COURT FILE NUMBER:	B301-135903
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER SECTION 50.4 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985, c. B-3, AS AMENDED
	AND IN THE MATTER OF ERIKSON NATIONAL ENERGY INC.
DOCUMENT:	**BRIEF OF CANADIAN NATURAL RESOURCES LIMITED**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**OSLER, HOSKIN & HARCOURT LLP** Barristers & Solicitors Brookfield Place Suite 2700, 225 6 Ave SW Calgary, AB T2P 1N2 Solicitor: Emily Paplawski / Stephen Kroeger Telephone: (403) 260-7000 Facsimile: (403) 260-7024 Email: epaplawski@osler.com / skroeger@osler.com File Number: 1229333

PART I - INTRODUCTION

1. This Bench Brief is submitted by Canadian Natural Resources Limited ("**Canadian Natural**") in opposition to the applications of Erikson National Energy Inc. ("**Erikson**") for: (a) an extension of both the time within which Erikson is required to file a proposal under section 50.4 of the BIA[1] and the stay of proceedings; (b) approval of the sale and investment solicitation process ("**SISP**"); and (c) approval of the proposed interim financing and the grant of a charge (the "**Interim Lender's Charge**") in favour of Third Eye Capital ("**TEC**").

2. None of the relief sought by Erikson should be granted. Instead, these NOI proceedings should be stayed or suspended and the application of the British Columbia Energy Regulator ("**BCER**") for appointment of a Receiver over Erikson, filed October 3, 2024 in ABKB Action No. 2401-13792 (the "**Receivership Application**") should be heard and granted.

3. Capitalized terms used but not defined in this Brief have the meanings given to such terms in the Affidavit of Ron Laing, sworn October 18, 2024.

PART II - LAW AND ARGUMENT

B. THE 30-DAY PERIOD SHOULD NOT BE EXTENDED

4. Pursuant to section 50.4(9) of the *BIA*, this Court has the authority to extend the 30-day period within which Erikson must file a proposal to its creditors if the Court is satisfied that:

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

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

[1] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [***BIA***]. **[TAB 1]**

(c) no creditor would be materially prejudiced if the extension being applied for is granted.[2]

5. The requirements in section 50.4(9) are conjunctive and Erikson bears the onus of satisfying this Honourable Court that each have been met.[3] If Erikson fails on any part of the test, the Court must deny the application.

(i) The Good Faith and Due Diligence Requirement

6. Good faith is a duty that must govern the behaviour of "any interested person in any proceedings under the *BIA*.[4] As noted by Justice Romaine in *Bellatrix Exploration Ltd (Re)*[5], the court will find bad faith conduct where a debtor, creditor or their professionals fail to meet the requirements to act candidly, honestly, forthrightly and reasonably in their dealings with one another and the court; where parties act capriciously and arbitrarily; or where they lie or otherwise knowingly mislead each other about matters relating to the insolvency proceedings.[6]

7. Erikson has failed to act candidly and forthrightly in these NOI proceedings. It has sought approval of a sale process for assets it doesn't own and has no right to sell. Yet nowhere in the Horrox Affidavit[7] does Mr. Horrox advise that its leases have been cancelled, or that the viability of the sale process is wholly contingent on the Tenure and Resources Stewardship Branch, Ministry of Energy (the "**BC Ministry**") exercising its discretion to re-instate the leases. Nowhere does Mr. Horrox advise that the leases were cancelled more than two months ago and, to date,

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[2] *BIA*, section 50.4(9). **[TAB 1]**

[3] *H&H Fisheries Ltd, Re*, 2005 NSSC 346 [***H&H Fisheries***], at para 12. **[TAB 3]**

[4] *BIA*, section 4.2 **[TAB 1]**; see also *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [***CCAA***], section 18.6. **[TAB 2**]

[5] *Bellatrix Exploration Ltd (R*e), 2020 ABQB 809 [***Bellatrix***]. **[TAB 4]**

[6] *Bellatrix* at para 105. **[TAB 4]**

[7] Affidavit of Mark Horrox, sworn October 15, 2024 (the "**Horrox Affidavit**").

have not been re-instated. Courts have repeatedly confirmed that a lack of good faith includes not only lies, but also half-truths, omissions, and even silence.[8]

8. The first mention by Erikson that its leases have been cancelled by the BCER is in the Supplemental Horrox Affidavit[9]. However, the disclosure in the Supplemental Horrox Affidavit was only made after Canadian Natural served the Laing Affidavit highlighting the lease issue and, even then, only disclosed that "the crown leases which are subject to the CNRL Joint Interests have been terminated due to fee arrears."[10] Nowhere does Erikson disclose that all of its crown mineral leases have been cancelled by the BCER and, it, in fact, has nothing to market or sell.[11] The lack of candour by Erikson is striking.

9. More generally, Erikson's disclosure in support of its application is wholly deficient. Erikson bears the onus of establishing that it is acting in good faith and with due diligence yet has failed to provide either the Court or Erikson's stakeholders with information sufficient to assess that bald proposition. As the Court has noted, the "good faith requirements in the BIA…is not a mere catechism, to be satisfied by a bald statement 'we are acting in good faith and with due diligence.'" The Court should have sufficient material upon which to make that evaluation, itself."[12]

10. Noticeably lacking from Erikson's disclosure are financial statements – a statutory requirement in any CCAA initial application because of their significance to the insolvency

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[8] *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45 at para 91 **[TAB 5]**; *Malhotra v. City of Brampton*, 2023 ONSC 2291 at paras 202, 203 **[TAB 6]**; *CWB Maxium Financial Inc v 2026998 Alberta Ltd*, 2021 ABQB 137 **[*CWB Financial*]** at para 55. **[TAB 7]**

[9] Supplemental Affidavit of Mark Horrox, sworn October 18, 2024 (the "**Supplemental Horrox Affidavit**").

[10] Supplemental Horrox Affidavit at para 11.

[11] First Report of the Proposal Trustee dated October 18, 2024 (the "**First Report**") at para 7.1.2.

[12] *Chester Basin Seafood Group Inc (re)*, 2023 NSSC 388 at para 19. **[TAB 8]**

proceeding.[13] More broadly, Erikson has failed to provide any information about its finances, its liabilities (other than that owing to TEC) or the value of its assets – all information necessary for the Court to assess the viability of a sales process and the need for an NOI proceeding as opposed to a receivership. It has failed to provide copies of any documentation alleged in the Horrox Affidavit as justifying Erikson's diversion of $174 million in fees and interest to TEC at a time when the BCER was paying to clean up sludge and other contaminants on Erikson's sites.[14]

11. Put simply, it has failed to meet its onus for the relief sought in its application. It has adopted a "nothing to see here" approach to these NOI proceedings and has shown a complete lack of candour in its disclosure, a requirement of good faith.

