment: March 14, 2008.

(20 paras.)

[Editor's note: Supplementary reasons for judgment were released April 14, 2008. See [2008] B.C.J. No. 637.]

Insolvency law -- Legislation -- Companies' Creditors Arrangement Act -- Directions issued in this proceeding under the Companies' Creditors Arrangement Act to the effect that the creditor Pine Valley Mining Corporation bore the burden of proving its claim for a debt of $37,692,218, and that the matter would proceed to a summary trial -- The monitor's report confirming a debt was not en-

titled to deference in the sense that would alter the burden of proof ordinarily imposed on the claimant -- A summary trial was mandated by s. 12 of the Act -- Companies' Creditors Arrangement Act, s. 12.

Insolvency law -- Claims -- Priorities -- Directions issued in this proceeding under the Companies' Creditors Arrangement Act to the effect that the creditor Pine Valley Mining Corporation bore the burden of proving its claim for a debt of $37,692,218, and that the matter would proceed to a summary trial -- The monitor's report confirming a debt was not entitled to deference in the sense that would alter the burden of proof ordinarily imposed on the claimant -- A summary trial was mandated by s. 12 of the Act -- Companies' Creditors Arrangement Act, s. 12.

Insolvency law -- Receivers, managers and monitors -- Duties and powers -- Directions issued in this proceeding under the Companies' Creditors Arrangement Act to the effect that the creditor Pine Valley Mining Corporation bore the burden of proving its claim for a debt of $37,692,218, and that the matter would proceed to a summary trial -- The monitor's report confirming a debt was not entitled to deference in the sense that would alter the burden of proof ordinarily imposed on the claimant -- A summary trial was mandated by s. 12 of the Act -- Companies' Creditors Arrangement Act, s. 12.

The petitioners in this proceeding under the Companies' Creditors Arrangement Act sought directions respecting the process for determining the amount of the Pine Valley Mining Corporation's claim against Fall Mountain Coal (FMC) -- In the present application, the court was asked to determine (a) who bore the onus of proof of the amount and character of PVM's claim, and (b) whether the trial ought to be a summary trial or a conventional one with viva voce witnesses, or some combination of both -- PVM claimed that FMC, its wholly-owned subsidiary, owed it $37,692,218 -- The other major creditors disputed the amount on the grounds that advances to FMC were properly characterized as capital investment, not debt, with the result that PVM would rank behind the other unsecured creditors in the distribution of FMC assets -- The court-appointed monitor had reviewed the accounts and determined $27,070,166 was properly owed to PVM by FMC -- HELD: PVM bore the onus of proving its claim in the summary trial to follow -- The Monitor's process was in no way akin to an adversarial process -- He was not entitled to deference in the sense that would alter the burden of proof ordinarily imposed on the claimant -- It followed that PVM had the burden of proving its claim -- Either party was at liberty to use the monitor's report or part of it at the trial as an expert report, provided the necessary notice was given to the other party -- Section 12 of the Act required a summary trial -- The court was not persuaded that the claim could not be tried summarily on the date reserved -- Either party had leave to apply to convert this summary trial to a conventional trial, but the parties were expected to make their best efforts to manage this generally as a summary trial.

Statutes, Regulations and Rules Cited:

Business Corporations Act, R.S.B.C. 2002, c. 57,

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 12(2)

Counsel:

Counsel for Pine Valley Mining Corporation: J.R. Sandrelli, O. Jones.

Counsel for Tercon Mining PV Ltd.: B.G. McLean, C. Armstrong.

Counsel for the Monitor: W. Kaplan, Q.C.

Counsel for Petro-Canada: D.A. Garner.

Counsel for CN Rail: R.D. Watson.

Reasons for Judgment

1 **N.J. GARSON J.** (orally):-- This is an application for directions respecting the process for the determination of the amount of Pine Valley Mining Corporation's ("PVM") claim against Falls Mountain Coal Inc. ("FMC") within a proceeding under the ***Companies' Creditors Arrangement Act***, R.S.C. 1985, c. C-36, as amended, (the "CCAA Proceeding"), in which both PVM and FMC are related parties and petitioners.

2 FMC is a wholly-owned subsidiary of PVM. PVM claims that FMC owes PVM $37,692,218. The other major creditors of FMC dispute that amount largely on the basis that the advances made to FMC are properly characterized as capital investment in FMC, not debt, and therefore PVM should rank behind the other unsecured creditors in the distribution of FMC assets. The Monitor appointed by this Court in the CCAA Proceeding has reviewed the accounts of PVM and FMC and determined that $27,070,166 is properly owed to PVM by FMC as debt.

3 On this application the Court is asked to determine two issues:

1. Who bears the onus of proof of the amount and character of PVM's claim?
2. Should the trial be a summary trial or a conventional trial with *viva voce* witnesses, or some combination of those two procedures?

4 The relevant factual background to the matter may be stated as follows:

* FMC is the wholly-owned subsidiary of PVM.
* FMC operated the Willow Creek Coal Mine.
* On October 20, 2006, PVM and FMC petitioned this Court for a general stay of proceedings under the ***CCAA***. The order they sought was granted, and extended from time to time since the initial order.
* The Petition did not disclose an inter-company debt as between the two petitioners. All financial reporting was done on a consolidated basis. When the Monitor requested unconsolidated financial statements for each of the petitioners the inter-company debt was revealed. In recounting this history I make no adverse finding of fact on this point. That is a matter for the trial judge.
* On January 19, 2007, PVM filed a claim with the Monitor stating that FMC was indebted to PVM in the amount of $41,658,441.
* On March 16, 2007, the Monitor issued its Fourth Report to the Court. That report contained a detailed review of the transactions underlying the PVM claim.

As already noted, as a result of his investigations the Monitor "[proposed] to allow a revised PVM Claim against FMC in the amount of $27,070,166".

* Some of the creditors objected to the claim, including the revised claim, and agreed that the counsel for the largest creditor, Tercon, would have standing to defend the PVM claim and to raise all defences available to FMC and to creditors of FMC. The other main creditors have maintained - if I may describe it thus - an active watching brief.

5 A ten-day trial has been reserved for May of this year. The parties have reached an impasse on the two issues mentioned above. Mr. Sandrelli, counsel for PVM, says that "deference is owed to the Monitor's ... conclusions ... in [his] Fourth Report, such that the onus to challenge the Monitor's findings lies on the party appealing the Monitor's findings; and if deference is owed to the Monitor's findings, what standard of review applies to those findings".

6 I understood Mr. Sandrelli to use the term "appeal" in a loose sense. He acknowledged that this is not an appeal because Tercon did not participate in the original decision making process of the Monitor. He said in submissions that the process is more akin to a review on a correctness standard of review. He concluded his submissions by contending that Tercon should bear the onus of displacing the finding of the Monitor that PVM is owed $27 Million by FMC, and that PVM bears the onus of displacing the Monitor's finding that PVM is not entitled to the additional approximate $11 million it claims.

7 Mr. McLean, counsel for Tercon, contends that "the burden of proof lies upon the party who substantially asserts the affirmative of the issue": *Phipson on Evidence*, 14th ed. He says that PVM seeks to prove that it is a creditor of FMC and it must carry the burden of proof of that whole claim.

8 Mr. Sandrelli argues that in the special context of a ***CCAA*** proceeding the Monitor, who is appointed by the court, should be accorded deference and that the review of his decision is akin to a review of a ***CCAA*** claims officer's decision in a ***CCAA*** proceeding. He relies for this proposition on dicta in ***Olympia & York Developments Ltd. (Re)*** (1993), 17 C.B.R. (3d) 1; ***Air Canada (Re.)*** (2004), 2 C.B.R. (5th) 23; ***Canadian Airlines (Re)***, 2001 ABQB 146; ***Matte v. Roux***, 2007 BCSC 902; ***Triton Tubular Components Corp v. Steelcase Inc.***, [2005] O.J. No. 3926 (S.C.J.); and ***Muscletech Research & Development Inc.*** (2006), 25 C.B.R. (5th) 231.

9 In ***Olympia & York***, the decision under review was that made by a claims officer. The claims officer is akin to a judicial officer. The proceeding before him is an adversarial one and naturally he should be granted some deference. That decision is distinguishable on the grounds that the court appointed Monitor in this proceeding, while undoubtedly an impartial agent of the court, reviews the claim but is in no way engaged to conduct a hearing or any type of adversarial or quasi-judicial type proceeding. Similarly, ***Air Canada*** involved an appeal from a decision of a claims officer appointed in the ***CCAA*** proceeding in which the claims officer had dismissed a contingent claim. The appeal was dismissed. The ***Air Canada*** case is distinguishable for the same reasons as the ***Olympia & York*** case. In ***Canadian Airlines***, the decision under review was also that of a claims officer appointed to determine disputed claims within a ***CCAA*** proceeding. Paperny J., as she then was, held that the review was a trial *de novo*, but that was because the law in Alberta differed from Ontario. The ***Matte*** case involved the standard of review of a master's decision and for the same reasons, I find it unhelpful and distinguishable. ***Triton*** also involved the review of a claims officer's decision. The court determined that the standard of review was correctness but, for the same reasons as above, the case is distinguishable. The ***Muscletech*** case is similarly distinguishable.

10 In none of the cases cited above was the decision under review one of a monitor, not engaged in an adversarial process.

11 Paragraph 17 of the Claims Procedure Order pronounced December 8, 2006, provides:

> Where a Creditor delivers a Dispute Notice in accordance with the terms of this Order, such dispute shall be resolved as directed by this Court or as the Creditor in question, the Petitioners and Monitor may agree.

12 Section 12(2) of the ***CCAA*** provides in part as follows:

> For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor shall be determined as follows:
>
> (a) the amount of the unsecured claim shall be the amount
>
> (iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is not admitted by the company, the amount shall be determined by the court on summary application by the company or by the creditor;

13 I conclude from the ***CCAA*** and the Claims Procedure Order that the function of the Monitor, that is relevant to this application, is to determine the validity and amount of a claim on the basis of the evidence submitted. The Monitor's process in doing so is in no way akin to an adversarial process. Although his findings and opinion should be respectfully considered, he is not entitled to deference in the sense that would alter the burden of proof ordinarily imposed on the claimant. Counsel have not called my attention to any authority for either of the following propositions, either that the CCAA claim process alters substantive law that would otherwise apply to the determination of such a claim, or that a monitor appointed on the terms here is entitled to the deference accorded a quasi-judicial officer like a court appointed claims officer. It follows that PVM has the burden of proving its claim. PVM shall file a statement of claim. Tercon, with standing to defend on behalf of FMC, shall file a statement of defence.

14 I turn next to the procedural questions.

15 The Monitor has spent a good deal of time investigating the PVM claim. His report documents the numerous transactions that are at issue, and provides a very useful framework for the court. There is much in the report that may be of use to the parties at the hearing of this matter. In exercising my jurisdiction to give directions for a summary determination of this matter I order that either party is at liberty to use the Monitor's report or part of the report at the trial of this matter, as an expert report, provided the necessary notice is given to the other. The Monitor may be required to be cross-examined on the report.

16 The second issue I have been asked to determine is the question of the format of this trial. Section 12 of the ***CCAA*** requires a summary trial. I recognize that in some cases, courts have held that that does not preclude a conventional trial. (See ***Algoma Steel Corporation v. Royal Bank of Canada*** (1992), 8 O.R. (3d) 449 (C.A.). I do not understand Mr. McLean to object in principle to an order that this matter be determined in a summary way but, rather, I think he reserves his right to object to the suitability of such a procedure depending on how the evidence unfolds. It is my view

that s. 12 of the ***CCAA*** informs any decision the court must make as to the format of a trial and that trial must surely be as the section dictates, a summary trial, unless to do otherwise would be unjust, or there is some other compelling reason against a summary trial. I am not persuaded that this claim cannot be tried summarily on the date reserved in May of this year. The parties have one week to work out an agreement as to a time line for the necessary steps to prepare for that trial, including the exchange of pleadings, disclosure of documents as requested by Tercon, agreed facts, delivery of affidavits, expert reports (including notice of reliance on all or part of the Monitor's reports), delivery and responses to notices to admit, examination for discovery if consented to, and delivery of written arguments. I acknowledge that many of these steps are underway.

17 Mr. Sandrelli says he will now have to marshall all the evidence to prove his claim from ground zero as opposed to simply relying in the first instance on the Monitor's report. As I have said, he may rely on all or part of the Monitor's report. I am not persuaded yet that he cannot marshall his evidence in the time remaining before the May trial date. I will hear submissions on the trial schedule if, by March 21, 2008, the parties have been unable to reach agreement on it. The parties may contact the registry to arrange such a hearing prior to ordinary court hours. Either party has leave to apply to cross-examine the deponent of an affidavit out of court or in court. Either party has leave to apply to convert this summary trial to a conventional trial but I expect the parties to make their best efforts to manage this generally as a summary trial.

18 The parties have each proposed somewhat differing forms of order, concerning various procedural matters relevant to the conduct and hearing of the inter-company claim. Also Mr. Watson, for CN, objects to the following clause proposed by PVC:

> No other creditor, claimant or counsel therefore shall be entitled to participate by having representation in the proceedings concerning the determination of the Issues and in relation to the claim of PVM against FMC without leave of the Court, which application for leave,if any, shall be made on 4 days' notice to PVM and Tercon by no later than March 31, 2008.

19 Mr. Watson, counsel for CN, one of the creditors, contends that his client should be exempted from the limitation imposed on all other creditors contemplated by this last mentioned clause in the draft order. I agree with Mr. Sandrelli that it is necessary for the orderly conduct of the resolution of the claim that PVM and Tercon have some certainty as to what counsel are involved. On the other hand, CN and Petro-Canada have maintained what I earlier described as an active watching brief on the progress of the inter-company claim resolution. They should have the ability to continue to do so. Their submissions have generally been helpful and consequently I see no prejudice in permitting them to continue in that role, at least until shortly before the hearing. I will leave it to counsel to work out a date by which those two creditors will be barred from seeking leave to participate. I have in mind something like two weeks before the hearing but if counsel cannot agree they may make further submissions on this point.

20 I will leave it to the parties to work out the balance of the terms of the order. They have leave to speak to the matter if those terms cannot be agreed upon.

N.J. GARSON J.

TAB 5

CITATION: Canwest Global Communications Corp., 2011 ONSC 2215
COURT FILE NO.: CV-09-8396-00CL
DATE: 20110407

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND OTHER APPLICANTS

COUNSEL: *Douglas J. Wray and Jesse B. Kugler*, counsel for the Applicant, Communications, Energy and Paperworkers Union of Canada ("CEP")
David Byers and Maria Konyukhova, counsel for the Monitor

PEPALL J.

REASONS FOR DECISION

Introduction

[1] The Communications, Energy and Paperworkers Union of Canada ("CEP") requests an order lifting the stay of proceedings in respect of certain grievances and directing that they be adjudicated in accordance with the provisions of the applicable collective agreement. In the alternative, CEP requests an order amending the claims procedure order so as to permit the subject claim to be adjudicated in accordance with the provisions of the collective agreement.

Background Facts

[2] On October 6, 2009, the CMI Entities obtained an initial order pursuant to the *CCAA* staying all proceedings and claims against them. Specifically, paragraphs 15 and 16 of that order stated:

> **NO PROCEEDINGS AGAINST THE CMI ENTITIES OR THE CMI PROPERTY**

15. **THIS COURT ORDERS** that until and including November 5, 2009, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the CMI Entities, the Monitor or the CMI CRA or affecting the CMI Business or the CMI Property, except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI CRA), or with leave of this Court, and any and all Proceedings currently under way against or in respect of the CMI Entities or the CMI CRA or affecting the CMI Business or the CMI Property are hereby stayed and suspended pending further Order of this Court. In the case of the CMI CRA, no Proceeding shall be commenced against the CMI CRA or its directors and officers without prior leave of this Court on seven (7) days notice to Stonecrest Capital Inc.