12. The fact that the Proposal Trustee observes that Erikson has been acting in good faith and with due diligence since the filing date is not determinative. As noted by the Registrar in Bankruptcy in *Atlantic Sea Cucumber Limited (re)*, the assessment of good faith and due diligence "is a determination to be made by the Court, not by the Trustee. It is also something of an exercise in 'don't ask a barber if you need a haircut.'"[15]

13. In addition to Erikson's lack of candid disclosure, there is a second issue. Erikson is asking this Court to shield it from the consequences of its own gross negligence. Erikson and CNRL own a working interest in the Jointly Owned Assets, comprised of 68 well events and 19 facility functional units, pipe segments and roads.[16] As operator of a number of the Jointly Owned Assets, Erikson was obliged to maintain the title documents in good standing, including the payment of

[13] *CCAA* at s. 10(2). **[TAB 2]**

[14] Affidavit of Ron K. Laing, sworn October 18, 2024 (the "**Laing Affidavit**") at paras 16, 19, 22, 33 and Exhibit A.

[15] *Atlantic Sea Cucumber Limited (re)*, 2023 NSSC 238 at para 21. **[TAB 9]**

[16] Laing Affidavit at para 10.

rentals.[17] It failed to do so, and the BC Ministry terminated all leases for non-payment. It allowed the leases to expire notwithstanding that Canadian Natural flagged the payment issue to Erikson in March 2024, and requested that Erikson transfer it "payor" status in May 2024 so that Canadian Natural could pay the arrears directly.[18] As the Alberta Court of Appeal has noted, "Conscious indifference equates to gross negligence."[19] In *Adeco*, the ABCA specifically determined that, like here, failure by the operator to continue leases constituted gross negligence.[20]

14. Erikson's permitted cancellation of the leases occurred in the period immediately preceding these NOI proceedings. In assessing good faith, the Court is entitled to look at conduct "factually and temporally…connected to or 'in respect of' the proceeding."[21] Here, Erikson is asking this Court to allow it to remain in a self-directed process, instead of a receivership, so that it can <u>try</u> to revive the leases and complete a sale process. Erikson should not be shielded by the Court from its own gross negligence. The BIA does "not allow debtors absolute immunity and impunity from their creditors."[22] A Receiver should be appointed immediately.

(ii) Erikson is not Likely to Make a Viable Proposal

15. The purpose of the *BIA*'s proposal provisions is to facilitate the rehabilitation of an insolvent debtor. As such, a debtor who commences proposal proceedings is protected by a stay

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[17] See, for example, clause 309 of the 1981 CAPL Operating Procedure and clause 309(a) of the 1990 CAPL Operating Procedure **[TAB 18]**.

[18] Laing Affidavit at paras 20-21 and Exhibits J and K.

[19] *Adeco Exploration Company Ltd. v. Hunt Oil Company of Canada, Inc.*, 2008 ABCA 214 **[*Adeco*]** at para 55. **[TAB 10]**

[20] *Adeco* at para 55. **[TAB 10]**

[21] *CWB Financial* at para 49. **[TAB 7]**

[22] *Cumberland Trading Inc. (Re)*, [1994] O.J. No. 132, (C.J. (Gen. Div.)) [***Cumberland Trading***] at para 5 **[TAB 11]**; *Andover Mining Corp. (Re)*, 2013 BCSC 1833 [***Andover***] at para 42. **[TAB 12]**

of proceedings for a period of thirty-days in which it must put forward a viable plan for their reorganization.[23]

16. Pursuant to section 50.4(9)(b) of the *BIA*, the Court must decline to extend the period for filing a proposal if the applicant is not likely to be able to make a viable proposal if the extension is granted.[24]

17. A court is entitled to conclude that a debtor is not likely to make a viable proposal where it has failed to provide "even a hint" of what its proposal might look like by the time an extension of the filing date is proposed.[25] The Court has also dismissed an application to extend under section 50.4(9) of the *BIA* where the insolvent person issued a "bald assertion" that a proposal "would be a better result for everyone".[26]

18. The expectation that there be at least a "hint" of a viable plan justifying the stay of proceedings or extension thereof is heightened in circumstances where:

(a) there is no active business;

(b) there are few significant creditors;

(c) there are few or no assets; and

(d) there are no complex financial arrangements.[27]

19. The Court in *Cogent* further stated that, "In the face of a motion to terminate the stay, one would have thought the debtor would be motivated to come up with the best evidence it could of what its proposal might be and, specifically, why an extension is necessary to further the

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[23] *In the Matter of the Proposal of Cogent Fibre Inc.*, 2015 ONSC 5139 [***Cogent***] at para 8. **[TAB 13]**

[24] *BIA*, s.50.4(9)(b). **[TAB 1]**

[25] *St. Isidore Meats Inc / Vianes St. Isidore Inc. v. Paquette Fine Foods Inc.*, 1997 CarswellOnt 1524, at para 16. **[TAB 14]**

[26] *Cumberland Trading* at para 8. **[TAB 11]**

[27] *Cogent*, at para 20. **[TAB 13]**

development of that proposal. Yet the debtor has chosen to put forward no concrete evidence but to rely on vague, conclusory assertions."[28]

20. In the immediate case, Erikson has had almost two years to conduct a sales process. The same sales agent – Sayer Energy Advisors – has been marketing Erikson's assets since January 2023.[29] Over a 22-month period, Erikson and Sayer have failed to identify an executable transaction. An additional 30-day period to locate and finalize a transaction is unlikely to yield a different result. Importantly, Erikson has provided no evidence that any conditions have changed in the current SISP that would lead to an outcome different than the sales process that has been ongoing since January 2023 – the pool of potential purchasers is the same, the sales agent is the same, and the asset offering is the same (other than the leases are now cancelled).

21. If anything, the current SISP is proposed to be undertaken in more difficult circumstances than the original process as Erikson has allowed all of its leases to be terminated by the BCER.[30] Without leases, the wells and other oil and gas assets cannot be produced or accessed except for purposes of completing regulatorily required shut-in and abandonment work.[31] In other words, Erikson currently has no assets (other than some potentially miscellaneous interests in roads) to market or sell. Erikson is asking this Court to approve a sales process for assets it doesn't own and has no right to sell.

22. Instead, Erikson's entire sale process is contingent on the BC Ministry agreeing to re-instate Erikson's leases. There is not a trace of evidence before this Court that the BC Ministry has agreed to do so. More than two months have passed since the leases were cancelled and, to date,

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[28] *Cogent*, at para 20. **[TAB 13]**

[29] Laing Affidavit at para 43; Horrox Affidavit at para 31.

[30] Laing Affidavit at para 22.

[31] Laing Affidavit at para 19.

the only leases that have been re-instated are the four that Canadian Natural paid current and revived.[32] As Canadian Natural has revived the four leases in which it holds a registered interest, there is no reason Erikson could not also have done so. The fact that Erikson has not is indicative of its chances of success moving forward.

23. Even TEC, who controls Erikson, is not confident in Erikson's ability to conduct the proposed SISP. It is a funding condition under the Interim Financing Term Sheet that Erikson achieve re-instatement of the leases by no later than November 1, 2024. The current initial 30-day period expires on October 31, 2024. Accordingly, TEC is entitled under the Interim Financing Term Sheet to pull funding on the very first day of the requested 40-day extension. The current NOI proceedings and, in particular, the proposed SISP, are nothing more than a house of cards.

24. In any event, this Court should not be asked to approve a sales process for assets not currently owned by Erikson and for which Erikson has no ability to sell.

25. Further, even if Erikson is successful in having the leases re-instated, Erikson has not provided any indication that it has a "germ of a plan".[33] In particular, Erikson has not provided any evidence that there is value in the company beyond the proposed administration charge and Interim Lender's Charge. It has not adduced any information, much less sufficient financial information, to establish that there is realizable value in Erikson sufficient to allow a viable proposal to be made to its creditors. As at the filing date, Erikson had secured liabilities of $31,696,602 and unsecured liabilities of $10,946,063.[34] Without any indication that there is value in the company, there is no evidence before this Court that a "germ of a plan" could or would be made.

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[32] Laing Affidavit at para 25 and Exhibit M.

[33] *Cumberland Trading* at para 5 **[TAB 11]**; *Andover* at para 42. **[TAB 12]**

[34] First Report at para 6.

26. Erikson is seeking to benefit from the protection of the NOI proposal proceedings and the associated stay of proceedings to permit it and TEC to remain in control through the SISP. This intention is amply illustrated by the fact that the maturity date of the proposed interim financing is November 30, 2024 – the target closing date under the SISP.[35] At the very time that Erikson is supposed to be making a proposal to its creditors, the interim financing matures and must be repaid. The entire NOI proceeding is geared toward the SISP, not a viable proposal to creditors.

27. There is no reason that an NOI proceeding is necessary; the sale process can and should be undertaken in a receivership. A receivership is also necessary to permit an independent court officer to review Erikson's diversion of $174 million to TEC at a time when it was in breach of both its regulatory obligations and its obligations to working interest partners like Canadian Natural.

(iii) Material Prejudice

28. The threshold of the material prejudice element of the *BIA* section 50.4(9)(c) test requires that material prejudice be of a degree that raises significant concern to a level that would be unreasonable for a creditor or creditors to accept.[36] Material prejudice is an objective prejudice and refers to "the degree of prejudice suffered vis-à-vis the indebtedness and the attendant security of each creditor".[37] It is incumbent on the applicant to provide some information to establish that no creditor will be materially prejudiced by an extension of the filing date which involves a quantitative or qualitative analysis as to the extent of the prejudice.[38]

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[35] Supplemental Horrox Affidavit at Exhibit A, s. 13; SISP at para 10.

[36] *H&H Fisheries*, at par 37. **[TAB 3]**

[37] *Cumberland Trading*, at para 11. **[TAB 11]**

[38] *Cumberland Trading*, at para 11. **[TAB 11]**

29. Canadian Natural submits that material prejudice arises for all the reasons discussed throughout this Brief, namely, creditors are being asked to stand by and allow Erikson to undertake a SISP without any information regarding the value of the assets or why the SISP will yield a different result than the sales and marketing process undertaken by Erikson over the past 22 months. They are being asked to permit TEC to remain in the driver's seat notwithstanding its prior gross negligence. They are being asked to stand by and allow TEC to reap further benefits from its control of Erikson by means of the Interim Lender's Charge (discussed below). None of the foregoing benefits any stakeholder of Erikson other than TEC.

C. THE INTERIM LENDER CHARGE SHOULD NOT BE APPROVED

30. The Court has jurisdiction to approve the proposed interim financing and grant the Interim Lender's Charge.[39] In deciding whether to make such an order, the Court is to consider, among other things:

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

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

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

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

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

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

[39] *BIA* at s. 50.6(1). **[TAB 1]**

(g) the trustee's report.[40]

31. The within case is squarely on point with the Court's analysis in *Nautican v. Dumont*.[41] In that case, the interim financing was proposed to be advanced by the debtors' sole shareholder and, like here, the terms requested included a super priority charge. The Court refused to approve the interim financing, holding that "the DIP Loan is being offered by the sole shareholder of the debtors" and "[t]he major creditors in this case have expressed their lack of confidence in the management of [the debtors]."[42] The Court went on to note:

> As a result, one of the key factors to be assessed, specifically s. 50.6(5)(c) is thoroughly lacking in these circumstances. The evidentiary record is clear that the creditors do not have confidence in the debtor's management. I find that this not an appropriate situation to order a DIP Loan. Section 50.6(5)(c) is a subjective test. It requests the court to look at the actual situation of the debtor's management and its relationship to its major creditors.[43]

32. Here, the same analysis applies. The interim financing is proposed to be advanced by TEC. Erikson is a portfolio company of TEC.[44] The sole director of Erikson (Mr. Horrox) is a principal of TEC.[45] Since at least October 2023, Erikson has been directly managed by TEC.[46] By TEC's own admission, it "control[s]" Erikson.[47]

33. Canadian Natural is a major stakeholder in, and creditor of, Erikson and has lost confidence in Erikson's management.[48] Among other things, Erikson was grossly negligent in compromising CNRL's property interests and causing a deterioration in its security by allowing the leases to be

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[40] *BIA* at s. 50.6(5). **[TAB 1]**

[41] *Nautican v. Dumont*, 2020 PESC 15 [***Nautican***] at paras 30-31. **[TAB 15]**

[42] *Nautican* at para 31. **[TAB 15]**

[43] *Nautican* at para 31. **[TAB 15]**

[44] Laing Affidavit at para 7.

[45] Laing Affidavit at para 7; Horrox Affidavit at para 1.

[46] Laing Affidavit at para 42 and Exhibit T; Horrox Affidavit at para 1.

[47] Laing Affidavit at para 42 and Exhibit U.