NO EXERCISE OF RIGHTS OR REMEDIES

16. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person") against or in respect of the CMI Entities, the Monitor and/or the CMI CRA, or affecting the CMI Business or the CMI Property, are hereby stayed and suspended except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of rights and remedies affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of rights or remedies affecting the CMI CRA), or leave of this Court, provided that nothing in this Order shall (i) empower the CMI Entities to carry on any business which the CMI entities are not lawfully entitled to carry on, (ii) exempt the CMI Entities from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of claim for lien.

[3] On October 14, 2009, as part of the CCAA proceedings, I granted a claims procedure order which established a claims procedure for the identification and quantification of claims against the CMI Entities. In that order, "Claim" is defined as any right or claim of any Person against one or more of the CMI Entities in existence on the Filing Date[1] (a "Prefiling Claim") and any right or claim of any Person against one or more of the CMI Entities arising out of the restructuring on or after the Filing Date (a "Restructuring Claim"). Claims arising prior to certain dates had to be asserted within the claims procedure failing which they were forever extinguished and barred. Pursuant to the claims procedure order, subject to the discretion of the Court, claims of any person against one or more of the CMI Entities were to be determined by a claims officer who would determine the validity and amount of the disputed claim in accordance with the claims procedure order. The Honourable Ed Saunders, The Honourable Jack Ground and The Honourable Coulter Osborne were appointed as claims officers. Other persons could also be appointed by court order or on consent of the CMI Entities and the Monitor. This order was unopposed. It was amended on November 30, 2009 and again the motion was unopposed. As at October 29, 2010, over 1,800 claims asserted against the CMI Entities had been finally resolved in accordance with and pursuant to the claims procedure order.

[4] On October 27, 2010, CEP was authorized to represent its current and former union members including pensioners employed or formerly employed by the CMI Entities to the extent, if any, that it was necessary to do so.

[5] On the date of the initial order, CEP had a number of outstanding grievances. CEP filed claims pursuant to the claims procedure order in respect of those grievances. The claim that is the subject matter of this motion is the only claim filed by CEP that has not been resolved and therefore is the only claim filed by CEP that requires adjudication. There is at least one other claim in Western Canada that may require adjudication.

---

[1] The Filing Date was October 6, 2009, the date of the initial order.

[6] John Bradley had been employed for 20 years by Global Television, a division of Canwest Television Limited Partnership ("CTLP"), one of the CMI Entities. Mr. Bradley is a member of CEP. On February 24, 2010, CTLP suspended Mr. Bradley for alleged misconduct. On March 8, 2010, CEP filed a grievance relating to his suspension under the applicable collective agreement. On March 25, 2010, CTLP terminated his employment. On March 26, 2010, CEP filed a grievance requesting full redress for Mr. Bradley's termination. This would include reinstatement to his employment. On June 23, 2010 a restructuring period claim was filed with respect to the Bradley grievances on the following basis:

> The Union has filed this claim in order to preserve its rights. Filing this claim is without prejudice to the Union's ability to pursue all other remedies at its disposal to enforce its rights, including any other statutory remedies available. Notwithstanding that the Union has filed the present claim, the Union does not agree that this claim is subject to compromise pursuant [to the CCAA][2]. The Union reserves its right to make further submissions in this regard.

[7] In spite of the parties' good faith attempts to resolve the Bradley grievances and the Bradley claim, no resolution was achieved.

[8] The Plan was sanctioned on July 28, 2010 and implemented on October 27, 2010. At that time, all of the operating assets of the CMI Entities were transferred to the Plan Sponsor and the CMI Entities ceased operations. The CTLP stay was also terminated. The stay with respect to the Remaining CMI Entities (as that term is defined in the Plan) was extended until May 5, 2011. Pursuant to an order dated September 27, 2010, following the Plan implementation date the Monitor shall be:

> (a) empowered and authorized to exercise all of the rights and powers of the CMI Entities under the Claims Procedure Order, including, without limitation, revise, reject, accept,

[2] The words in brackets were omitted but presumably this was the intention.

> settle and/or refer for adjudication Claims (as defined in the Claims Procedure Order) all without (i) seeking or obtaining the consent of the CMI Entities, the Chief Restructuring Advisor or any other person, and (ii) consulting with the Chief Restructuring Advisor in the CMI Entities; and
>
> (b) take such further steps and seek such amendments to the Claims Procedure Order or additional orders as the Monitor considers necessary or appropriate in order to fully determine, resolve or deal with any Claims.

[9] The Monitor has taken the position that if the Bradley matter is not resolved, the claim should be referred to a claims officer for determination. It is conceded that a claims officer would have no jurisdiction to reinstate Mr. Bradley to his employment.

[10] CEP now requests an order lifting the stay of proceedings in respect of the Bradley grievances and directing that they be adjudicated in accordance with the provisions of the collective agreement. In the alternative, CEP requests an order amending the claims procedure order so as to permit the Bradley claim to be adjudicated in accordance with the provisions of the collective agreement.

[11] For the purposes of this motion and as is obvious from the motion seeking to lift the stay, both CEP and the Monitor agree that the stay did catch the Bradley claim and that it is encompassed by the definition of claim found in the claims procedure order.

[12] Since the commencement of the *CCAA* proceedings, CEP has only sought to lift the stay in respect of one other claim, that being a claim relating to a grievance filed by CEP on behalf of Vicky Anderson. The CMI Entities consented to lifting the stay in respect of Ms. Anderson's claim because at the date of the initial order, there had already been eight days of hearing before an arbitrator, all evidence had already been called, and only one further date was scheduled for final argument. Ultimately, the arbitrator ordered that Ms. Anderson be reinstated but made no order for compensation.

[13] Pursuant to Article 12.3 of the applicable collective agreement, discharge grievances are to be heard by a single arbitrator. All other grievances are to be heard by a three person Board of

Arbitration unless the parties consent to submit the grievance to a single arbitrator. The single arbitrator is to be selected within 10 days of the notice of referral to arbitration from a list of 5 people drawn by lot. An award is to be given within 30 days of the conclusion of the hearing. The list of arbitrators was negotiated and included in the collective agreement. The arbitrator has the power to reinstate with or without compensation.

[14] The evidence before me suggests that adjudications of grievances under collective agreements are typically much more costly and time consuming than adjudications before a claims officer as the latter may determine claims in a summary manner and there is more control over scheduling. The Monitor takes the position that additional cost and delay would arise if the claims were adjudicated pursuant to the terms of the collective agreement rather than pursuant to the terms of the claims procedure order.

Issues

[15] Both parties agree that the following two issues are to be considered:

(a) Should this court lift the stay of proceedings in respect of the Bradley grievances and direct that the Bradley grievances be adjudicated in accordance with the provisions of the collective agreement?

(b) Should this court amend the claims procedure order so as to permit the Bradley claim to be adjudicated in accordance with the provisions of the collective agreement?

Positions of the Parties

[16] In brief, dealing firstly with the stay, CEP submits that the balance of convenience favours pursuit of the grievances through arbitration. CEP is seeking to compel the employer to comply with fundamental obligations that flow from the collective agreement. This includes the appointment of an arbitrator on consent who has jurisdiction to award reinstatement if he or she determines that there was no just cause to terminate Mr. Bradley's employment. Requiring that the claim and the grievances be adjudicated in a manner that is inconsistent with the collective

agreement would have the effect of depriving the griever of some of the most fundamental rights under a collective agreement. Furthermore, permitting the grievances to proceed to arbitration would prejudice no one.

[17] Alternatively, CEP submits that the claims procedure order ought to be amended. It is in conflict with the terms of the collective agreement. Pursuant to section 33 of the *CCAA*, the collective agreement remains in force during the *CCAA* proceedings. The claims procedure order must comply with the express requirements of the *CCAA*. Lastly, orders issued under the *CCAA* should not infringe upon the right to engage in associational activities which are protected by the *Charter of Rights and Freedoms*.

[18] The Monitor opposes the relief requested. On the issue of the lifting of the stay, it submits that the *CCAA* is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. The stay of proceedings permits the *CCAA* to accomplish its legislative purpose and in particular enables continuance of the company seeking *CCAA* protection.

[19] The lifting of a stay is discretionary. Mr. Bradley is no more prejudiced than any other creditor and the claims procedure established under the order has been uniformly applied. The claims officer has the power to recognize Mr. Bradley's right to reinstatement and monetize that right. The efficacy of *CCAA* proceedings would be undermined if a debtor company was forced to participate in an arbitration outside the *CCAA* proceedings. This would place the resources of an insolvent *CCAA* debtor under strain. The Monitor submits that CEP has not satisfied the onus to demonstrate that the lifting of the stay is appropriate in this case.

[20] As for the second issue, the Monitor submits that the claims procedure order should not be amended. Courts regularly affect employee rights arising from collective agreements during *CCAA* proceedings and recent amendments to the *CCAA* do not change the existing case law in this regard. Furthermore, amending the claims procedure order would undermine the purpose of the *CCAA*. Lastly, relying on the Supreme Court of Canada's statements in *Health Services and*

Support – Facilities Subsector Bargaining Assn. v. British Columbia[3], the claims procedure order does not interfere with freedom of association.

[21] Following argument, I requested additional brief written submissions on certain issues and in particular, to what employment Mr. Bradley would be reinstated if so ordered. I have now received those submissions from both parties.

Discussion

1. Stay of Proceedings

[22] The purpose of the *CCAA* has frequently been described but bears repetition. In *Lehndorff General Partner Limited*[4], Farley J. stated:

> The *CCAA* is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both.

[23] The stay provisions in the *CCAA* are discretionary and very broad. Section 11.02 provides that:

> (1) A court may, on an initial application in respect of the debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,
>
> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding Up and Restructuring Act;

---

[3] [2007] S.C.J. No. 27.

[4] (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div.) at para. 6.

> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.
>
> (2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,
>
> > (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an *Act* referred to in paragraph (1)(a);
> >
> > (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
> >
> > (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

[24] As the Court of Appeal noted in *Nortel Networks Corp.*[5], the discretion provided in section 11 is the engine that drives this broad and flexible statutory scheme. The stay of proceedings in section 11 should be broadly construed to accomplish the legislative purpose of the *CCAA* and in particular to enable continuance of the company seeking *CCAA* protection: *Lehndorff General Partner Limited*[6].

[25] Section 11 provides an insolvent company with breathing room and by doing so, preserves the status quo to assist the company in its restructuring or arrangement and prevents any particular stakeholder from obtaining an advantage over other stakeholders during the

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[5] [2009] O.J. No. 4967 at para. 33.

[6] *Supra,* note 4 at para. 10.

restructuring process. It is anticipated that one or more creditors may be prejudiced in favour of the collective whole. As stated in *Lendorff General Partner Limited*[7]:

> The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the *CCAA* because this effect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the *CCAA* must be for the debtor and all of the creditors.

[26] In *Canwest Global Communications Corp.*[8], I had occasion to address the issue of lifting a stay in a *CCAA* proceeding. I referred to situations in which a court had lifted a stay as described by Paperny J. (as she then was) in *Re Canadian Airlines Corp.*[9] and by Professor McLaren in his book, "*Canadian Commercial Reorganization: Preventing Bankruptcy*"[10]. They included where:

> a) a plan is likely to fail;
>
> b) the applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor);
>
> c) the applicant shows necessity for payment;
>
> d) the applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors;

---

[7] *Ibid,* at para. 6.

[8] (2009) O.J. 5379.

[9] (2000) 19 C.B.R. (4th) 1.

[10] (Aurora: Canada Law Book, looseleaf) at para. 3.3400.

e) it is necessary to permit the applicant to take steps to protect a right that could be lost by the passage of time;

f) after the lapse of a significant period, the insolvent debtor is no closer to a proposal than at the commencement of the stay period;

g) there is a real risk that a creditor's loan will become unsecured during the stay period;

h) it is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period;

i) it is in the interests of justice to do so.

[27] The lifting of a stay is discretionary. As I wrote in *Canwest Global Communications Corp.*[11]:

> There are no statutory guidelines contained in the Act. According to Professor R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing Bankruptcy", an opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 33 C.B.R. (5th) 50 (Sask. C.A.) at para. 68. That decision also indicated that the judge should consider the good faith and due diligence of the debtor company.

[28] There appears to be no real issue that the grievances are caught by the stay of proceedings. In *Luscar Ltd. v. Smoky River Coal Limited*[12], the issue was whether a judge had

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[11] *Supra*, note 8 at para. 32.

[12] [1999] A.J. No. 676.

the discretion under the *CCAA* to establish a procedure for resolving a dispute between parties who had previously agreed by contract to arbitrate their disputes. The question before the court was whether the dispute should be resolved as part of the supervised reorganization of the company under the *CCAA* or whether the court should stay the proceedings while the dispute was resolved by an arbitrator. The presiding judge was of the view that the dispute should be resolved as expeditiously as possible under the *CCAA* proceedings. The Alberta Court of Appeal upheld the decision stating:

> The above jurisprudence persuades me that "proceedings" in section 11 includes the proposed arbitration under the B.C. *Arbitration Act*. The Appellants assert that arbitration is expeditious. That is often, but not always, the case. Arbitration awards can be appealed. Indeed, this is contemplated by section 15(5) of the *Rules*. Arbitration awards, moreover, can be subject to judicial review, further lengthening and complicating the decision making process. Thus, the efficacy of *CCAA* proceedings (many of which are time sensitive) could be seriously undermined if a debtor company was forced to participate in an extra-*CCAA* arbitration. For these reasons, having taken into account the nature and purpose of the *CCAA*, I conclude that, in appropriate cases, arbitration is a "proceeding" that can be stayed under section 11 of the *CCAA*.[13]

[29] I do recognize that the *Luscar* decision did not involve a collective agreement but an agreement to arbitrate. That said, the principles described also apply to an arbitration pursuant to the terms of a collective agreement.

[30] In considering balance of convenience, CEP's primary concerns are that the claims procedure order does not accord with the rights and obligations contained in the collective agreement. Firstly, a claims officer is the adjudicator rather than an arbitrator chosen pursuant to the terms of the collective agreement and secondly, reinstatement is not an available remedy

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[13] *Ibid*, at para. 33.

before a claims officer. Thirdly, an arbitration imports rules of natural justice and procedural fairness whereas the claims procedure is summary in nature.

[31] The claims officers who were identified in the claims procedure order are all former respected and experienced judges who are well suited and capable of addressing the issues arising from the Bradley claim. Furthermore, had this been a real issue, CEP could have raised it earlier and identified another claims officer for inclusion in the claims procedure order. Indeed, an additional claims officer still could be appointed but no such request was ever advanced by CEP.

[32] Should the claims officer find that CTLP did not have just cause to terminate Mr. Bradley's employment, he can recognize Mr. Bradley's right to reinstatement by monetizing that right. This was done for a multitude of other claims in the *CCAA* proceedings including claims filed by CEP on behalf of other members. I note that Mr. Bradley would not be receiving treatment different from that of any other creditor participating in the claims process.

[33] The claims process is summary in nature for a reason. It reduces delay, streamlines the process, and reduces expense and in so doing promotes the objectives of *CCAA*. Indeed, if grievances were to customarily proceed to arbitration, potential exists to significantly undermine the *CCAA* proceedings. Arbitration of all claims arising from collective agreements would place the already stretched resources of insolvent *CCAA* debtors under significant additional strain and could divert resources away from the restructuring. It is my view that generally speaking, grievances should be adjudicated along with other claims pursuant to the provisions of a claims procedure order within the context of the CCAA proceedings.

[34] That said, it seems to me that this case is unique. While the claims procedure order and the meeting order of June 23, 2010 provide that all claims against CTLP and others arising prior to certain dates must be asserted within the claims procedure failing which they are forever extinguished and barred, the stay relating to CTPL was terminated on October 27, 2010. CTLP has emerged from CCAA protection and is currently operating in the normal course having changed its name to Shaw Television Limited Partnership ("STLP"). If the grievance relating to

Mr. Bradley's termination is successful, he could be reinstated to his employment at STLP. The position of CEP, Mr. Bradley and the Monitor is that reinstatement, if ordered, would be to STLP. Counsel for CEP advised the court that notice of the motion was given to STLP and that a representative was present in court for the argument of the motion although did not appear on the record. The Monitor has also confirmed that Shaw Communications Inc., the parent of STLP, was aware of the motion and its counsel has confirmed its understanding that any reinstatement of Mr. Bradley, if ordered, would be to STLP.