[48] Laing Affidavit at paras 18, 41 and 42.

terminated for non-payment of rentals. Erikson did so after Canadian Natural both flagged the issue for it (in March 2024) and requested that "payor" status be transferred to Canadian Natural so that it could pay the outstanding rentals directly (in May 2024).[49] Canadian Natural has understandably lost confidence in Erikson and, in turn, TEC.

34. In addition to the loss of confidence in management, Erikson fails to meet the following other sub-sections of the test under section 50.6(5) of the *BIA*:

(a) *Section 50.6(a)* – the schedule under the SISP provides that Erikson will file[50] a sale approval application by November 25, 2024, with a target closing date on November 30, 2024. While one would expect that in the period thereafter, Erikson would be focused on finalizing and delivering a proposal to its creditors, instead, the interim financing matures and must be repaid. The Proposal Trustee has confirmed in its First Report that Erikson is not forecasting any receipts as its oil and gas assets have been shut-in.[51] It is accordingly clear that the intent of the BIA proceedings are simply to allow Erikson and TEC to remain in control of the process until conclusion of the SISP. The interim financing is neither of a sufficient quantum or duration to allow these NOI proceedings to continue beyond the SISP;

(b) *Section 50.6(b)* – Erikson's business and financial affairs are to be managed by Erikson and TEC – the same two entities that were grossly negligent in allowing the leases to expire, which improperly converted Canadian Natural's production to their benefit and mislead Canadian Natural regarding the whereabouts of its production, and which, prior to the filing date, diverted $174 million in interest and fees to TEC while the BCER cleaned up sludge and other contaminants from Erikson's licensed assets;[52]

[49] Laing Affidavit at paras 20, 21 and Exhibits J and K.

[50] It is not clear from the SISP whether the sale approval application must be filed or granted by November 25, 2024.

[51] First Report at para 4.0.2.

[52] Laing Affidavit at paras 19, 35 and 37-40.

(c) *Section 50.6(d)* – for the same reasons noted above at section 50.6(a), the interim financing will not enhance the prospects of a viable proposal being made;

(d) *Section 50.6(e)* – Erikson has adduced no evidence of the value of its property, as discussed above; and

(e) *Section 50.6(g)* – the First Report preceded Erikson's application for approval of the Interim Financing Charge and so does not address it.

35. The carve out of the Jointly Owned Assets from the scope of the Interim Lender's Charge does not address Canadian Natural's concerns. The proposed interim financing and Interim Lender's Charge are problematic for all the reasons noted above.

36. Canadian Natural's position is that these NOI proceedings should be stayed or suspended and the Receivership Application granted. However, in the event this Court is prepared to grant Erikson's application, Canadian Natural submits that the Interim Lender's Charge is still inappropriate and should not be granted. Since mid-2013, TEC has earned $174 million in interest and fees from Erikson and has taken an assignment of the Shares and Warrants.[53] It has realized such returns during a period when Erikson was in breach of numerous regulatory orders, failed to clean up environmental contaminants, failed to comply with its obligations to its working interest partners, and failed to maintain title documents, notwithstanding the ownership interests of Canadian Natural (and likely other third parties) in such assets.

37. TEC should not be permitted to continue capitalizing on Erikson in these NOI proceedings to the detriment of all other stakeholders. If TEC sees value in the NOI proceedings, it should fund them.

38. In addition to the foregoing, the following issues exist in the Interim Financing Term Sheet:

[53] Laing Affidavit at paras 31 and 35 and Exhibits N, O and P.

(a) *Maturity Date* – issue discussed above;

(b) *Lease Reinstatement* – inclusion of a funding condition that all leases must be re-instated by no later than November 1, 2024, thereby entitling TEC to pull funding on the very first day of the requested 40-day extension, as discussed above;

(c) *Interim Financing Fees and Expenses* – Erikson is required to pay all of TEC's fees, including all legal fees on a solicitor and own client basis, all out of pocket disbursements, and all reasonable costs relating to the Interim Financing Term Sheet, the interim facility and associated security, and the NOI proceedings. Such fees and expenses are defined in the Interim Financing Term Sheet as "Interim Financing Fees and Expenses" which are required to be secured by the Interim Lender's Charge. Such Interim Financing Fees and Expenses are required to be paid by Erikson as a funding condition. Accordingly, notwithstanding that TEC controlled Erikson prior to, and continues to control Erikson during, these NOI proceedings, it is seeking a "free ride" to the detriment of all other stakeholders. It is the author of whatever misfortune Erikson now finds itself. It should not be permitted to once again use its control of Erikson to realize an advantage; and

(d) *Interest Rate* – in the circumstances where TEC controlled Erikson prior to the NOI proceedings, the interest rate and fees are too high.

D. THE BC REGULATOR SHOULD PROCEED WITH ITS RECEIVERSHIP

39. The Court has the jurisdiction to stay or suspend the NOI proceedings and grant the BCER's application for appointment of a Receiver over Erikson. This was the approach taken by the Courts in each of *Dondeb Inc. (Re)*[54] and *White Oak Commercial Finance, LLC v. Nygård Holdings.*[55]

[54] *Dondeb Inc. (Re)*, 2012 ONSC 6087 at paras 23-24. **[TAB 16]**

[55] *White Oak Commercial Finance, LLC v. Nygård Holdings*, 2020 MBQB 58 at paras 33-35. **[TAB 17]**

40. Following its appointment, the Receiver will take possession and exercise control over Erikson's property and undertake a review of the various assignments and payments made by Erikson to TEC (among potentially others) in the period preceding the filing date. The Receiver may determine that it wishes to avail itself of the expanded investigatory and clawback provision under the BIA, in which case the Receiver can apply to terminate the NOI proceedings and have Erikson assigned into bankruptcy. The Receiver may determine that the rights and remedies provided under provincial legislation are sufficient. In either case, that determination is for the Receiver to make at a later date.

PART III - CONCLUSION

41. In light of the foregoing, Canadian Natural respectfully requests that this Honourable Court deny Erikson's application and hear and grant the Receivership Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 20th day of October, 2024

Emily Paplawski / Stephen Kroeger
Osler, Hoskin & Harcourt LLP
Counsel for the Respondents

TABLE OF AUTHORITIES

TAB 1

Canada Federal Statutes
Bankruptcy and Insolvency Act
Duty of Good Faith [Heading added 2019, c. 29, s. 133.]

Most Recently Cited in: Nsair (Re) , 2024 ABKB 450, 2024 CarswellAlta 1928, [2024] A.W.L.D. 3606 | (Alta. K.B., Jul 23, 2024)

R.S.C. 1985, c. B-3, s. 4.2

s 4.2

Currency

4.2
4.2(1)Good faith
Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

4.2(2)Good faith — powers of court
If the court is satisfied that an interested person fails to act in good faith, on application by any interested person, the court may make any order that it considers appropriate in the circumstances.

Amendment History
2019, c. 29, s. 133

Judicial Consideration (1)

Currency
Federal English Statutes reflect amendments current to June 19, 2024
Federal English Regulations Current to Gazette Vol. 158:12 (June 5, 2024)

End of Document

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

R.S.C. 1985, c. B-3, s. 50

s 50.

Currency

50.

50(1)Who may make a proposal

Subject to subsection (1.1), a proposal may be made by

(a) an insolvent person;

(b) a receiver, within the meaning of subsection 243(2), but only in relation to an insolvent person;

(c) a liquidator of an insolvent person's property;

(d) a bankrupt; and

(e) a trustee of the estate of a bankrupt.

50(1.1)Where proposal may not be made

A proposal may not be made under this Division with respect to a debtor in respect of whom a consumer proposal has been filed under Division II until the administrator under the consumer proposal has been discharged.

50(1.2)To whom proposal made

A proposal must be made to the creditors generally, either as a mass or separated into classes as provided in the proposal, and may also be made to secured creditors in respect of any class or classes of secured claim, subject to subsection (1.3).

50(1.3)Idem

Where a proposal is made to one or more secured creditors in respect of secured claims of a particular class, the proposal must be made to all secured creditors in respect of secured claims of that class.

50(1.4)Classes of secured claims

Secured claims may be included in the same class if the interests or rights of the creditors holding those claims are sufficiently similar to give them a commonality of interest, taking into account

(a) the nature of the debts giving rise to the claims;

(b) the nature and rank of the security in respect of the claims;

(c) the remedies available to the creditors in the absence of the proposal, and the extent to which the creditors would recover their claims by exercising those remedies;

(d) the treatment of the claims under the proposal, and the extent to which the claims would be paid under the proposal; and

(e) such further criteria, consistent with those set out in paragraphs (a) to (d), as are prescribed.

50(1.5)Court may determine classes
The court may, on application made at any time after a notice of intention or a proposal is filed, determine, in accordance with subsection (1.4), the classes of secured claims appropriate to a proposal, and the class into which any particular secured claim falls.

50(1.6)Creditors' response
Subject to section 50.1 as regards included secured creditors, any creditor may respond to the proposal as made to the creditors generally, by filing with the trustee a proof of claim in the manner provided for in

(a) sections 124 to 126, in the case of unsecured creditors; or

(b) sections 124 to 134, in the case of secured creditors.

50(1.7)Effect of filing proof of claim
Hereinafter in this Division, a reference to an unsecured creditor shall be deemed to include a secured creditor who has filed a proof of claim under subsection (1.6), and a reference to an unsecured claim shall be deemed to include that secured creditor's claim.

50(1.8)Voting
All questions relating to a proposal, except the question of accepting or refusing the proposal, shall be decided by ordinary resolution of the creditors to whom the proposal was made.

50(2)Documents to be filed
Subject to section 50.4, proceedings for a proposal shall be commenced, in the case of an insolvent person, by filing with a licensed trustee, and in the case of a bankrupt, by filing with the trustee of the estate,

(a) a copy of the proposal in writing setting out the terms of the proposal and the particulars of any securities or sureties proposed, signed by the person making the proposal and the proposed sureties if any; and

(b) the prescribed statement of affairs.

50(2.1)Filing of documents with the official receiver
Copies of the documents referred to in subsection (2) must, at the time the proposal is filed under subsection 62(1), also be filed by the trustee with the official receiver in the locality of the debtor.

50(3)Approval of inspectors
A proposal made in respect of a bankrupt shall be approved by the inspectors before any further action is taken thereon.

50(4)Proposal, etc., not to be withdrawn
No proposal or any security, guarantee or suretyship tendered with the proposal may be withdrawn pending the decision of the creditors and the court.

50(4.1)Assignment not prevented
Subsection (4) shall not be construed as preventing an insolvent person in respect of whom a proposal has been made from subsequently making an assignment.

50(5)Duties of trustee
The trustee shall make or cause to be made such an appraisal and investigation of the affairs and property of the debtor as to enable the trustee to estimate with reasonable accuracy the financial situation of the debtor and the cause of the debtor's financial difficulties or insolvency and report the result thereof to the meeting of the creditors.

50(6)Trustee to file cash-flow statement
The trustee shall, when filing a proposal under subsection 62(1) in respect of an insolvent person, file with the proposal

(a) a statement — or a revised cash-flow statement if a cash-flow statement had previously been filed under subsection 50.4(2) in respect of that insolvent person — (in this section referred to as a "cash-flow statement") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the person making the proposal, reviewed for its reasonableness by the trustee and signed by the trustee and the person making the proposal;

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

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

50(7)Creditors may obtain statement
Subject to subsection (8), any creditor may obtain a copy of the cash-flow statement on request made to the trustee.

50(8)Exception
The court may order that a cash-flow statement or any part thereof not be released to some or all of the creditors pursuant to subsection (7) where it is satisfied that

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

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

50(9)Trustee protected
If the trustee acts in good faith and takes reasonable care in reviewing the cash-flow statement, he is not liable for loss or damage to any person resulting from that person's reliance on the cash-flow statement.

50(10)Trustee to monitor and report
Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a proposal in respect of an insolvent person shall, for the purpose of monitoring the insolvent person's business and financial affairs, have access to and examine the insolvent person's property, including his premises, books, records and other financial documents, to the extent necessary to adequately assess the insolvent person's business and financial affairs, from the filing of the proposal until the proposal is approved by the court or the insolvent person becomes bankrupt, and shall

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

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

(ii) with the court at any time that the court may order; and

(a.1) send a report about the material adverse change to the creditors without delay after ascertaining the change; and

(b) send, in the prescribed manner, a report on the state of the insolvent person's business and financial affairs — containing the trustee's opinion as to the reasonableness of a decision, if any, to include in a proposal a provision that sections 95 to 101

do not apply in respect of the proposal and containing the prescribed information, if any — to the creditors and the official receiver at least 10 days before the day on which the meeting of creditors referred to in subsection 51(1) is to be held.

50(11)Report to creditors

An interim receiver who has been directed under subsection 47.1(2) to carry out the duties set out in subsection (10) in substitution for the trustee shall deliver a report on the state of the insolvent person's business and financial affairs, containing any prescribed information, to the trustee at least fifteen days before the meeting of creditors referred to in subsection 51(1), and the trustee shall send the report to the creditors and the official receiver, in the prescribed manner, at least ten days before the meeting of creditors referred to in that subsection.