[35] As mentioned, Mr. Bradley was a 20 year employee. While I do not consider the identity of the arbitrator and the natural justice arguments of CEP to be persuasive, given the stage of the CCAA proceedings, the fact that the stay relating to CTLP has been lifted, and Mr. Bradley's employment tenure, I am persuaded that he ought to be given the opportunity to pursue his claim for reinstatement rather than being compelled to have that entitlement monetized by a claims officer if so ordered. Counsel for the Monitor has confirmed that the timing of the distributions would not appear to be affected by the outcome of this motion. No meaningful prejudice would ensue to any stakeholder. It seems to me that the balance of convenience and the interests of justice favour lifting the stay to permit the grievances to proceed through arbitration rather than before the claims procedure officer. Therefore, CEP's motion to lift the stay is granted and the Bradley grievances may be adjudicated in accordance with the terms of the collective agreement.

2. Amendment of the Claims Procedure Order

[36] In light of my decision on the stay, it is not strictly necessary to consider whether the claims procedure order should be amended as requested by CEP as alternative relief. As this issue was argued, however, I will address it.

[37] Section 33 of *CCAA* was added to the statute in September, 2009. The relevant sub-sections now provide:

> 33(1) If proceedings under this Act have been commenced in respect of a debtor company, any collective agreement that the company has entered into as the employer remains in

> force, and may not be altered except as provided in this section or under the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent.
>
> 33(8) For greater certainty, any collective agreement that the company and the bargaining agent have not agreed to revise remains in force, and the court shall not alter its terms.

[38] Justice Mongeon of the Québec Superior Court had occasion to address the effect of section 33 of the *CCAA* in *White Birch Paper Holding Company*[14]. He stated that the fact that a collective agreement remains in force under a *CCAA* proceeding does not have the effect of "excluding the entire collective labour relations process from the application of the *CCAA*." [15] He went on to write that:

> It would be tantamount to paralyzing the employer with respect to reducing its costs by any means at all, and to providing the union with a veto with regard to the restructuring process.[16]

[39] In *Canwest Global Communications Corp.*[17], I wrote that section 33 of the *CCAA* "maintains the terms and obligations contained in the collective agreement but does not alter priorities or status."[18] In that case when dealing with the issue of immediate payment of severance payments, I wrote:

> There are certain provisions in the amendments that expressly mandate certain employee related payments. In those

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[14] 2010, Q.C.C.S. 2590.

[15] *Ibid*, at para. 31.

[16] *Ibid*, at para. 35.

[17] [2010] O.J. No. 2544.

[18] *Ibid*, at para. 32.

> instances, section 6(5) dealing with a sanction of a plan and section 36 dealing with a sale outside the ordinary course of business being two such examples, Parliament specifically dealt with certain employee claims. If Parliament had intended to make such a significant amendment whereby severance and termination payments (and all other payments under a collective agreement) would take priority over secured creditors, it would have done so expressly.[19]

[40] I agree with the Monitor's position that if Parliament had intended to carve grievances out of the claims process, it would have done so expressly. To do so, however, would have undermined the purpose of the *CCAA* and in particular, the claims process which is designed to streamline the resolution of the multitude of claims against an insolvent debtor in the most time sensitive and cost efficient manner. It is hard to imagine that it was Parliament's intention that grievances under collective agreements be excluded from the reach of the stay provisions of section 11 of the *CCAA* or the ancillary claims process. In my view, such a result would seriously undermine the objectives of the *Act*.

[41] Furthermore, I note that over 1,800 claims have been processed and dealt with by way of the claims procedure order, many of them involving claims filed by CEP on behalf of its members. CEP was provided with notice of the motion wherein the claims procedure order and the claims officers were approved. CEP did not raise any objection to the claims procedure order, the claims officers or the inclusion of grievances in the claims procedure at the time that the order was granted. The claims procedure order was not an order made without notice and none of the prerequisites to variation of an order has been met. Had I not lifted the stay, I would not have amended the claims procedure order as requested by CEP.

[42] CEP's last argument is that the claims procedure order interferes with Mr. Bradley's freedoms under the Canadian *Charter of Rights and Freedoms*. In this regard I make the

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[19] *Ibid*, at para. 33.

following observations. Firstly, this argument was not advanced when the claims procedure order was granted. Secondly, CEP is not challenging the validity of any section of the *CCAA*. Thirdly, nothing in the statute or the claims procedure inhibits the ability to collectively bargain. In *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*[20], the Supreme Court of Canada stated:

> We conclude that section 2(d) of the *Charter* protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues. This protection does not cover all aspects of "collective bargaining", as that term is understood in the statutory labour relations regimes that are in place across the country. Nor does it ensure a particular outcome in a labour dispute or guarantee access to any particularly statutory regime. ...
>
> In our view, it is entirely possible to protect the "procedure" known as collective bargaining without mandating constitutional protection for the fruits of that bargaining process.[21]

[43] In my view, nothing in the claims procedure or the *CCAA* impacts the procedure known as collective bargaining.

Conclusion

[44] Under the circumstances, the request to lift the stay as requested by CEP is granted. Had it been necessary to do so, I would have dismissed the alternative relief requested.

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[20] *Supra*, note 3.

[21] *Ibid*, at at paras. 19 and 29.

Pepall J.

Released: April 7, 2011

CITATION: Canwest Global Communications Corp., 2011 ONSC 2215
COURT FILE NO.: CV-09-8396-00CL
DATE: 20110407

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND OTHER APPLICANTS

REASONS FOR DECISION

Pepall J.

Released: April 7, 2011

TAB 6

2008 Hfx No. 305549

SUPREME COURT OF NOVA SCOTIA

IN THE MATTER OF: The *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36, as amended.

AND IN THE MATTER OF: A Plan of Compromise or Arrangement of ScoZinc Limited

Applicant

CLAIMS PROCEDURE ORDER

BEFORE THE HONOURABLE JUSTICE DUNCAN R. BEVERIDGE IN CHAMBERS

UPON MOTION by **ScoZinc Limited** ("ScoZinc") for an Order approving a procedure for identification and quantification of claims against ScoZinc pursuant to the *Companies' Creditors Arrangement* Act, R.S.C. 1985, c. C-36 as amended;

UPON READING the Fifth Affidavit of G. William Felderhof sworn on February 13, 2009 and the Third Report of the Monitor;

AND UPON HEARING John Stringer, Q.C. and Ben Durnford, counsel for ScoZinc together with such other counsel as were present;

NOW UPON MOTION:

IT IS HEREBY ORDERED THAT:

Service of Materials

1. ScoZinc not be required to serve notice of this Motion on any of its creditors save and except for those asserting claims against ScoZinc in excess of $100,000, namely: Acadian Mining Corporation; Aggregate Equipment (Atlantic) Limited; Basin Contracting Ltd.; Conestoga-Rovers & Associates; Komatsu International (Canada) Inc.; Miller Tire Services Limited; Nova Scotia Power Inc.; Nova Scotia Government Royalties/Nova Scotia Department of Natural Resources; Petro Canada; Royal Roads Corp.; Quadra Chemicals Ltd.; Source Atlantic Limited; Archibald Drilling & Blasting (1986) Ltd.; Weir Canada Inc.; Wilson Equipment Limited; Wolseley Canada Inc.; as well as Molnar Welding Limited and Eddy Group Limited.

Claims Procedure

2. The Claims Procedure for the identification and quantification of Claims (as defined below) to be implemented in accordance with this Order is hereby approved.

3. Grant Thornton Limited, Monitor of ScoZinc, is directed and empowered to administer the Claims Procedure, on its own behalf and as agent for and on behalf of ScoZinc, and take such steps or actions as may be necessary or desirable to administer or complete the Claims Procedure.

Definitions

4. The following terms in this Order shall have the following meanings ascribed thereto:

   a. "Applicant", as used in the heading of this proceeding, means ScoZinc Limited

   b. "Appointment Order" means the Initial Order dated December 22, 2008, appointing Grant Thornton Limited as Monitor of ScoZinc;

   c. "Business Day" means a day, other than a Saturday or a Sunday or statutory holiday, on which banks are generally open for business in Halifax, Nova Scotia;

   d. "CCAA" means *Companies' Creditors Arrangement Act*, R.S.C. 1985, C. C-36, as amended;

   e. "Claim" means any right or claim of any Person, whether or not asserted, in connection with any indebtedness, liability or obligation of any kind whatsoever against ScoZinc or any present or former director or officer of ScoZinc, and, in the case of any such present or former director or officer, any indebtedness, liability or obligation of any kind whatsoever actually and reasonably incurred by the director or officer as a result of his or her position or involvement with ScoZinc, and, without limiting the foregoing, whether arising from employment, contract, the commission of a tort (intentional or not intentional), any breach of duty (legal, statutory, fiduciary or otherwise), or any Taxes, or any right of ownership or title to property, or to a trust or deemed trust, howsoever created, and whether or not reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known or unknown, by guarantee, surety or otherwise and whether or not such right is executory in nature, including the right or ability of any Person to advance a claim for contribution or indemnity or otherwise:

      i. which indebtedness, liability or obligation is based in whole or in part on facts existing on or prior to the Valuation Date or would have been claims provable in bankruptcy had ScoZinc become bankrupt on the Valuation Date; or

      ii. which indebtedness, liability or obligation arises after, or is based upon facts arising after, the Valuation Date, including without limitation, that which arises from or is caused by the repudiation or termination of any contract, lease or agreement by ScoZinc or order of this Court,

   but excluding Excluded Claims. For greater certainty, although all Claims for interest shall be barred in accordance with the terms of the Appointment Order, if

entitled thereto under any applicable contract, a creditor of ScoZinc may make claims for interest which has accrued on its Claim to and including the Valuation Date, but no claim shall be made or accepted by the Monitor for interest accrued after the Valuation Date;

f. "Claimant" means any Person having a Claim and, if the context requires, includes the assignee of a Claim, or a trustee, interim receiver, receiver, receiver and manager, liquidator, or other Person acting on that Person's behalf;

g. "Claims Bar Date" means 5:00 p.m. (Halifax time) on March 16, 2009, or such later date as may be ordered by this Court;

h. "Claims Officer" means the individual designated by the Monitor pursuant to paragraph 13 of this Order or any other individual or individuals designated as the Claims Officer by this Court;

i. "Claims Package" means the document package which shall include a copy of the Instruction Letter, a Proof of Claim and such other materials as ScoZinc or the Monitor consider necessary or appropriate;

j. "Claims Procedure" means the procedures outlined in this Order in connection with the assertion of Claims against ScoZinc;

k. "Court" means the Nova Scotia Supreme Court;

l. "Creditor" means any person asserting a Claim;

m. "Date of Appointment" means December 22, 2008;

n. "Disputed Claim" means a Claim for which a Claimant has delivered a Notice of Dispute;

o. "Excluded Claims" has the meaning ascribed thereto in paragraph 7 of this Order;

p. "Filing Date" means December 22, 2008;

q. "Initial Order" means the Initial Order of the Honourable Justice Beveridge dated December 22, 2008; as amended, restated, extended or varied from time to time;

r. "Instruction Letter" means the instruction letter in substantially the form annexed as Schedule "A" hereto;

s. "Monitor" means Grant Thornton Limited, in its capacity as Monitor of ScoZinc pursuant to the Appointment Order;

t. "Monitorship" means the Monitorship proceedings with respect to ScoZinc;

u. "Notice of Dispute" means a written notice in substantially the form annexed as Schedule "E" hereto, delivered as directed to the Monitor by a Claimant who has received a Notice of Revision or Disallowance, disputing the Notice of Revision or Disallowance with reasons for its dispute;

v. "Notice of Revision or Disallowance" means a written notice to a Claimant, in substantially the form attached as Schedule "D" hereto, delivered by the Monitor advising the Claimant that the Monitor has revised or disallowed all or part of its Claim;

w. "Notice to Claimants" means the notice for publication substantially in the form annexed as Schedule "B" hereto;

x. "Person" means any individual, partnership, firm, joint venture, trust, entity, corporation, limited or unlimited liability company, association, unincorporated organization, government or any agency, officer or instrumentality thereof or similar entity, or any other entity howsoever designated or constituted exercising executive, legislative, judicial, regulatory or administrative functions in Canada;

y. "Plan" means any Plan of Compromise or Arrangement filed by ScoZinc and presented to the Creditors for approval pursuant to the CCAA;

z. "Post-Filing Claim" means a Claim arising after ScoZinc has filed its plan of arrangement with this Court;

aa. "Proof of Claim" means the form of Proof of Claim substantially in the form annexed as Schedule "C" hereto;

bb. "Proven Claim" means the amount and status of the Claim of a Creditor as determined in accordance with the Claims Procedure;

cc. "Taxes" means taxes, including all income, capital, corporate, gross receipts, goods and services, sales, use, value-added, ad valorem, transfer, non-resident, property, real or personal property, business, franchise, license and excise taxes and duties, together with any interest, penalties, fines, additional taxes and additions to tax imposed with respect to the foregoing; and

dd. "Valuation Date" means December 22, 2008.

Notice to Claimants

5. For the purpose of facilitating the identification and resolution of Claims:

a. on or before February 20, 2009 the Monitor shall send a Claims Package by ordinary mail, courier, facsimile transmission or electronic mail to each known potential Claimant, identified by the Monitor through its review of the books and records maintained in connection with the Monitorship of ScoZinc;

b. the Monitor shall send by ordinary mail, courier, facsimile transmission or electronic mail as soon as reasonably possible following receipt of a request therefor, a Claims Package to any Claimant requesting the same, provided such request is received prior to the Claims Bar Date;

c. the Monitor shall, on or before February 23, 2009, cause the Notice to Claimants in the form attached hereto as Schedule "B" to be published once in the Chronicle Herald; and

d. in addition, the Monitor shall make a copy of the Claims Package available on the Monitor's website at http://www.grantthornton.ca/services/reorg/bankruptcy_and_insolvency/ScoZinc

6. Subject to paragraph 7 of this Order, any Person asserting a Claim shall deliver to the Monitor a Proof of Claim by the Claims Bar Date. Any Claimant that does not deliver to the Monitor a completed Proof of Claim with respect to a Claim as provided for herein on or before the Claims Bar Date, or such later date as the Monitor may agree to in writing, or as the Court may otherwise order:

   a. shall have its Claim forever extinguished and shall be forever barred from making or enforcing any Claim against ScoZinc, the Monitor, or any other Person based on any action or inaction on the part of ScoZinc; and

   b. shall not be entitled to vote on the Plan, receive any further notice in respect of the Claims Procedure and these proceedings, or receive any distribution from the Plan or otherwise from ScoZinc, or the Monitor on behalf of ScoZinc or from the proceeds of sale of ScoZinc's assets.

7. Notwithstanding anything contained in this Order, the following claims shall not be extinguished or affected by this Order (collectively, the "Excluded Claims"):

   a. claims by the Monitor and counsel to the Monitor for fees and disbursements payable in accordance with the Appointment Order or claims by counsel to ScoZinc for fees and disbursements payable in this matter;

   b. claims by any person providing debtor-in-possession financing to ScoZinc under any Order of this Court; and

8. Notwithstanding anything contained in this Order, Excluded Claims shall not be extinguished or affected by this Order and, for greater certainty, paragraph 6 of this Order shall not apply to Excluded Claims.

Review of Proofs of Claim

9. Upon receipt of a Proof of Claim:

   a. the Monitor is hereby authorized and directed to use reasonable discretion as to the adequacy of compliance as to the manner in which Proofs of Claim are completed and executed and may, where it is satisfied that a Claim has been adequately proven, waive strict compliance with the requirements of this Order as to the completion and the execution of a Proof of Claim. A Claim which is accepted by the Monitor shall constitute a Proven Claim;

   b. the Monitor and ScoZinc may attempt to consensually resolve the classification and amount of any Claim with the Claimant prior to accepting, revising or disallowing such Claim; and

   c. each Claim shall be reduced by the amount of any subsequent payment thereon and any other subsequent credit against the Claim or the Claimant.