50(12)Court may declare proposal as deemed refused by creditors

The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1 or a creditor, at any time before the meeting of creditors, declare that the proposal is deemed to have been refused by the creditors if the court is satisfied that

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

(b) the proposal will not likely be accepted by the creditors; or

(c) the creditors as a whole would be materially prejudiced if the application under this subsection is rejected.

50(12.1)Effect of declaration

If the court declares that the proposal is deemed to have been refused by the creditors, paragraphs 57(a) to (c) apply.

50(13)Claims against directors — compromise

A proposal made in respect of a corporation may include in its terms provision for the compromise of claims against directors of the corporation that arose before the commencement of proceedings under this Act and that relate to the obligations of the corporation where the directors are by law liable in their capacity as directors for the payment of such obligations.

50(14)Exception

A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors arising from contracts with one or more directors; or

(b) are based on allegations of misrepresentation made by directors to creditors or of wrongful or oppressive conduct by directors.

50(15)Powers of court

The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be just and equitable in the circumstances.

50(16)Application of other provisions

Subsection 62(2) and section 122 apply, with such modifications as the circumstances require, in respect of claims against directors compromised under a proposal of a debtor corporation.

50(17)Determination of classes of claims

The court, on application made at any time after a proposal is filed, may determine the classes of claims of claimants against directors and the class into which any particular claimant's claim falls.

50(18)Resignation or removal of directors

Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the corporation shall be deemed to be a director for the purposes of this section.

Amendment History
1992, c. 27, s. 18; 1997, c. 12, s. 30(1)-(4), (6); 2001, c. 4, s. 27; 2004, c. 25, s. 32(1), (2); 2005, c. 47, s. 34; 2007, c. 36, s. 16

Judicial Consideration (3)

Currency
Federal English Statutes reflect amendments current to June 19, 2024
Federal English Regulations Current to Gazette Vol. 158:12 (June 5, 2024)

End of Document

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

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

s 50.4

Currency

50.4

50.4(1)Notice of intention

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

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

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

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

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

50.4(2)Certain things to be filed

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

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

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

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

50.4(3)Creditors may obtain statement

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

50.4(4)Exception

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

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

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

50.4(5)Trustee protected
If the trustee acts in good faith and takes reasonable care in reviewing the cash-flow statement, the trustee is not liable for loss or damage to any person resulting from that person's reliance on the cash-flow statement.

50.4(6)Trustee to notify creditors
Within five days after the filing of a notice of intention under subsection (1), the trustee named in the notice shall send to every known creditor, in the prescribed manner, a copy of the notice including all of the information referred to in paragraphs (1)(a) to (c).

50.4(7)Trustee to monitor and report
Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a notice of intention in respect of an insolvent person

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

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

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

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

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

50.4(8)Where assignment deemed to have been made
Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

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

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

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

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

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

extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

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

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

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

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

50.4(11)Court may terminate period for making proposal
The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

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

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

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

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

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

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

Judicial Consideration (2)

Currency
Federal English Statutes reflect amendments current to June 19, 2024
Federal English Regulations Current to Gazette Vol. 158:12 (June 5, 2024)

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

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

s 64.2

Currency

64.2

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

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

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

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

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

64.2(2)Priority

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

64.2(3)Individual

In the case of an individual,

(a) the court may not make the order unless the individual is carrying on a business; and

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

Amendment History

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

Currency

Federal English Statutes reflect amendments current to June 19, 2024
Federal English Regulations Current to Gazette Vol. 158:12 (June 5, 2024)

End of Document

TAB 2

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

Most Recently Cited in: In the Matter of The Body Shop Canada Limited , 2024 ONSC 3882, 2024 CarswellOnt 10411 | (Ont. S.C.J. [Commercial List], Jul 5, 2024)

R.S.C. 1985, c. C-36, s. 10

s 10.

Currency

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

10(2)Documents that must accompany initial application
An initial application must be accompanied by

(a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;

(b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and

(c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

10(3)Publication ban
The court may make an order prohibiting the release to the public of any cash-flow statement, or any part of a cash-flow statement, if it is satisfied that the release would unduly prejudice the debtor company and the making of the order would not unduly prejudice the company's creditors, but the court may, in the order, direct that the cash-flow statement or any part of it be made available to any person specified in the order on any terms or conditions that the court considers appropriate.

Amendment History
2005, c. 47, s. 127

Judicial Consideration (2)

Currency
Federal English Statutes reflect amendments current to June 19, 2024
Federal English Regulations Current to Gazette Vol. 158:12 (June 5, 2024)

End of Document

Most Recently Cited in: Purdue Pharma (Re) , 2024 ONSC 3252, 2024 CarswellOnt 8290, 14 C.B.R. (7th) 165, 2024 A.C.W.S. 2874 | (Ont. S.C.J. [Commercial List], Jun 6, 2024)

R.S.C. 1985, c. C-36, s. 18.6

s 18.6

Currency

18.6
18.6(1)Good faith
Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

18.6(2)Good faith — powers of court
If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

Amendment History
2019, c. 29, s. 140

Currency
Federal English Statutes reflect amendments current to June 19, 2024
Federal English Regulations Current to Gazette Vol. 158:12 (June 5, 2024)

End of Document

TAB 3

2005 NSSC 346
Nova Scotia Supreme Court

H & H Fisheries Ltd., Re

2005 CarswellNS 541, 2005 NSSC 346, [2005] N.S.J. No. 513, 144 A.C.W.S. (3d) 407, 18 C.B.R. (5th) 293, 239 N.S.R. (2d) 229, 760 A.P.R. 229

In the Matter of H & H Fisheries Limited

Goodfellow J.

Heard: December 14, 2005
Judgment: December 19, 2005
Docket: SH B259148

Counsel: Victor J. Goldberg, Martha L. Mann for H & H Fisheries Limited
Stephen J. Kingston, Bob Mann (articled clerk) for Bank of Nova Scotia

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.5 Practice and procedure
Headnote
Bankruptcy and insolvency --- Proposal — Time period to file — Extension of time
Debtor agreed to maintain all operating accounts with bank as condition of financing — Debtor breached agreement by depositing funds with other bank — Debtor had net loss of nearly $600,000 for fiscal year ending June 30, 2005 — Debtor applied for 45-day extension to file proposal — Application granted — Debtor met requirements of s. 50.4(9) of Bankruptcy and Insolvency Act — Debtor acted in good faith notwithstanding breach of agreement — Debtor acted to stay in operation as bank would have used funds to pay down debt — Debtor's good faith was supported by respected trustee — Debtor was likely to make viable proposal in sense of reasonable one to reasonable creditor — Bank as largest secured creditor should not be able to veto proposal at this early stage — Bank would not be unduly prejudiced by extension given debtor's current receivables of nearly $1 million were double its indebtedness to bank.
Table of Authorities
Cases considered by *Goodfellow J.*:
Baldwin Valley Investors Inc., Re (1994), 23 C.B.R. (3d) 219, 1994 CarswellOnt 253 (Ont. Gen. Div. [Commercial List]) — referred to
Cumberland Trading Inc., Re (1994), 23 C.B.R. (3d) 225, 1994 CarswellOnt 255 (Ont. Gen. Div. [Commercial List]) — considered
St. Isidore Meats Inc. / Viandes St. Isidore Inc. v. Paquette Fine Foods Inc. (1997), 1997 CarswellOnt 1524, 46 C.B.R. (3d) 280, 36 O.T.C. 76 (Ont. Bktcy.) — considered
Statutes considered:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 1 [rep. & sub. 1992, c. 27, s. 2] — referred to

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

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

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

s. 54(2.2) [en. 1992, c. 27, s. 22] — considered

s. 54(3) — considered

s. 62(1.2) [en. 1992, c. 12, s. 39] — considered

s. 62(2) — considered

Interpretation Act, R.S.C. 1985, c. I-21

Generally — referred to

s. 10 — considered

s. 12 — considered

APPLICATION by debtor for extension of time for filing proposal under Bankruptcy and Insolvency Act.

***Goodfellow J.*:**

Backgound

1 H & H Fisheries Limited (HHFL) owns and operates a fish processing plant at Eastern Passage, Halifax, Nova Scotia, which is a somewhat seasonal operation and it presently employs seventy-five people which diminishes to approximately twelve people off-season.

2 Reginald P. Hartlen is the president, a founding shareholder and director of HHFL and the company became a customer of the Bank of Nova Scotia (BNS) in May of 2003.

3 HHFL and BNS secured a commitment letter December 2, 2004 with the stated purpose of BNS "to finance trade receivables and inventory". It provided that BNS would have a first charge over accounts receivable and inventory and set out the terms and conditions of their agreement including "for ongoing credit risk management purposes, all operating accounts of the borrower shall be maintained with the Bank as long as the borrower has any operating line facilities with the Bank". There were several additional terms and conditions dealing with reporting ratios of current assets to current liabilities, ratio of debt to tangible net worth, etc. The letter of commitment contained a clear outline of the general borrower reporting conditions. The letter of commitment made reference to two specific receivables outstanding; Emporio and Simone, upon which I will comment further.

4 In November 2004 HHFL applied to increase its limit on its operating credit line from $400,000 to $1,100,000 and this increase was approved subject to confirmation as to the collection of the Emporio and Simone accounts.

5 In December 2004 the Simone account was paid in full but Emporio remained outstanding. Because the lobster season was approaching, HHFL requested BNS to waive the condition relating to the Emporio account. BNS did not waive the requirement in relation to that account but did allow access to the full operating line of $1,100,000 to January 31, 2005 when the limit was reduced to $750,000.

6 In February 2005, HHFL again requested access to the $1,100,000 credit limit to February 28, 2005 when again it would be reduced to $750,000 and this was agreed upon by the parties. HHFL provided BNS with an update on the status of the Emporio account which continued to remain outstanding. BNS became increasingly concerned with respect to the impact of the potential write-off of the Emporio account and as a result in March 2005 conversations took place between BNS and Reginald Hartlen, who undertook April 7, 2005 to inject equity of $200,000 into HHFL by April 22, 2005. Mr. Hartlen did come up with $100,000 and endeavoured to obtain additional funds in relation to mortgaging his residence but unfortunately there was a lien/judgment against his property and his financing has not been possible.

> 10. The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning.

Enactments Remedial

> *Enactments deemed remedial*
>
> 12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

Application

10 HHFL filed a Notice of Intention dated November 3, 2005 under ss. 50.4(1) to make a Proposal of H & H Fisheries Limited. An order was granted extending the time to file a proposal November 29, 2005 to December 8, 2005. Unfortunately, the Chambers' docket was so heavy that the Justice presiding on December 8, 2005 was unable to address the matter and I was asked to deal with it and it was put over by consent to December 14, 2005. The application is comprised of several affidavits and both parties declined cross-examination of the other sides' supporting affidavits. On December 14th I heard almost four hours of argument and reserved my decision in order to thoroughly review the extensive material filed by both parties and arrive at a determination.

Onus

11 The court, as directed by s. 50.4(9) above, must be satisfied on each application that:

> (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
>
> (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
>
> (c) no creditor would be materially prejudiced if the extension being applied for were granted.

12 The onus is upon the applicant, in this case HHFL), to satisfy the court on a balance of probabilities that all three prerequisites of s. 50.4(9) have been established on the application.

13 This is so because of the use of the "semi-colon" and the use of the word "and" in (b), rendering the requirements conjunctive. This requires the court to consider each of the subsections as to whether the applicant has established the prerequisite contained in the subsection on a balance of probabilities. For the application to be successful the court must be satisfied that all three prerequisites of the application have been established on a balance of probabilities before extending the time for filing a proposal. It is, in essence, a three part test and if the applicant fails on any part the court would not then be satisfied, requiring the application to be dismissed.

14 **Has HHFL satisfied the court that it has acted in good faith and exercised due diligence?**

15 There is some merit to the arguments advanced by BNS and the court is particularly concerned about a party HHFL signing a commitment letter with the clear undertaking noted above that all its operating accounts were to be maintained with BNS. This is for the obvious purpose of providing BNS with an opportunity to monitor and protects its interests as a creditor and clearly HHFL in moving all its trading, operating business to its CIBC accounts has committed a breach of contract, a breach of the commitment it made in the original committal letter executed by both parties December 2, 2004.

16 Does a breach of contract automatically constitute bad faith? The answer is, "not necessarily", but it is evidence that must be weighed very carefully and the evidence here does show a deliberate failure to notify BNS of this redirection of operating

> 11. I believe that the forty five day extension for filing the proposal is critical to the operations of the Company. It is my opinion that no creditor would be materially prejudiced if the extension is granted. The security of BNS would actually be enhanced during the extension period because of the profitable time of year and increase in inventory and receivables. BDC would have an opportunity to add to their security the land which I understand is to be conveyed to the Company by the government.
>
> 12. In the event the Company were to become bankrupt, it is my opinion that both BDC and R. Hartlen Investments Inc., which has a third charge on the assets would be severely prejudiced. It is also my opinion that the unsecured creditors would lose any opportunity of recovery.