Revision or Disallowance

10. The Monitor shall review all Proofs of Claim filed on or before the Claims Bar Date. The Monitor shall accept, revise or disallow such Proofs of Claim as contemplated herein. The Monitor shall send a Notice of Revision or Disallowance and the form of Notice of Dispute to the Claimant as soon as the Claim has been revised or disallowed but in any event no later than 11:59 p.m. (Halifax time) on March 27, 2009 or such later date as the Court may order. Where the Monitor does not send a Notice of Revision or Disallowance by the aforementioned date to a Claimant who has submitted a Proof of Claim, the Monitor shall be deemed to have accepted such Claim.

Notice of Dispute

11. Any Person who intends to dispute a Notice of Revision or Disallowance shall deliver a Notice of Dispute to the Monitor and the Claims Officer, by ordinary mail, courier, delivery or fax (but not by electronic mail) as soon as reasonably possible but in any event any Notice of Dispute must be received by the Monitor by no later than 5:00 p.m. (Halifax time) on April 6, 2009 or such later date as this Court may order.

12. Where a Claimant who receives a Notice of Revision or Disallowance fails to deliver a Notice of Dispute to the Monitor within the time limit therefor, the value and classification of such Claimant's Claim shall be as set out in the Notice of Revision or Disallowance, and such Claim as set out in the Notice of Revision or Disallowance shall constitute a Proven Claim to the extent it has been accepted by the Monitor, and all other Claims of such Claimant, if any, other than Excluded Claims shall be forever extinguished and barred.

Resolution of Claims

13. A claims officer shall be appointed by the Monitor and shall be designated as the Claims Officer for the claims process described herein, subject to any further Order of this Court. Mr. Richard Cregan, Q.C. has agreed to serve as Claims Officer, acting in his personal capacity and not as Registrar in Bankruptcy.

14. Subject to the direction of the Court, the Claims Officer shall determine the manner, if any, in which evidence may be brought before him by the parties as well as any other procedural matters that may arise in respect of his determination of the value of the Claim for which a Claimant has delivered a Notice of Dispute. The Claims Officer shall have the discretion to determine who shall bear the costs of any hearing before the Claims Officer. All costs of the Monitor and its counsel relating to the Claims Procedure shall be paid by the Monitor and may be included in the accounts of the Monitor, subject to any assessment as may be required pursuant to the Appointment Order. All costs of the Claims Officer in any proceedings relating to disputed claims shall be included in the costs of the Monitor in Administering the Claims Procedure.

15. Upon receiving a Notice of Dispute from a Claimant, the Claims Officer shall schedule a hearing in order to make a determination concerning the Disputed Claim and, following such hearing (all such hearings to be held no later than April 20, 2009, or such later date as may be ordered by this Honourable Court), the Claims Officer shall subsequently notify the Monitor and such Claimant of the value of the Claim; provided that, where the

Monitor advises the Claims Officer that it is negotiating with a Claimant as to its Claim, the scheduling of a hearing with respect to that Claim may be deferred pending the outcome of such negotiations

16. A Claimant or the Monitor, may, within seven (7) calendar days of notification of the Claims Officer's determination of the value of such Claimant's Claim under this Claims Procedure, appeal such determination to the Court by filing with this Court a Notice of Appeal, which appeal shall be made returnable within fourteen (14) calendar days of the filing of the Notice of Appeal, in default of which such determination by the Claims Officer shall, subject to further Order of this Court, be deemed to be final.

17. Notwithstanding paragraphs 12 to 15 hereof, but subject to paragraph 9 of this Order, the Monitor shall at all times be authorized to enter into negotiations with Claimants and settle any Claim on such terms as the Monitor may consider appropriate.

Unresolved Claims

18. Any Claimants whose Claims have not yet been resolved prior to the meeting at which all Claimants will vote to either accept or reject the Plan to be filed by ScoZinc with this Court shall be entitled to vote the portion of their Claim that is undisputed. Such portion shall be determined by the Monitor.

General Provisions

19. Any Claim denominated in any currency other than Canadian dollars shall, for the purposes of this Order, be converted to and shall constitute obligations in Canadian dollars, such calculation to be effected using the Bank of Canada noon spot rate of exchange for exchanging such currency on the Filing Date (US$1= CDN $1.22; €1= CDN $1.70; £1 = CDN $1.80).

20. ScoZinc, in addition to its prescribed rights and obligations under the CCAA and under the Initial Order, shall assist the Monitor in connection with the administration of the Claims Procedure and is hereby authorized and directed to take such other actions and fulfill such other roles as are contemplated by this Order.

Notices and Communications

21. Any notice or other communication (including, without limitation, Notices of Revision or Disallowance) to be given under this Order by the Monitor to a Claimant shall be in writing in substantially the form, if any, provided for in this Order. Such notice or other communication will be sufficiently given to a Claimant, if given by prepaid ordinary mail, courier, delivery, facsimile transmission or electronic mail to the Claimant to such address, facsimile number or electronic mail address for such Claimant as may be recorded in the books and records of ScoZinc, the Monitor or to such other address, facsimile number or electronic mail address as such Claimant may request by notice to the Monitor given in accordance with this Order. Any such notice or other communication, (i) if given by prepaid ordinary mail, shall be deemed received on the third (3rd) Business Day after mailing, (ii) if given by courier or delivery shall be deemed received on the next Business Day following dispatch, (iii) if given by facsimile transmission or electronic mail before 5:00 p.m. on a Business Day shall be deemed received on such Business Day; and (iv) if given by facsimile transmission or electronic mail after 5:00 p.m. on a Business Day shall be deemed received on the next following Business Day.

22. Any notice or other communication (including, without limitation, Proofs of Claim and Notices of Dispute) to be given under this Order by a Claimant to the Monitor shall be in writing in substantially the form, if any, provided for in this Order and will be sufficiently given only if given by ordinary mail, courier, delivery, facsimile transmission or electronic mail (except for Notices of Dispute, which may not be given to the Monitor via electronic mail) addressed to:

    Grant Thornton Limited, in its capacity as Monitor of ScoZinc Limited
    Attention: Peter Rainforth CA
    Suite 1100, Cogswell Tower
    2000 Barrington Street
    Halifax, NS
    B3J 3K1

    Phone and Fax: 902.491.7545
    Email: ScoZinc@grantthornton.ca

    Any such notice or other communication by a Claimant shall be deemed received only upon actual receipt thereof during normal business hours on a Business Day.

23. If during any period during which notices or other communication are being given pursuant to this Order a postal strike or postal work stoppage of general application should occur, such notices or other communications then not received or deemed received shall not, absent further Order of this Court, be effective and notices and other communications given hereunder during the course of any such postal strike or work stoppage of general application shall only be effective if given by courier, delivery, facsimile transmission or electronic mail in accordance with this Order.

Transfer of Claims

24. If the holder of a Claim transfers the whole of such Claim to another Person after the Filing Date, neither the Monitor nor ScoZinc shall be obligated to give notice or otherwise deal with the transferee of such Claim in respect thereof unless and until actual notice of transfer, together with satisfactory evidence of such transfer (a "Transfer Notice"), shall have been received and acknowledged by the Monitor in writing and thereafter such transferee shall for the purposes hereof constitute the Creditor in respect of such Claim. Any such transferee of a Claim shall be bound by any notices given or steps taken in respect of such Claim in accordance with this Claims Procedure Order and any other orders in these proceedings prior to receipt and acknowledgment by the Monitor of satisfactory evidence of such transfer. A transferee of a Claim takes the Claim subject to any rights of set-off to which ScoZinc may be entitled with respect to such Claim. For greater certainty, a transferee of a Claim is not entitled to set off, apply, merge, consolidate or combine any Claims transferred to it against or on account or in reduction of any amounts owing by such Person to ScoZinc. No transfer shall be acknowledged for voting purposes unless a Transfer Notice in respect of such transfer shall have been received by the Monitor no later than ten (10) Business Days prior to a meeting of ScoZinc's Creditors to vote on a Plan. Reference to a transfer of Claim in this Order includes a transfer or assignment, whether absolute or intended as security.

25. If the holder of the whole of a Claim transfers the whole of such Claim to more than one Person or part of such Claim to another Person after the Filing Date, such transfer shall not create a separate Claim and such Claim shall continue to constitute and be dealt

with as a single Claim. Notwithstanding such transfer, ScoZinc and the Monitor shall not be bound to recognize or acknowledge any such transfer and shall be entitled to give notices to and otherwise deal with such Claim only as a whole and only to and with the Person last holding such Claim in whole as the Creditor in respect of such Claim, provided such Creditor may, by notice in writing to the Monitor in accordance with the preceding paragraph and subject to the provisions of the preceding paragraph, direct the subsequent dealings in respect of such Claim, but only as a whole, shall be with a specified Person and in such event, such transferee of the Claim and the whole of such Claim shall be bound by any notices given or steps taken in respect of such Claim in accordance with this Claims Procedure Order and any other orders in these proceedings.

Post-Filing Claims

26. The process for Post-Filing Claims shall be established by further order of this Court.

II. FURTHER ORDER

27. Notwithstanding any other provision of this Order, the Monitor and ScoZinc may apply at any time to this Court to seek any further relief in respect of the Claims Process, and any other interested Person may apply to this Court to vary this Order or seek other relief in respect of the Claims Process on seven (7) calendar days notice to the Monitor and ScoZinc, as applicable, and to any other Person likely to be affected by the Order sought or on such other notice, if any, as the Court may order. For greater certainty, applications for relief unrelated to the Claims shall continue to be governed by the procedure set out in the Initial Order.

DATED at Halifax, Nova Scotia, this 18th day of February, 2009.

IN THE SUPREME COURT OF NOVA SCOTIA
I hereby certify that the foregoing document, identified by the Seal of the Court, is a true copy of the original document on file herein.
Dated the 18th day of February A.D. 2009
D. Swales
Deputy Prothonotary

D. Swales
~~Prothonotary~~
Deputy Prothonotary

DARLENE SWALES
Deputy Prothonotary

TAB 7

Court File No. CV-09-8396-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	WEDNESDAY, THE 14th DAY
	)	
MADAM JUSTICE PEPALL	)	OF OCTOBER, 2009

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

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

APPLICANTS

CLAIMS PROCEDURE ORDER

THIS MOTION made by Canwest Global Communications Corp. ("Canwest Global") and the other applicants listed on Schedule "A" (the "Applicants") and the partnerships listed on Schedule "B" (collectively and together with Canwest Global and the Applicants, the "CMI Entities", and each a "CMI Entity"), for an order establishing a claims procedure for the identification and quantification of certain claims against (i) the CMI Entities and (ii) the directors and officers of the Applicants was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion, the Affidavit of John Maguire sworn October 8, 2009, the First Report of FTI Consulting Canada Inc. in its capacity as Court-appointed monitor of the CMI Entities (the "Monitor") and on hearing from counsel for the CMI Entities, the Monitor, the Special Committee of the Board of Directors of Canwest Global, the *ad hoc* committee of holders of 8% senior subordinated notes issued by Canwest Media Inc. ("CMI"), CIT Business Credit Canada Inc., and the Management Directors of the Applicants and such other counsel as were present, no one else appearing although duly served as appears from the

affidavit of service, filed.

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and Motion Record herein be and is hereby abridged and that the motion is properly returnable today and service upon any interested party other than those parties served is hereby dispensed with.

DEFINITIONS AND INTERPRETATION

2. **THIS COURT ORDERS** that, for the purposes of this Order establishing a claims process for the CMI Entities and their directors and officers (the "CMI Claims Procedure Order"), in addition to terms defined elsewhere herein, the following terms shall have the following meanings:

   (a) "Assessments" means Claims of Her Majesty the Queen in Right of Canada or of any Province or Territory or Municipality or any other taxation authority in any Canadian or foreign jurisdiction, including, without limitation, amounts which may arise or have arisen under any notice of assessment, notice of reassessment, notice of appeal, audit, investigation, demand or similar request from any taxation authority;

   (b) "Business Day" means a day, other than a Saturday, Sunday or a statutory holiday, on which banks are generally open for business in Toronto, Ontario;

   (c) "Calendar Day" means a day, including Saturday, Sunday and any statutory holidays in the Province of Ontario, Canada;

   (d) "Canwest Intercompany Claim" means any claim of a wholly or partially owned subsidiary of Canwest Global which is not a CMI Entity against any of the CMI Entities;

   (e) "CCAA" means the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended;

(f) "CCAA Proceedings" means the proceedings commenced by the CMI Entities in the Court at Toronto under Court File No. CV-09-8396-00CL;

(g) "Claim" means:

(i) any right or claim of any Person against one or more of the CMI Entities, whether or not asserted, in connection with any indebtedness, liability or obligation of any kind whatsoever of one or more of the CMI Entities in existence on the Filing Date, including on account of Wages and Benefits, and any accrued interest thereon and costs payable in respect thereof to and including the Filing Date, whether or not such right or claim is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present, future, known, or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including the right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, which indebtedness, liability or obligation is based in whole or in part on facts which existed prior to the Filing Date, and includes any other claims that would have been claims provable in bankruptcy had the applicable CMI Entity become bankrupt on the Filing Date (each, a "Prefiling Claim", and collectively, the "Prefiling Claims");

(ii) any right or claim of any Person against one or more of the CMI Entities in connection with any indebtedness, liability or obligation of any kind whatsoever owed by one or more of the CMI Entities to such Person arising out of the restructuring, disclaimer, resiliation, termination or breach on or after the Filing Date of any contract, lease or other agreement whether written or oral and whether such restructuring, disclaimer, resiliation, termination or breach took place or takes place before or after the date of this CMI Claims Procedure Order (each, a "Restructuring

Period Claim", and collectively, the "Restructuring Period Claims"); and

(iii) any right or claim of any Person against one or more of the Directors or Officers of one or more of the Applicants or any of them, that relates to a Prefiling Claim or a Restructuring Period Claim howsoever arising for which the Directors or Officers of an Applicant are by statute or otherwise by law liable to pay in their capacity as Directors or Officers or in any other capacity (each a "Director/Officer Claim", and collectively, the "Directors/Officers Claims");

provided however, that in any case "Claim" shall not include an Excluded Claim or a Canwest Intercompany Claim;

(h) "Claims Officer" means the individuals designated by the Court pursuant to paragraph 11 of this CMI Claims Procedure Order and such other Persons as may be designated by the CMI Entities and consented to by the Monitor;

(i) "CMI Claims Bar Date" means 5:00 p.m. on November 19, 2009;

(j) "CMI Claims Package" means the materials to be provided by the CMI Entities to Persons who may have a Claim which materials shall include:

(i) in the case of a CMI Known Creditor (other than a CMI Employee), a CMI General Notice of Claim, a blank CMI Notice of Dispute of Claim, a CMI Instruction Letter, and such other materials as the CMI Entities may consider appropriate or desirable;

(ii) in the case of a CMI Employee, a CMI Employee Notice of Claim, a blank CMI Notice of Dispute of Claim, a CMI Employee Instruction Letter, and such other materials as the CMI Entities may consider appropriate or desirable; or

(iii) in the case of a CMI Unknown Creditor, a blank CMI Proof of Claim and a CMI Proof of Claim Instruction Letter, and such other materials as the CMI Entities may consider appropriate or desirable;

(k) "CMI Claims Schedule" means a list of all known Creditors prepared and updated from time to time by the CMI Entities, with the assistance of the Monitor, showing the name, last known address, last known facsimile number, and last known email address of each CMI Known Creditor (except that where a CMI Known Creditor is represented by counsel known by the CMI Entities, the address, facsimile number, and email address of such counsel may be substituted) and, to the extent possible, the amount of each CMI Known Creditor's Claim as valued by the CMI Entities for voting and/or distribution purposes;

(l) "CMI CRA" means Hap. S. Stephen and Stonecrest Capital Inc. in their capacity as the court-appointed Chief Restructuring Advisor of the CMI Entities;

(m) "CMI Employee Instruction Letter" means the instruction letter to CMI Employees, substantially in the form attached as Schedule "F" hereto, regarding the CMI Employee Notice of Claim, completion of a CMI Notice of Dispute of Claim by a CMI Employee and the claims procedure described herein;

(n) "CMI Employee Notice of Claim" means the notice referred to in paragraph 18 hereof, substantially in the form attached hereto as Schedule "E", advising each CMI Employee of their Claim, if any, in respect of Wages and Benefits as valued by the CMI Entities for voting and distribution purposes based on the books and records of the CMI Entities;

(o) "CMI Employees" means all current employees of the CMI Entities as at the Filing Date, and "CMI Employee" means any one of them;

(p) "CMI General Notice of Claim" means the notice referred to in paragraph 17 hereof, substantially in the form attached hereto as Schedule "C", advising each CMI Known Creditor (other than CMI Employees) of its Claim as valued by the CMI Entities (in consultation with the CMI CRA, if applicable) for voting and distribution purposes based on the books and records of the CMI Entities;

(q) "CMI Instruction Letter" means the instruction letter to CMI Known Creditors (other than CMI Employees), substantially in the form attached as Schedule "D"

hereto, regarding the CMI General Notice of Claim, completion of a CMI Notice of Dispute of Claim by a CMI Known Creditor and the claims procedure described herein;

(r) "CMI Known Creditor" means a Creditor, other than a CMI Noteholder in its capacity as a CMI Noteholder or CMI Unknown Creditor, including CMI Employees, former employees of the CMI Entities, and any CMI Entity in its capacity as a Creditor of one or more CMI Entities, whose Claim is included on the CMI Claims Schedule;

(s) "CMI Note" means a bond or note issued pursuant to the CMI Noteholder Trust Indenture and any bonds or notes issued in substitution or replacement thereof;

(t) "CMI Noteholder" means a registered or beneficial holder of a CMI Note;

(u) "CMI Noteholder Trustee" means The Bank of New York as Trustee under the CMI Noteholder Trust Indenture;

(v) "CMI Noteholder Trust Indenture" means the trust indenture dated November 18, 2004 between CMI (through its predecessor 3815668 Canada Inc.), certain guarantors party thereto and the CMI Noteholder Trustee, as amended by certain supplemental indentures thereto;

(w) "CMI Notice of Dispute of Claim" means the notice referred to in paragraph 20 hereof, substantially in the form attached as Schedule "G" hereto, which may be delivered to the Monitor by a CMI Known Creditor disputing a CMI General Notice of Claim or a CMI Employee Notice of Claim, as applicable, with reasons for its dispute;

(x) "CMI Notice of Dispute of Revision or Disallowance" means the notice referred to in paragraphs 33 and 38 hereof, substantially in the form attached as Schedule "I" hereto, which may be delivered to the Monitor by a CMI Unknown Creditor disputing a CMI Notice of Revision or Disallowance, with reasons for its dispute;

(y) "CMI Notice of Revision or Disallowance" means the notice referred to in

paragraphs 32 and 37 hereof, substantially in the form of Schedule "H" advising a CMI Unknown Creditor that the CMI Entities have revised or rejected all or part of such CMI Unknown Creditor's Claim set out in its CMI Proof of Claim;

(z) "CMI Notice to Creditors" means the notice for publication by the CMI Entities or the Monitor as described in paragraph 29 hereof, substantially in the form attached hereto as Schedule "J";

(aa) "CMI Proof of Claim" means the Proof of Claim referred to in paragraph 30 hereof to be filed by CMI Unknown Creditors, substantially in the form attached hereto as Schedule "K";

(bb) "CMI Proof of Claim Instruction Letter" means the instruction letter to CMI Unknown Creditors, substantially in the form attached as Schedule "L" hereto, regarding the completion of a CMI Proof of Claim by a CMI Unknown Creditor and the claims procedure described herein;

(cc) "CMI Unknown Creditors" means Creditors which are not CMI Known Creditors or CMI Noteholders;

(dd) "Court" means the Superior Court of Justice (Commercial List) in the City of Toronto in the Province of Ontario;

(ee) "Creditor" means any Person having a Claim and includes without limitation the transferee or assignee of a Claim transferred and recognized as a Creditor in accordance with paragraph 45 hereof or a trustee, executor, liquidator, receiver, receiver and manager, or other Person acting on behalf of or through such Person;

(ff) "Director/Officer Claim" has the meaning ascribed to that term in paragraph 2(f)(iii) of this CMI Claims Procedure Order;

(gg) "Directors" means all current and former directors (or their estates) of the Applicants and "Director" means any one of them;

(hh) "Distribution Claim" means the amount of the Claim of a Creditor as finally

determined for distribution purposes, in accordance with the provisions of this CMI Claims Procedure Order and the CCAA;

(ii) "Excluded Claim" means (i) claims secured by any of the "Charges", as defined in the Initial Order, (ii) any claim against a Director that cannot be compromised due to the provisions of subsection 5.1(2) of the CCAA, (iii) that portion of a Claim arising from a cause of action for which the applicable CMI Entities are fully insured, (iv) any claim of The Bank of Nova Scotia arising from the provision of cash management services to the CMI Entities, and (v) any claim of CIT Business Credit Canada Inc. under the CIT Credit Agreement as defined in the Initial Order;

(jj) "Filing Date" means October 6, 2009;

(kk) "Initial Order" means the Initial Order of the Honourable Madam Justice Pepall made October 6, 2009, as amended, restated or varied from time to time;

(ll) "Meeting" means a meeting of Creditors called for the purpose of considering and voting in respect of a Plan;

(mm) "Officers" means all current and former officers (or their estates) of the Applicants, and "Officer" means any one of them;

(nn) "Person" means any individual, corporation, limited or unlimited liability company, general or limited partnership, association, trust, unincorporated organization, joint venture, government or any agency or instrumentality thereof or any other entity;

(oo) "Plan" means any proposed plan(s) of compromise or arrangement to be filed by any or all of the CMI Entities (in consultation with the CMI CRA) pursuant to the CCAA as the same may be amended, supplemented or restated from time to time in accordance with the terms thereof;

(pp) "Prefiling Claim" has the meaning ascribed to that term in paragraph 2(f)(i) of this CMI Claims Procedure Order;

(qq) "Restructuring Period Claim" has the meaning ascribed to that term in paragraph 2(f)(ii) of this CMI Claims Procedure Order;

(rr) "Wages and Benefits" means all outstanding wages, salaries and employee benefits (including, but not limited to, employee medical, dental, disability, life insurance and similar benefit plans or arrangements, incentive plans, share compensation plans and employee assistance programs and employee or employer contributions in respect of pension and other benefits) vacation pay, commissions, bonuses and other incentive payments, payments under collective bargaining agreements, and employee and director expenses and reimbursements, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements; and

(ss) "Voting Claim" means the amount of the Claim of a Creditor as finally determined for voting at the Meeting, in accordance with the provisions of this CMI Claims Procedure Order, and the CCAA.

3. **THIS COURT ORDERS** that all references as to time herein shall mean local time in Toronto, Ontario, Canada, and any reference to an event occurring on a Business Day shall mean prior to 5:00 p.m. on such Business Day unless otherwise indicated herein.

4. **THIS COURT ORDERS** that all references to the word "including" shall mean "including without limitation".

5. **THIS COURT ORDERS** that all references to the singular herein include the plural, the plural include the singular, and any gender includes the other gender.

GENERAL PROVISIONS

6. **THIS COURT ORDERS** that the CMI Entities and the Monitor are hereby authorized to use reasonable discretion as to the adequacy of compliance with respect to the manner in which forms delivered hereunder are completed and executed, and may, where they are satisfied that a Claim has been adequately proven, waive strict compliance with the requirements of this CMI Claims Procedure Order as to completion and execution of such

forms and to request any further documentation from a Creditor that the CMI Entities or the Monitor may require in order to enable them to determine the validity of a Claim.

7. **THIS COURT ORDERS** that any Claims denominated in a foreign currency shall be converted to Canadian dollars for purposes of any Plan on the basis of the average Bank of Canada United States/Canadian dollar noon exchange rate in effect over the ten day period preceding the filing of a Plan.

8. **THIS COURT ORDERS** that interest and penalties that would otherwise accrue after the Filing Date shall not be included in any Claim. Amounts claimed in Assessments issued after the Filing Date shall be subject to this CMI Claims Procedure Order and there shall be no presumption of validity or deeming of the amount due in respect of the Claim set out in any Assessment where such Assessment was issued after the Filing Date.

9. **THIS COURT ORDERS** that copies of all forms delivered hereunder, as applicable, and determinations of Claims by a Claims Officer or the Court, as the case may be, shall be maintained by the CMI Entities and, subject to further order of the Court, such Creditor will be entitled to have access thereto by appointment during normal business hours on written request to the CMI Entities or the Monitor.

10. **THIS COURT ORDERS** that, notwithstanding anything to the contrary in this CMI Claims Procedure Order, in respect of any Claim that exceeds $15 million, the CMI Entities shall consult with the CMI CRA prior to: accepting, admitting, settling, resolving, valuing (for purposes of a CMI General Notice of Claim, a CMI Employee Notice of Claim, a notice of disclaimer or resiliation or otherwise), revising or rejecting such Claim; referring the determination of such Claim to a Claims Officer or the Court; appealing any determination of such Claim by the Claims Officer; or adjourning any Meeting on account of a dispute with respect to such Claim.

CLAIMS OFFICER

11. **THIS COURT ORDERS** that the Honourable Ed Saunders, the Honourable Jack Ground, the Honourable Coulter Osborne, and such other Persons as may be appointed by the Court from time to time on application of the CMI Entities (in consultation with

the CMI CRA), or such other Persons designated by the CMI Entities (in consultation with the CMI CRA) and consented to by the Monitor, be and they are hereby appointed as Claims Officers for the claims procedure described herein.

12. **THIS COURT ORDERS** that, subject to the discretion of the Court, a Claims Officer shall determine the validity and amount of disputed Claims in accordance with this CMI Claims Procedure Order and to the extent necessary may determine whether any Claim or part thereof constitutes an Excluded Claim. A Claims Officer shall determine all procedural matters which may arise in respect of his or her determination of these matters, including the manner in which any evidence may be adduced. A Claims Officer shall have the discretion to determine by whom and to what extent the costs of any hearing before a Claims Officer shall be paid.

13. **THIS COURT ORDERS** that, notwithstanding anything to the contrary herein, a CMI Entity may with the consent of the Monitor: (i) refer a CMI Known Creditor's Claim for resolution to a Claims Officer or to the Court for voting and/or distribution purposes; and (ii) refer a CMI Unknown Creditor's Claim for resolution to a Claims Officer or to the Court for voting and/or distribution purposes, where in the CMI Entity's view such a referral is preferable or necessary for the resolution of the valuation of the Claim.

MONITOR'S ROLE

14. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights, duties, responsibilities and obligations under the CCAA and under the Initial Order, shall assist the CMI Entities in connection with the administration of the claims procedure provided for herein, including the determination of Claims of Creditors and the referral of a particular Claim to a Claims Officer, as requested by the CMI Entities from time to time, and is hereby directed and empowered to take such other actions and fulfill such other roles as are contemplated by this CMI Claims Procedure Order. The Monitor shall file a report with the Court by October 31, 2009 detailing the nature and quantum of the Canwest Intercompany Claims.

CLAIMS PROCEDURE FOR CMI NOTEHOLDERS

15. **THIS COURT ORDERS** that the CMI Entities shall not be required to send to a CMI Noteholder a CMI General Notice of Claim and neither the CMI Noteholders nor the CMI Noteholder Trustee shall be required to file a CMI Proof of Claim in respect of Claims pertaining to the CMI Notes. Within 15 Calendar Days of the Filing Date, the CMI Entities shall send to the CMI Noteholder Trustee (as representative of the CMI Noteholders' Voting Claim), with a copy to the advisors of the Ad Hoc Committee (as defined in the Initial Order), a notice stating the accrued amounts owing directly by each of the CMI Entities under the CMI Noteholder Trust Indenture and the guarantees executed by the CMI Entities in respect of the CMI Notes (including, in each case, principal and accrued interest thereon) up to the Filing Date. The CMI Noteholder Trustee shall confirm whether such amounts are accurate to the Monitor within 15 Calendar Days of receipt of the CMI Entities' notice. If such amounts are confirmed by the CMI Noteholder Trustee, or in the absence of any response by the CMI Noteholder Trustee within 15 Calendar Days of receipt of the CMI Entities' notice, such amounts shall be deemed to be the accrued amounts owing directly by each of the CMI Entities under the CMI Noteholder Trust Indenture and the guarantees executed by the CMI Entities in respect of the CMI Notes for the purposes of voting and for the purposes of distributions under the Plan, unless the amounts of such Claims are otherwise agreed to in writing by the applicable CMI Entities, the Ad Hoc Committee, and the CMI Noteholder Trustee, in which case such agreement shall govern. If the CMI Noteholder Trustee indicates that it cannot confirm the accrued amounts owing directly by each of the CMI Entities under the CMI Noteholder Trust Indenture and the guarantees executed by the CMI Entities in respect of the CMI Notes, such amounts shall be determined by the Court for the purposes of voting and distributions under the Plan, unless the amount of such Claims are otherwise agreed to in writing by the applicable CMI Entities, the Ad Hoc Committee and the CMI Noteholder Trustee, in which case such agreement shall govern.

CLAIMS PROCEDURE FOR CMI KNOWN CREDITORS

(i) Disclaimers and Resiliations

16. **THIS COURT ORDERS** that any action taken by the CMI Entities to restructure, disclaim, resiliate, terminate or breach any contract, lease or other agreement, whether written or oral, pursuant to the terms of the Initial Order, must occur on or before 23 Calendar Days prior to the date of the Meeting. Any notices of disclaimer or resiliation delivered to Creditors in connection with the foregoing shall be accompanied by a CMI Claims Package. The CMI Entities (in consultation with the CMI CRA, if applicable), the Monitor and such Creditor shall resolve such Restructuring Period Claims by two (2) Calendar Days prior to the date of the Meeting for voting purposes.

(ii) Notice of Claims

17. **THIS COURT ORDERS** that the CMI Entities shall send a CMI Claims Package to each of the CMI Known Creditors (other than CMI Employees who are dealt with in paragraph 18 below) by prepaid ordinary mail to the address as shown on the CMI Claims Schedule before 11:59 p.m. on October 22, 2009. The CMI Entities shall specify in the CMI General Notice of Claim included in the CMI Claims Package the CMI Known Creditor's Claim for voting and distribution purposes as valued by the CMI Entities (in consultation with the CMI CRA, if applicable) based on the books and records of the CMI Entities.

18. **THIS COURT ORDERS** that the CMI Entities shall send a CMI Claims Package to each CMI Employee by prepaid ordinary mail to the address as shown on the CMI Claims Schedule before 11:59 p.m. on October 22, 2009. The CMI Entities shall specify in the CMI Employee Notice of Claim included in the CMI Claims Package the CMI Employee's Claim in respect of Wages and Benefits for voting and distribution purposes as valued by the CMI Entities (in consultation with the CMI CRA, if applicable) based on the books and records of the CMI Entities.

19. **THIS COURT ORDERS** that, on or before 11:59 p.m. on October 22, 2009, the CMI Entities shall provide a CMI General Notice of Claim and a CMI Claims Package to any

and all of the CMI Entities that have one or more Claims against any of the CMI Entities (each a "CMI Intercompany Claim"), with a copy to the Monitor and the advisors to the Ad Hoc Committee, with respect to each such CMI Intercompany Claim that appears on the books and records of the CMI Entities. All CMI Intercompany Claims shall be deemed to be proven against such CMI Entities for the amounts specified in the applicable CMI General Notices of Claim, provided that the advisors of the Ad Hoc Committee, on behalf of the CMI Noteholders, may, within 15 Calendar Days of receiving notice of such CMI Intercompany Claims, contest the quantum of any CMI Intercompany Claim in the manner provided for herein with respect to the Claims of CMI Known Creditors. No CMI Intercompany Claim may be amended, restated, withdrawn, settled, discharged or released without the prior written consent of the advisors of the Ad Hoc Committee, except where such CMI Intercompany Claim is finally determined by the Claims Officer or the Court in the manner provided for herein.

(iii) Adjudication of Claims

20. **THIS COURT ORDERS** that if a CMI Known Creditor (other than a CMI Employee) disputes the amount of the Claim as set out in the CMI General Notice of Claim, the CMI Known Creditor shall deliver to the Monitor a CMI Notice of Dispute of Claim which must be received by the Monitor by no later than the CMI Claims Bar Date. Such Person shall specify therein whether it disputes the value of the Claim for voting and/or distribution purposes.

21. **THIS COURT ORDERS** that if a CMI Known Creditor (other than a CMI Employee) does not deliver to the Monitor a completed CMI Notice of Dispute of Claim by the CMI Claims Bar Date disputing its Claim as valued by the CMI Entities for voting and distribution purposes, then such CMI Known Creditor shall be deemed to have accepted for voting and distribution purposes the valuation of the CMI Known Creditor's Claim as set out in the CMI Notice of Claim, and such CMI Known Creditor's Claim shall be treated as both a Voting Claim and a Distribution Claim. A CMI Known Creditor may accept a Claim for voting purposes as set out in the CMI Notice of Claim and dispute the Claim for distribution purposes in such CMI Known Creditor's CMI Notice of Dispute of

Claim provided that it does so by the CMI Claims Bar Date. A determination of a Voting Claim of a CMI Known Creditor does not in any way affect and is without prejudice to the process to determine such CMI Known Creditor's Distribution Claim.

22. **THIS COURT ORDERS** that if a CMI Employee: (i) disputes the amount of the Claim in respect of Wages and Benefits as set out in the CMI Employee Notice of Claim; and/or (ii) believes that they have a Claim other than in respect of Wages and Benefits, the CMI Employee shall deliver to the Monitor a CMI Notice of Dispute of Claim which must be received by the Monitor by no later than the CMI Claims Bar Date. If such Person disputes the amount of the Claim in respect of Wages and Benefits as set out in the CMI Employee Notice of Claim, such Person shall specify therein whether it disputes the value of such Claim in respect of Wages and Benefits for voting and/or distribution purposes.

23. **THIS COURT ORDERS** that if a CMI Employee does not deliver to the Monitor a completed CMI Notice of Dispute of Claim by the CMI Claims Bar Date disputing its Claim in respect of Wages and Benefits as valued by the CMI Entities for voting and distribution purposes or asserting other Claims, then such CMI Employee shall be deemed to have accepted for voting and distribution purposes the valuation of the CMI Employee's Claim as set out in the CMI Employee Notice of Claim, and such CMI Employee's Claim shall be treated as both a Voting Claim and a Distribution Claim and all other Claims of the CMI Employee shall be forever extinguished and barred. A CMI Employee may accept a Claim for voting purposes as set out in the CMI Employee Notice of Claim and dispute the Claim for distribution purposes in such CMI Employee's CMI Notice of Dispute of Claim provided that it does so by the CMI Claims Bar Date. A determination of a Voting Claim of a CMI Employee does not in any way affect and is without prejudice to the process to determine such CMI Employee's Distribution Claim.

(iv) Resolution of Disputed Claims

24. **THIS COURT ORDERS** that in the event that a CMI Entity, with the assistance of the Monitor (in consultation with the CMI CRA, if applicable), is unable to resolve a dispute regarding any Voting Claim with a CMI Known Creditor, the CMI Entity or the CMI

Known Creditor shall so notify the Monitor, and the CMI Known Creditor or the CMI Entity, as the case may be. The decision as to whether the CMI Known Creditor's Voting Claim should be adjudicated by the Court or a Claims Officer shall be in the sole discretion of the CMI Entity (in consultation with the CMI CRA, if applicable); provided, however that to the extent a Claim is referred under this paragraph to the Court or a Claims Officer, it shall be on the basis that the value of the Claim shall be resolved or adjudicated both for voting and distribution purposes (and that it shall remain open to the parties to agree that the Creditor's Voting Claim may be settled by the CMI Known Creditor and the CMI Entity (in consultation with the CMI CRA, if applicable) without prejudice to a future hearing by the Court or a Claims Officer to determine the Creditor's Distribution Claim). Thereafter, the Court or a Claims Officer, as the case may be, shall resolve the dispute between the CMI Entity and such CMI Known Creditor, and in any event, it is anticipated that the Court or a Claims Officer shall, by no later than two (2) Calendar Days prior to the date of the Meeting, notify the CMI Entity, such CMI Known Creditor and the Monitor of the determination of the value of the CMI Known Creditor's Voting Claim and Distribution Claim. Such determination of the value of the Voting Claim and Distribution Claim by the Court or the Claims Officer shall be deemed to be the CMI Known Creditor's Voting Claim and Distribution Claim for voting and distribution purposes.

25. **THIS COURT ORDERS** that where the value of a CMI Known Creditor's Voting Claim has not been finally determined by the Court or a Claims Officer by the date on which a vote is held, the relevant CMI Entity (in consultation with the CMI CRA, if applicable) shall either:

(a) accept the CMI Known Creditor's determination of the value of their Voting Claim as set out in the applicable CMI Notice of Dispute of Claim only for the purposes of voting, and conduct the vote of the Creditors on that basis subject to a final determination of such CMI Known Creditor's Voting Claim, and in such case the Monitor shall record separately the value of such CMI Known Creditor's Voting Claim and whether such CMI Known Creditor voted in favour of or against the Plan;

(b) adjourn the Meeting until a final determination of the Voting Claim(s) is made; or

(c) deal with the matter as the Court may otherwise direct or as the relevant CMI Entity, the Monitor and the CMI Known Creditor may otherwise agree.

26. **THIS COURT ORDERS** that in the event that a CMI Entity, with the assistance of the Monitor (in consultation with the CMI CRA, if applicable), is unable to resolve a dispute with a CMI Known Creditor regarding any Distribution Claim, the CMI Entity (in consultation with the CMI CRA, if applicable) or the CMI Known Creditor shall so notify the Monitor, and the CMI Known Creditor or the CMI Entity, as the case may be. The decision as to whether the CMI Known Creditor's Distribution Claim should be adjudicated by the Court or a Claims Officer shall be in the sole discretion of the CMI Entity (in consultation with the CMI CRA, if applicable). Thereafter, the Court or a Claims Officer shall resolve the dispute between the CMI Entity and such CMI Known Creditor.

27. **THIS COURT ORDERS** that a CMI Known Creditor or a CMI Entity (in consultation with the CMI CRA, if applicable), may, within seven (7) Calendar Days of notification of a Claims Officer's determination of the value of a CMI Known Creditor's Voting Claim or Distribution Claim, appeal such determination to the Court by filing a notice of appeal, and the appeal shall be initially returnable within ten (10) Calendar Days of the filing of such notice of appeal, such appeal to be an appeal based on the record before the Claims Officer and not a hearing de novo.

28. **THIS COURT ORDERS** that if neither party appeals the determination of value of a Voting Claim or Distribution Claim by a Claims Officer within the time set out in paragraph 27 above, the decision of the Claims Officer in determining the value of a CMI Known Creditor's Voting Claim or Distribution Claim shall be final and binding upon the relevant CMI Entity, the Monitor and the CMI Known Creditor for voting and distribution purposes and there shall be no further right of appeal, review or recourse to the Court from the Claims Officer's final determination of a Voting Claim or Distribution Claim.

CLAIMS PROCEDURE FOR CMI UNKNOWN CREDITORS

(i) Notice of Claims

29. **THIS COURT ORDERS** that forthwith after the date of this CMI Claims Procedure Order and in any event on or before October 20, 2009, the CMI Entities or the Monitor shall publish the CMI Notice to Creditors, for at least two (2) Business Days in The Globe & Mail (National Edition), the National Post, La Presse and The Wall Street Journal.

30. **THIS COURT ORDERS** that the Monitor shall send a CMI Claims Package to any CMI Unknown Creditor who requests these documents. Such CMI Unknown Creditor must return a completed CMI Proof of Claim to the Monitor by no later than the CMI Claims Bar Date.

31. **THIS COURT ORDERS** that any CMI Unknown Creditor that does not return a CMI Proof of Claim to the Monitor by the CMI Claims Bar Date shall not be entitled to attend or vote at any Meeting and shall not be entitled to receive any distribution from any Plan and its Claim shall be forever extinguished and barred without any further act or notification by the CMI Entities.

(ii) Adjudication of Claims

32. **THIS COURT ORDERS** that the CMI Entities, with the assistance of the Monitor and in consultation with the CMI CRA, if applicable, shall review all CMI Proofs of Claim received by the CMI Claims Bar Date and shall accept, revise or reject the amount of each Claim set out therein for voting and/or distribution purposes. The CMI Entities shall by no later than 11:59 p.m. on November 30, 2009, notify each CMI Unknown Creditor who has delivered a CMI Proof of Claim as to whether such CMI Unknown Creditor's Claim as set out therein has been revised or rejected for voting purposes (and for distribution purposes, if the CMI Entities (in consultation with the CMI CRA, if applicable), elect to do so), and the reasons therefor, by sending a CMI Notice of Revision or Disallowance. Where the CMI Entities do not send by such date a CMI Notice of Revision or Disallowance to a CMI Unknown Creditor, the CMI Entities shall

be deemed to have accepted such CMI Unknown Creditor's Claim in the amount set out in that CMI Unknown Creditor's CMI Proof of Claim as a Voting Claim for voting purposes only, which shall be deemed to be that CMI Unknown Creditor's Voting Claim.

33. **THIS COURT ORDERS** that any CMI Unknown Creditor who intends to dispute a CMI Notice of Revision or Disallowance sent pursuant to the immediately preceding paragraph shall, by no later than 5:00 p.m. on December 10, 2009 deliver a CMI Notice of Dispute of Revision or Disallowance to the Monitor.

(iii) Resolution of Claims

34. **THIS COURT ORDERS** that where a CMI Unknown Creditor that receives a CMI Notice of Revision or Disallowance pursuant to paragraph 32 above does not file a CMI Notice of Dispute of Revision or Disallowance by the time set out in paragraph 33 above, the value of such CMI Unknown Creditor's Voting Claim or Distribution Claim (if the CMI Notice of Revision or Disallowance dealt with the Distribution Claim) shall be deemed to be as set out in the CMI Notice of Revision or Disallowance.

35. **THIS COURT ORDERS** that in the event that a CMI Entity, with the assistance of the Monitor (in consultation with the CMI CRA, if applicable), is unable to resolve a dispute regarding any Voting Claim with a CMI Unknown Creditor, the CMI Entity or the CMI Unknown Creditor shall so notify the Monitor, and the CMI Unknown Creditor or the CMI Entity (in consultation with the CMI CRA, if applicable), as the case may be. The decision as to whether the CMI Unknown Creditor's Voting Claim should be adjudicated by the Court or a Claims Officer shall be in the sole discretion of the CMI Entity; provided, however that to the extent a Claim is referred under this paragraph to the Court or a Claims Officer, it shall be on the basis that the value of the Claim shall be resolved or adjudicated both for voting and distribution purposes (and that it shall remain open to the parties to agree that the Creditor's Voting Claim may be settled by the CMI Unknown Creditor and the CMI Entity (in consultation with the CMI CRA, if applicable) without prejudice to a future hearing by the Court or a Claims Officer to determine the Creditor's Distribution Claim). Thereafter, the Court or a Claims Officer, as the case may be, shall resolve the dispute between the CMI Entity and such CMI Unknown Creditor, and in any

event, it is anticipated that the Court or a Claims Officer shall, by no later two (2) Calendar Days prior to the date of the Meeting, notify the CMI Entity, such CMI Unknown Creditor and the Monitor of the determination of the value of the CMI Unknown Creditor's Voting Claim and Distribution Claim. Such determination of the value of the Voting Claim and Distribution Claim by the Court or the Claims Officer shall be deemed to be the CMI Unknown Creditor's Voting Claim and Distribution Claim for voting and distribution purposes.

36. **THIS COURT ORDERS** that where the value of a CMI Unknown Creditor's Voting Claim has not been finally determined by the Court or the Claims Officer by the date of the meeting, the relevant CMI Entity shall (in consultation with the CMI CRA, if applicable) either:

(a) accept the CMI Unknown Creditor's determination of the value of the Voting Claim as set out in the applicable CMI Notice of Dispute of Revision or Disallowance only for the purposes of voting and conduct the vote of the Creditors on that basis subject to a final determination of such CMI Unknown Creditor's Voting Claim, and in such case the Monitor shall record separately the value of such CMI Unknown Creditor's Voting Claim and whether such CMI Unknown Creditor voted in favour of or against the Plan;

(b) adjourn the Meeting until a final determination of the Voting Claim(s) is made; or

(c) deal with the matter as the Court may otherwise direct or as the relevant CMI Entity, the Monitor and the CMI Unknown Creditor may otherwise agree.

37. **THIS COURT ORDERS** that the CMI Entities, with the assistance of the Monitor (in consultation with the CMI CRA, if applicable), shall review and consider all CMI Proofs of Claim filed in accordance with this CMI Claims Procedure Order, in order to determine the Distribution Claims. The relevant CMI Entities shall notify each CMI Unknown Creditor who filed a CMI Proof of Claim and who did not receive a CMI Notice of Revision or Disallowance for distribution purposes pursuant to paragraph 32 herein as to whether such CMI Unknown Creditor's Claim as set out in such CMI

Unknown Creditor's CMI Proof of Claim has been revised or rejected for distribution purposes, and the reasons therefore, by delivery of a CMI Notice of Revision or Disallowance. Where the relevant CMI Entities do not send a CMI Notice of Revision or Disallowance for distribution purposes to a CMI Unknown Creditor, the relevant CMI Entities and the Monitor shall be deemed to have accepted the amount of such CMI Unknown Creditor's Claim as set out in such CMI Unknown Creditor's CMI Proof of Claim as such CMI Unknown Creditor's Distribution Claim.

38. **THIS COURT ORDERS** that any CMI Unknown Creditor who intends to dispute a CMI Notice of Revision or Disallowance for distribution purposes shall no later than 21 Calendar Days after receiving the notice referred to in paragraph 37, deliver a CMI Notice of Dispute of Revision or Disallowance to the Monitor.

39. **THIS COURT ORDERS** that where a CMI Unknown Creditor that receives a CMI Notice of Revision or Disallowance pursuant to paragraph 37 above does not return a CMI Notice of Dispute of Revision or Disallowance for distribution purposes to the Monitor by the time set out in paragraph 38 above, the value of such CMI Unknown Creditor's Distribution Claim shall be deemed to be as set out in the CMI Notice of Revision or Disallowance for distribution purposes and the CMI Unknown Creditor will be barred from disputing or appealing same.

40. **THIS COURT ORDERS** that in the event that a CMI Entity (in consultation with the CMI CRA, if applicable) is unable to resolve a dispute with a CMI Unknown Creditor regarding any Distribution Claim, the CMI Entity or the CMI Unknown Creditor shall so notify the Monitor, and the CMI Unknown Creditor or the CMI Entity, as the case may be. The decision as to whether the CMI Unknown Creditor's Distribution Claim should ~~be adjudicated by the Court or a Claims Officer shall be in the sole discretion of the CMI~~ Entity (in consultation with the CMI CRA, if applicable). Thereafter, the Court or a Claims Officer shall resolve the dispute between the CMI Entity and such CMI Unknown Creditor.

41. **THIS COURT ORDERS** that either a CMI Unknown Creditor or a CMI Entity may, within seven (7) Calendar Days of notification of a Claims Officer's determination of the

value of a CMI Unknown Creditor's Voting Claim or Distribution Claim, appeal such determination to the Court by filing a notice of appeal, and the appeal shall be initially returnable within ten (10) Calendar Days of the filing of such notice of appeal, such appeal to be an appeal based on the record before the Claims Officer and not a hearing de novo.

42. **THIS COURT ORDERS** that if neither party appeals the determination of value of a Voting Claim or Distribution Claim by a Claims Officer within the time set out in paragraph 41 above, the decision of the Claims Officer in determining the value of a CMI Unknown Creditor's Voting Claim or Distribution Claim shall be final and binding upon the relevant CMI Entity, the Monitor and the CMI Unknown Creditor for voting and distribution purposes and there shall be no further right of appeal, review or recourse to the Court from the Claims Officer's final determination of a Voting Claim or Distribution Claim.

SET-OFF

43. **THIS COURT ORDERS** that the CMI Entities may set-off (whether by way of legal, equitable or contractual set-off) against payments or other distributions to be made pursuant to the Plan to any Creditor, any claims of any nature whatsoever that any of the CMI Entities may have against such Creditor, however, neither the failure to do so nor the allowance of any Claim hereunder shall constitute a waiver or release by the CMI Entities of any such claim that the CMI Entities may have against such Creditor.

NOTICE OF TRANSFEREES

44. **THIS COURT ORDERS** that leave is hereby granted from the date of this CMI Claims Procedure Order until ten (10) Business Days prior to the date fixed by the Court for the Meeting to permit a Creditor to provide notice of assignment or transfer of a Claim to the Monitor, subject to paragraph 45.

45. **THIS COURT ORDERS** that if, after the Filing Date, the holder of a Claim transfers or assigns the whole of such Claim to another Person, neither the Monitor nor the CMI Entities shall be obligated to give notice or otherwise deal with the transferee or assignee

of such Claim in respect thereof unless and until actual notice of transfer or assignment, together with satisfactory evidence of such transfer or assignment, shall have been received and acknowledged by the relevant CMI Entity and the Monitor in writing and thereafter such transferee or assignee shall for the purposes hereof constitute the "Creditor" in respect of such Claim. Any such transferee or assignee of a Claim shall be bound by any notices given or steps taken in respect of such Claim in accordance with this CMI Claims Procedure Order prior to receipt and acknowledgement by the relevant CMI Entity and the Monitor of satisfactory evidence of such transfer or assignment. A transferee or assignee of a Claim takes the Claim subject to any rights of set-off to which a CMI Entity may be entitled with respect to such Claim. For greater certainty, a transferee or assignee of a Claim is not entitled to set-off, apply, merge, consolidate or combine any Claims assigned or transferred to it against or on account or in reduction of any amounts owing by such Person to any of the CMI Entities. No transfer or assignment shall be received for voting purposes unless such transfer shall have been received by the Monitor no later than ten (10) Business Days prior to the date to be fixed by the Court for the Meeting, failing which the original transferor shall have all applicable rights as the "Creditor" with respect to such Claim as if no transfer of the Claim had occurred. Reference to transfer in this CMI Claims Procedure Order includes a transfer or assignment whether absolute or intended as security.

SERVICE AND NOTICES

46. **THIS COURT ORDERS** that the CMI Entities and the Monitor may, unless otherwise specified by this CMI Claims Procedure Order, serve and deliver the CMI Claims Package, any letters, notices or other documents to Creditors or any other interested Person by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery, facsimile transmission or email to such Persons at the physical or electronic address, as applicable, last shown on the books and records of the CMI Entities or set out in such Creditor's CMI Proof of Claim. Any such service and delivery shall be deemed to have been received: (i) if sent by ordinary mail, on the third Business Day after mailing within Ontario, the fifth Business Day after mailing within Canada (other than within Ontario), and the tenth Business Day after mailing internationally; (ii) if sent by courier

or personal delivery, on the next Business Day following dispatch; and (iii) if delivered by facsimile transmission or email by 6:00 p.m. on a Business Day, on such Business Day and if delivered after 6:00 p.m. or other than on a Business Day, on the following Business Day.

47. **THIS COURT ORDERS** that any notice or communication required to be provided or delivered by a Creditor to the Monitor or the CMI Entities under this CMI Claims Procedure Order shall be in writing in substantially the form, if any, provided for in this CMI Claims Procedure Order and will be sufficiently given only if delivered by prepaid registered mail, courier, personal delivery, facsimile transmission or email addressed to:

FTI Consulting Canada Inc., Court-appointed Monitor of Canwest Global Communications Corp. et al
Claims Process

Suite 2733, TD Canada Trust Tower
161 Bay Street
Toronto ON
M5J 2S1

Attention: Anna-Liisa Sisask

Telephone: 1-888-318-4018
Fax: 416-572-4068
Email: anna.sisask@fticonsulting.com

Any such notice or communication delivered by a Creditor shall be deemed to be received upon actual receipt by the Monitor thereof during normal business hours on a Business Day or if delivered outside of normal business hours, the next Business Day.

48. **THIS COURT ORDERS** that if during any period during which notices or other communications are being given pursuant to this CMI Claims Procedure Order a postal strike or postal work stoppage of general application should occur, such notices or other communications sent by ordinary mail and then not received shall not, absent further Order of this Court, be effective and notices and other communications given hereunder during the course of any such postal strike or work stoppage of general application shall

only be effective if given by courier, personal delivery, facsimile transmission or email in accordance with this CMI Claims Procedure Order.

49. **THIS COURT ORDERS** that in the event that this CMI Claims Procedure Order is later amended by further Order of the Court, the CMI Entities or the Monitor may post such further Order on the Monitor's website and such posting shall constitute adequate notice to Creditors of such amended claims procedure.

MISCELLANEOUS

50. **THIS COURT ORDERS** that notwithstanding any other provisions of this CMI Claims Procedure Order, the solicitation by the Monitor or the CMI Entities of CMI Proofs of Claim, and the filing by any Creditor of any CMI Proof of Claim shall not, for that reason only, grant any person any standing in these proceedings or rights under any proposed Plan. The CMI Entities shall not oppose the Ad Hoc Committee and the Noteholder Trustee seeking standing in any proceedings before a Claims Officer, this Court or otherwise in respect of the determination of any Claims.

51. **THIS COURT ORDERS** that nothing in this CMI Claims Procedure Order shall constitute or be deemed to constitute an allocation or assignment of Claims, Excluded Claims, CMI Intercompany Claims or Canwest Intercompany Claims by the CMI Entities into particular affected or unaffected classes for the purpose of a Plan and, for greater certainty, the treatment of Claims, Excluded Claims, CMI Intercompany Claims, Canwest Intercompany Claims or any other claims is to be subject to a Plan and the classes of creditors for voting and distribution purposes shall be subject to the terms of any proposed Plan or further Order of this Court.

52. **THIS COURT ORDERS** that in the event that no Plan is approved by this Court, the CMI Claims Bar Date shall be of no effect in any subsequent proceeding or distribution with respect to any and all Claims made by Creditors.

53. **THIS COURT ORDERS AND REQUESTS** the aid and recognition of any court or any judicial, regulatory or administrative body in any province or territory of Canada (including the assistance of any court in Canada pursuant to section 17 of the CCAA) and

the Federal Court of Canada and any judicial, regulatory or administrative tribunal or other court constituted pursuant to the Parliament of Canada or the legislature of any province and any court or any judicial regulatory body of the United States and the states or other subdivisions of the United States and of any other nation or state, to act in aid of and to be complementary to this Court in carrying out the terms of this CMI Claims Procedure Order.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

OCT 19 2009

PER / PAR:

TAB 8

Case Name:

Worldspan Marine Inc. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF the Canada Business Corporations Act, R.S.C. 1985, c. C-44, and the Business Corporations Act, S.B.C. 2002, c. 57
AND IN THE MATTER OF Worldspan Marine Inc., Crescent Custom Yachts Inc., Queenship Marine Industries Ltd., 27222 Developments Ltd., and Composite FRP Products Ltd., Petitioners

[2011] B.C.J. No. 2467

2011 BCSC 1758

86 C.B.R. (5th) 119

211 A.C.W.S. (3d) 557

2011 CarswellBC 3667

Docket: S113550

Registry: Vancouver

British Columbia Supreme Court
Vancouver, British Columbia

P.J. Pearlman J.

Heard: December 16, 2011.
Judgment: December 21, 2011.

(54 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Application by petitioner, Worldspan, for an extension of time to work toward plan of arrangement, allowed -- Worldspan had contracted with Sargeant to construct

a 144-foot custom motor yacht -- Sargeant stopped making payments after dispute arose between parties -- Worldspan alleged Sargeant's failure to pay resulted in its insolvency -- Worldspan needed additional time to market yacht to find another buyer, to explore debtor-in-possession financing to complete construction of yacht, and to resolve priorities among in rem claims against yacht -- Court satisfied Worldspan had acted in good faith and with due diligence -- Restructuring still best option.

Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Application by petitioner, Worldspan, for an extension of time to work toward plan of arrangement, allowed -- Worldspan had contracted with Sargeant to construct a 144-foot custom motor yacht -- Sargeant stopped making payments after dispute arose between parties -- Worldspan alleged Sargeant's failure to pay resulted in its insolvency -- Worldspan needed additional time to market yacht to find another buyer, to explore debtor-in-possession financing to complete construction of yacht, and to resolve priorities among in rem claims against yacht -- Court satisfied Worldspan had acted in good faith and with due diligence -- Restructuring still best option.

Application by the petitioner, Worldspan Marine Inc., for an extension of the initial order permitting them additional time to work toward a plan of arrangement. The proceedings had their genesis in a dispute between the Worldspan and one of its creditors, Sargeant. Sargeant had contracted with Worldspan to construct a 144-foot custom motor yacht. Construction on the yacht stopped after a dispute arose as to the cost of the vessel. Sargeant alleged he was being overcharged to offset funds that were being stolen from the company, and stopped making payments on the yacht. Sargeant claimed against Worldspan for the full amount he paid towards the yacht's construction, which amounted to almost $21 million. Worldspan maintained that Sargeant's failure to pay monies due to them resulted in their insolvency and led to its application under the Companies' Creditors Arrangement Act (CCAA). Worldspan argued it needed additional time to work toward a plan of arrangement by continuing the marketing of the yacht for the purpose of finding another buyer, to explore potential debtor-in-possession (DIP) financing to complete construction of the yacht pending a sale, and to resolve priorities among in rem claims against the yacht. Parallel proceedings had been commenced in the Federal Court with respect to the in rem claims against the yacht. The application was supported by the monitor as the best option available to all the creditors and stakeholders, and was either supported or not opposed by all of the creditors besides Sargeant.

HELD: Application allowed. The Court found that an extension of the stay would not materially prejudice any of the creditors or other stakeholders. The petitioners were simultaneously pursuing both the marketing of the yacht and efforts to obtain DIP financing that, if successful, would have enabled them to complete the construction of the yacht. Worldscan could not have finalized a restructuring plan until the yacht was sold and terms were negotiating for completing the yacht. All its creditors, other than Sargeant, shared the view that the best course of action was to have the yacht marketed and sold through an orderly process supervised by the courts. While the CCAA proceedings could not be extended indefinitely, at this stage restructuring was still the best option. The Court was satisfied that Worldspan had acted in good faith and with due diligence in the proceedings.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.02(2), s. 11.02(3)(a), s. 11.02(3)(b), s. 36

Counsel:

Counsel for the Petitioners Worldspan Marine Inc., Crescent Custom Yachts Inc., Queenship Marine Industries Ltd., 27222 Developments Ltd. and Composite FRP Products: J.R. Sandrelli and J.D. Schultz.

Counsel for Wolrige Mahon (the "VCO"): K. Jackson and V. Tickle.

Counsel for the Respondent, Harry Sargeant III: K.E. Siddall.

Counsel for Ontrack Systems Ltd.: J. Leathley, Q.C.

Counsel for Mohammed Al-Saleh: D. Rossi.

Counsel for Offshore Interiors Inc., Paynes Marine Group, Restaurant Design and Sales LLC, Arrow Transportation Systems and CCY Holdings Inc.: G. Wharton and P. Mooney.

Counsel for Canada Revenue Agency: N. Beckie.

Counsel for Comerica Bank: J. McLean, Q.C.

Counsel for The Monitor: G. Dabbs.

Reasons for Judgment

P.J. PEARLMAN J.:--

INTRODUCTION

1 On December 16, 2011, on the application of the petitioners, I granted an order confirming and extending the Initial Order and stay pronounced June 6, 2011, and subsequently confirmed and extended to December 16, 2011, by a further 119 days to April 13, 2012. When I made the order, I informed counsel that I would provide written Reasons for Judgment. These are my Reasons.

POSITIONS OF THE PARTIES

2 The petitioners apply for the extension of the Initial Order to April 13, 2012 in order to permit them additional time to work toward a plan of arrangement by continuing the marketing of the Vessel "QE014226C010" (the "Vessel") with Fraser Yachts, to explore potential Debtor In Possession ("DIP") financing to complete construction of the Vessel pending a sale, and to resolve priorities among *in rem* claims against the Vessel.

3 The application of the petitioners for an extension of the Initial Order and stay was either supported, or not opposed, by all of the creditors who have participated in these proceedings, other than the respondent, Harry Sargeant III.

4 The Monitor supports the extension as the best option available to all of the creditors and stakeholders at this time.

5 These proceedings had their genesis in a dispute between the petitioner Worldspan Marine Inc. and Mr. Sargeant. On February 29, 2008, Worldspan entered into a Vessel Construction Agreement with Mr. Sargeant for the construction of the Vessel, a 144-foot custom motor yacht. A dispute arose between Worldspan and Mr. Sargeant concerning the cost of construction. In January 2010 Mr. Sargeant ceased making payments to Worldspan under the Vessel Construction Agreement.

6 The petitioners continued construction until April 2010, by which time the total arrears invoiced to Mr. Sargeant totalled approximately $4.9 million. In April or May 2010, the petitioners ceased construction of the Vessel and the petitioner Queenship laid off 97 employees who were then working on the Vessel. The petitioners maintain that Mr. Sargeant's failure to pay monies due to them under the Vessel Construction Agreement resulted in their insolvency, and led to their application for relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ("*CCAA*") in these proceedings.

7 Mr. Sargeant contends that the petitioners overcharged him. He claims against the petitioners, and against the as yet unfinished Vessel for the full amount he paid toward its construction, which totals $20,945,924.05.

8 Mr. Sargeant submits that the petitioners are unable to establish that circumstances exist that make an order extending the Initial Order appropriate, or that they have acted and continue to act in good faith and with due diligence. He says that the petitioners have no prospect of presenting a viable plan of arrangement to their creditors. Mr. Sargeant also contends that the petitioners have shown a lack of good faith by failing to disclose to the Court that the two principals of Worldspan, Mr. Blane, and Mr. Barnett are engaged in a dispute in the United States District Court for the Southern District of Florida where Mr. Barnett is suing Mr. Blane for fraud, breach of fiduciary duty and conversion respecting monies invested in Worldspan.

9 Mr. Sargeant drew the Court's attention to Exhibit 22 to the complaint filed in the United States District Court by Mr. Barnett, which is a demand letter dated June 29, 2011 from Mr. Barnett's Florida counsel to Mr. Blane stating:

> Your fraudulent actions not only caused monetary damage to Mr. Barnett, but also caused tremendous damage to WorldSpan. More specifically, your taking Mr. Barnett's money for your own use deprived the company of much needed capital. Your harm to WorldSpan is further demonstrated by your conspiracy with the former CEO of WorldSpan, Lee Taubeneck, to overcharge a customer in order to offset the funds you were stealing from Mr. Barnett that should have gone to the company. Your deplorable actions directly caused the demise of what could have been a successful and innovative new company" (underlining added)

10 Mr. Sargeant says, and I accept, that he is the customer referred to in the demand letter. He submits that the allegations contained in the complaint and demand letter lend credence to his claim that Worldspan breached the Vessel Construction Agreement by engaging in dishonest business practices, and over-billed him. Further, Mr. Sargeant says that the petitioner's failure to disclose this dispute between the principals of Worldspan, in addition to demonstrating a lack of good faith, reveals an internal division that diminishes the prospects of Worldspan continuing in business.

11 As yet, there has been no judicial determination of the allegations made by Mr. Barnett in his complaint against Mr. Blane.

DISCUSSION AND ANALYSIS

12 On an application for an extension of a stay pursuant to s. 11.02(2) of the *CCAA*, the petitioners must establish that they have met the test set out in s. 11.02(3):

> (a) whether circumstances exist that make the order appropriate; and
> (b) whether the applicant has acted, and is acting, in good faith and with due diligence.

13 In considering whether "circumstances exist that make the order appropriate", the court must be satisfied that an extension of the Initial Order and stay will further the purposes of the *CCAA*.

14 In *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379 at para. 70, Deschamps J., for the Court, stated:

> ... Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA -- avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

15 A frequently cited statement of the purpose of the *CCAA* is found in *Chef Ready Foods Ltd. v. Hongkong Bank of Canada* (1990), 51 B.C.L.R. (2d) 84, [1990] B.C.J. No. 2384 at p. 3 where the Court of Appeal held:

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

16 In *Pacific National Lease Holding Corp. (Re)*, [1992] B.C.J. No. 3070 (S.C.) Brenner J. (as he then was) summarized the applicable principles at para. 26:

(1) The purpose of the C.C.A.A. is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and the Court.
(2) The C.C.A.A. is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and the employees.
(3) During the stay period the Act is intended to prevent manoeuvres for positioning amongst the creditors of the company.
(4) The function of the Court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.
(5) The status quo does not mean preservation of the relative pre-debt status of each creditor. Since the companies under C.C.A.A. orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, preservation of the status quo is not intended to create a rigid freeze of relative pre-stay positions.
(6) The Court has a broad discretion to apply these principles to the facts of a particular case.

17 In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, the Court of Appeal set aside the extension of a stay granted to the debtor property development company. There, the Court held that the *CCAA* was not intended to accommodate a non-consensual stay of creditors' rights while a debtor company attempted to carry out a restructuring plan that did not involve an arrangement or compromise on which the creditors could vote. At para. 26, Tysoe J.A., for the Court said this:

> In my opinion, the ability of the court to grant or continue a stay under s. 11 is not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring", a term with a broad meaning including such things as refinancings, capital injections and asset sales and other downsizing. Rather, s. 11 is ancillary to the fundamental purpose of the *CCAA*, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the *CCAA*'s fundamental purpose.

18 At para. 32, Tysoe J.A. queried whether the court should grant a stay under the *CCAA* to permit a sale, winding up or liquidation without requiring the matter to be voted upon by the creditors if the plan or arrangement intended to be made by the debtor company simply proposed that the net proceeds from the sale, winding up or liquidation be distributed to its creditors.

19 In *Cliffs Over Maple Bay Investments Ltd.* at para. 38, the court held:

> ... What the Debtor Company was endeavouring to accomplish in this case was to freeze the rights of all of its creditors while it undertook its restructuring plan without giving the creditors an opportunity to vote on the plan. The *CCAA* was not intended, in my view, to accommodate a non-consensual stay of creditors' rights while a debtor company attempts to carry out a restructuring plan that does not involve an arrangement or compromise upon which the creditors may vote.

20 As counsel for the petitioners submitted, *Cliffs Over Maple Bay Investments Ltd.* was decided before the current s. 36 of the *CCAA* came into force. That section permits the court to authorize the sale of a debtor's assets outside the ordinary course of business without a vote by the creditors.

21 Nonetheless, *Cliffs Over Maple Bay Investments Ltd.* is authority for the proposition that a stay, or an extension of a stay should only be granted in furtherance of the *CCAA*'s fundamental purpose of facilitating a plan of arrangement between the debtor companies and their creditors.

22 Other factors to be considered on an application for an extension of a stay include the debtor's progress during the previous stay period toward a restructuring; whether creditors will be prejudiced if the court grants the extension; and the comparative prejudice to the debtor, creditors and other stakeholders in not granting the extension: *Federal Gypsum Co. (Re)*, 2007 NSSC 347, 40 C.B.R. (5th) 80 at paras. 24-29.

23 The good faith requirement includes observance of reasonable commercial standards of fair dealings in the *CCAA* proceedings , the absence of intent to defraud, and a duty of honesty to the court and to the stakeholders directly affected by the *CCAA* process: *Re San Francisco Gifts Ltd.*, 2005 ABQB 91 at paras. 14-17.

Whether circumstances exist that make an extension appropriate

24 The petitioners seek the extension to April 13, 2012 in order to allow a reasonable period of time to continue their efforts to restructure and to develop a plan of arrangement.

25 There are particular circumstances which have protracted these proceedings. Those circumstances include the following:

(a) Initially, Mr. Sargeant expressed an interest in funding the completion of the Vessel as a Crescent brand yacht at Worldspan shipyards. On July 22, 2011, on the application of Mr. Sargeant, the Court appointed an independent Vessel Construction Officer to prepare an analysis of the cost of completing the Vessel to Mr. Sargeant's specifications. The Vessel Construction Officer delivered his completion cost analysis on October 31, 2011.

(b) The Vessel was arrested in proceedings in the Federal Court of Canada brought by Offshore Interiors Inc., a creditor and a maritime lien claimant. As a result, The Federal Court, while recognizing the jurisdiction of this Court in the *CCAA* proceedings, has exercised its jurisdiction over the vessel. There are proceedings underway in the Federal Court for the determination of *in rem* claims against the Vessel. Because this Court has jurisdiction in the CCAA proceedings, and the Federal Court exercises its maritime law jurisdiction over the Vessel, there have been applications in both Courts with respect to the marketing of the Vessel.

(c) The Vessel, which is the principal asset of the petitioner Worldspan, is a partially completed custom built super yacht for which there is a limited market.

26 All of these factors have extended the time reasonably required for the petitioners to proceed with their restructuring, and to prepare a plan of arrangement.

27 On September 19, 2011, when this court confirmed and extended the Initial Order to December 16, 2011, it also authorized the petitioners to commence marketing the Vessel unless Mr. Sargeant paid $4 million into his solicitor's trust account on or before September 29, 2011.

28 Mr. Sargeant failed to pay the $4 million into trust with his solicitors, and subsequently made known his intention not to fund the completion of the Vessel by the petitioners.

29 On October 7, 2011, the Federal Court also made an order authorizing the petitioners to market the Vessel and to retain a leading international yacht broker, Fraser Yachts, to market the Vessel for an initial term of six months, expiring on April 7, 2012. Fraser Yachts has listed the Vessel for sale at $18.9 million, and is endeavouring to find a buyer. Although its efforts have attracted little interest to date, Fraser Yachts have expressed confidence that they will be able to find a buyer for the Vessel during the prime yacht buying season, which runs from February through July. Fraser Yachts and the Monitor have advised that process may take up to 9 months.

30 On November 10, 2011, this Court, on the application of the petitioners, made an order authorizing and approving the sale of their shipyard located at 27222 Lougheed Highway, with a leaseback of sufficient space to enable the petitioners to complete the construction of the Vessel, should they find a buyer who wishes to have the Vessel completed as a Crescent yacht at its current location. The sale and leaseback of the shipyard has now completed.

31 Both this Court and the Federal Court have made orders regarding the filing of claims by creditors against the petitioners and the filing of *in rem* claims in the Federal Court against the Vessel.

32 The determination of the *in rem* claims against the Vessel is proceeding in the Federal Court.

33 After dismissing the *in rem* claims of various creditors, the Federal Court has determined that the creditors having *in rem* claims against the Vessel are:

Sargeant	$20,945.924.05
Capri Insurance Services	$45,573.63
Cascade Raider	$64,460.02
Arrow Transportation and CCY	$50,000.00

Offshore Interiors Inc.	$659,011.85
Continental Hardwood Co.	$15,614.99
Paynes Marine Group	$35,833.17
Restaurant Design and Sales LLC	$254,383.28

34 The petitioner, Worldspan's, *in rem* claim in the amount of $6,643,082.59 was dismissed by the Federal Court and is currently subject to an appeal to be heard January 9, 2012.

35 In addition, Comerica Bank has asserted an *in rem* claim against the Vessel for $9,429,913.86, representing the amount it advanced toward the construction of the Vessel. Mr. Mohammed Al-Saleh, a judgment creditor of certain companies controlled by Mr. Sargeant has also asserted an *in rem* claim against the Vessel in the amount of $28,800,000.

36 The Federal Court will determine the validity of the outstanding *in rem* claims, and the priorities amongst the *in rem* claims against the Vessel.

37 The petitioners, in addition to seeking a buyer for the Vessel through Fraser Yachts are also currently in discussions with potential DIP lenders for a DIP facility for approximately $10 million that would be used to complete construction of the Vessel in the shipyard they now lease. Fraser Yachts has estimated that the value of the Vessel, if completed as a Crescent brand yacht at the petitioners' facility would be $28.5 million. If the petitioners are able to negotiate a DIP facility, resumption of construction of the Vessel would likely assist their marketing efforts, would permit the petitioners to resume operations, to generate cash flow and to re-hire workers. However, the petitioners anticipate that at least 90 days will be required to obtain a DIP facility, to review the cost of completing the Vessel, to assemble workers and trades, and to bring an application for DIP financing in both this Court and the Federal Court.

38 An extension of the stay will not materially prejudice any of the creditors or other stakeholders. This case is distinguishable from *Cliffs Over Maple Bay Investments Ltd.*, where the debtor was using the *CCAA* proceedings to freeze creditors' rights in order to prevent them from realizing against the property. Here, the petitioners are simultaneously pursuing both the marketing of the Vessel and efforts to obtain DIP financing that, if successful, would enable them to complete the construction of the Vessel at their rented facility. While they do so, a court supervised process for the sale of the Vessel is underway.

39 Mr. Sargeant also relies on *Encore Developments Ltd. (Re)*, 2009 BCSC 13, in support of his submission that the Court should refuse to extend the stay. There, two secure creditors applied

successfully to set aside an Initial Order and stay granted *ex parte* to the debtor real estate development company. The debtor had obtained the Initial Order on the basis that it had sufficient equity in its real estate projects to fund the completion of the remaining projects. In reality, the debtor company had no equity in the projects, and at the time of the application the debtor company had no active business that required the protection of a *CCAA* stay. Here, when the petitioners applied for and obtained the Initial Order, they continued to employ a skeleton workforce at their facility. Their principal asset, aside from the shipyard, was the partially constructed Vessel. All parties recognized that the *CCAA* proceedings afforded an opportunity for the completion of the Vessel as a custom Crescent brand yacht, which represented the best way of maximizing the return on the Vessel. On the hearing of this application, all of the creditors, other than Mr. Sargeant share the view that the Vessel should be marketed and sold through and orderly process supervised by this Court and the Federal Court.

40 I share the view of the Monitor that in the particular circumstances of this case the petitioners cannot finalize a restructuring plan until the Vessel is sold and terms are negotiated for completing the Vessel either at Worldspan's rented facility, or elsewhere. In addition, before the creditors will be in a position to vote on a plan, the amounts and priorities of the creditors' claims, including the *in rem* claims against the Vessel, will need to be determined. The process for determining the *in rem* claims and their priorities is currently underway in the Federal Court.

41 The Monitor has recommended the Court grant the extension sought by the petitioners. The Monitor has raised one concern, which relates to the petitioners' current inability to fund ongoing operating costs, insurance, and professional fees incurred in the continuation of the *CCAA* proceedings. At this stage, the landlord has deferred rent for the shipyard for six months until May 2012. At present, the petitioners are not conducting any operations which generate cash flow. Since the last come back hearing in September, the petitioners were able to negotiate an arrangement whereby Mr. Sargeant paid for insurance coverage on the Vessel. It remains to be seen whether Mr. Sargeant, Comerica Bank, or some other party will pay the insurance for the Vessel which comes up for renewal in January, 2012.

42 Since the sale of the shipyard lands and premises, the petitioners have no assets other than the Vessel capable of protecting an Administration Charge. The Monitor has suggested that the petitioners apply to the Federal Court for an Administration Charge against the Vessel. Whether the petitioners do so is of course a matter for them to determine.

43 The petitioners will need to make arrangements for the continuing payment of their legal fees and the Monitor's fees and disbursements.

44 The *CCAA* proceedings cannot be extended indefinitely. However, at this stage, a *CCAA* restructuring still offers the best option for all of the stakeholders. Mr. Sargeant wants the stay lifted so that he may apply for the appointment of Receiver and exercise his remedies against the Vessel. Any application by Mr. Sargeant for the appointment of a Receiver would be resisted by the other creditors who want the Vessel to continue to be marketed under the Court supervised process now underway.

45 There is still the prospect that through the *CCAA* process the Vessel may be completed by the petitioners either as a result of their finding a buyer who wishes to have the Vessel completed at its present location, or by negotiating DIP financing that enables them to resume construction of the

Vessel. Both the marine surveyor engaged by Comerica Bank and Fraser Yachts have opined that finishing construction of the Vessel elsewhere would likely significantly reduce its value.

46 I am satisfied that there is a reasonable possibility that the petitioners, working with Fraser Yachts, will be able to find a purchaser for the Vessel before April 13, 2012, or that alternatively they will be able to negotiate DIP financing and then proceed with construction. I find there remains a reasonable prospect that the petitioners will be able to present a plan of arrangement to their creditors. I am satisfied that it is their intention to do so. Accordingly, I find that circumstances do exist at this time that make the extension order appropriate.

Good faith and due diligence

47 Since the last extension order granted on September 19, 2011, the petitioners have acted diligently by completing the sale of the shipyard and thereby reducing their overheads; by proceeding with the marketing of the Vessel pursuant to orders of this Court and the Federal Court; and by embarking upon negotiations for possible DIP financing, all in furtherance of their restructuring.

48 Notwithstanding the dispute between Mr. Barnett and Mr. Blane, which resulted in the commencement of litigation in the State of Florida at or about the same time this Court made its Initial Order in the *CCAA* proceedings, the petitioners have been able to take significant steps in the restructuring process, including the sale of the shipyard and leaseback of a portion of that facility, and the applications in both this Court and the Federal Court for orders for the marketing of the Vessel. The dispute between Mr. Barnett and his former partner, Mr. Blane has not prevented the petitioners from acting diligently in these proceedings. Nor am I persuaded on the evidence adduced on this application that dispute would preclude the petitioners from carrying on their business of designing and constructing custom yachts, in the event of a successful restructuring.

49 While the allegations of misconduct, fraud and misappropriation of funds made by Mr. Barnett against Mr. Blane are serious, at this stage they are no more than allegations. They have not yet been adjudicated. The allegations, which are as yet unproven, do not involve dishonesty, bad faith, of fraud by the debtor companies in their dealings with stakeholders in the course of the *CCAA* process.

50 In my view, the failure of the petitioners to disclose the dispute between Mr. Barnett and Mr. Blane does not constitute bad faith in the *CCAA* proceedings or warrant the exercise of the Court's discretion against an extension of the stay.

51 This case is distinguishable from *Re San Francisco Gifts Ltd.*, where the debtor company had pleaded guilty to 9 counts of copyright infringement, and had received a large fine for doing so.

52 In *Re San Francisco Gifts Ltd.*, at paras 30 to 32, the Alberta Court of Queen's Bench acknowledged that a debtor company's business practices may be so offensive as to warrant refusal of a stay extension on public policy grounds. However, the court declined to do so where the debtor company was acting in good faith and with due diligence in working toward presenting a plan of arrangement to its creditors.

53 The good faith requirement of s. 11.02(3) is concerned primarily with good faith by the debtor in the *CCAA* proceedings. I am satisfied that the petitioners have acted in good faith and with due diligence in these proceedings.

Conclusion

54 The petitioners have met the onus of establishing that circumstances exist that make the extension order appropriate and that they have acted and are acting in good faith and with due diligence. Accordingly, the extension of the Initial Order and stay to April 13, 2012 is granted on the terms pronounced on December 16, 2011.

P.J. PEARLMAN J.

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