35 I struggle with what constitutes material prejudice and there is some guidance in *Cumberland Trading Inc., Re* above. In that case the creditor under the BIA applied to have a stay, etc. In paragraph 11 Justice Farley stated:

> Is Skyview entitled to the benefit of s. 69.4(a) BIA? I am of the view that the material prejudice referred to therein is an objective prejudice as opposed to a subjective one — ie., it refers to the degree of the prejudice suffered vis-a-vis the indebtedness and the attendant security and not to the extent that such prejudice may affect the creditor *quo* person, organization or entity. If it were otherwise then a "big creditor" may be so financially strong that it could never have the benefit of this clause. ...

36 In the case before the court, the accounts receivables as of November 31, 2005 amounted to $956,532.16, almost double the indebtedness outstanding to BNS. HHFL certainly has as great if not greater motive in pursuing and collecting receivables as does BNS and I do not think there need be any concern as to the attempts in the short run for collection. Arguably, if an accounts receivable is uncollectible now its position cannot be any worse a few weeks from now. Extending the time period obviously creates some risk and some possibility of benefit. Provided a proper monitoring scheme is in effect, what normally should follow an extension is a flowing of proceeds from existing accounts receivables, new sales and new accounts receivables into the operating costs in an operation where in the immediate future a degree of profitability is projected.

37 This section of the *Act* contemplates some prejudice to creditors and I am of the view that the prejudice must be of a degree that raises significant concern to a level that it would be unreasonable for a creditor or creditors to accept. Overall, I am satisfied that HHFL has met the requirement of establishing on the balance of probabilities that the granting of an extension will not materially prejudice any of the creditors and in particular BNS.

Conditions

38 During the course of argument I indicated if an extension was granted that BNS at the very least was entitled to have timely full disclosure of the utilization of funds for the continued operation of the company. This could be achieved by requiring HHFL to return to the commitment of having all operating funds passed through its accounts with BNS but it will also require a direction that other than interest entitlement, if not paid, BNS would not be able in the intervening period to encroach upon the trading funds which are absolutely necessary for the continued operation and survival chances of the business. The direction would probably also require any outstanding documentation, possibly requiring HHFL to produce the invoices in the reconciliation it provided for cash withdrawals for cash purchases from Pacmar Norway, etc. There would be a requirement of timely disclosure. There are a number of other possible conditions that come to mind. However, as both counsel indicated if the extension was granted they requested the opportunity to address possible conditions, I readily accede to their offer of assistance. Counsel, if they agree, may take some time to consult with each other and put their views in writing or alternatively address the matter orally and, in any event, I will, as scheduled be available at 2:00 p.m. this afternoon unless both counsel agree on the appropriate terms and conditions of the order of extension.

Application granted.

End of Document

TAB 4

2020 ABQB 809
Alberta Court of Queen's Bench

Bellatrix Exploration Ltd (Re)

2020 CarswellAlta 2545, 2020 ABQB 809, [2020] A.J. No. 1453, [2021] A.W.L.D. 478, [2021] A.W.L.D. 481, [2021] A.W.L.D. 483, [2021] A.W.L.D. 568, 327 A.C.W.S. (3d) 166, 86 C.B.R. (6th) 191

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

In the Matter of the Compromise or Arrangement of Bellatrix Exploration Ltd.

B.E. Romaine J.

Judgment: December 22, 2020
Docket: Calgary 1901-13767

Counsel: Kelly Bourassa (agent), James Reid (agent), for National Bank of Canada
Robert J Chadwick, Caroline Descours, for Bellatrix Exploration Ltd.
Howard A Gorman, Q.C., Gunnar Benidiktsson, for BP Canada Energy Group LLC
Joseph G.A. Kruger, Q.C., Robyn Gorofsky, for Monitor, Pricewaterhousecoopers Inc.

Subject: Civil Practice and Procedure; Insolvency; Restitution
Related Abridgment Classifications
Bankruptcy and insolvency
X Priorities of claims
X.1 Secured claims
X.1.b Forms of secured interests
X.1.b.i Liens
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.1 Stay of proceedings
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.d Miscellaneous
Restitution and unjust enrichment
I General principles
I.1 When remedy available

Headnote

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

Parties in bankruptcy matter were originally parties to contract for sale and purchase of natural gas — Bankrupt company was granted protection under Companies' Creditors Arrangement Act in 2019 — Bankrupt company sent corporation disclaimer notice, regarding contract between parties — Corporation successfully applied to find that contract was eligible financial contract — Company was indebted to third party lenders — Lenders sought declaration that they had first priority interest in company's property — Corporation claimed company was obligated to perform remainder of contract — Corporation also claimed equitable relief — Parties applied for above-noted relief — Lenders granted declaratory relief, as to first priority interest in property of company — Corporation's claim as to obligation dismissed — Corporation did not have right to subject funds or to lift stay — Corporation was not entitled to equitable relief — Disclaimer provisions did not require performance of contract — Rather, these provisions provided opportunity for orderly termination of contract when necessary.

Bankruptcy and insolvency --- Practice and procedure in courts — Stay of proceedings
Parties in bankruptcy matter were originally parties to contract for sale and purchase of natural gas — Bankrupt company was granted protection under Companies' Creditors Arrangement Act in 2019 — Bankrupt company sent corporation disclaimer notice, regarding contract between parties — Corporation successfully applied to find that contract was eligible financial contract — Company was indebted to third party lenders — Lenders sought declaration that they had first priority interest in company's property — Corporation claimed company was obligated to perform remainder of contract — Corporation also claimed equitable relief — Parties applied for above-noted relief — Lenders granted declaratory relief, as to first priority interest in property of company — Corporation's claim as to obligation dismissed — Corporation did not have right to subject funds or to lift stay — Corporation was not entitled to equitable relief — Corporation had no right to set-off either legal or equitable — Corporation's damages arose from pre-filing contract — Company had not violated Act process — Court was reluctant to interfere with contract between parties — Continuation of stay would not prejudice corporation.
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Procedure — Miscellaneous
Parties in bankruptcy matter were originally parties to contract for sale and purchase of natural gas — Bankrupt company was granted protection under Companies' Creditors Arrangement Act in 2019 — Bankrupt company sent corporation disclaimer notice, regarding contract between parties — Corporation successfully applied to find that contract was eligible financial contract — Company was indebted to third party lenders — Lenders sought declaration that they had first priority interest in company's property — Corporation claimed company was obligated to perform remainder of contract — Corporation also claimed equitable relief — Parties applied for above-noted relief — Lenders granted declaratory relief, as to first priority interest in property of company — Corporation's claim as to obligation dismissed — Corporation did not have right to subject funds or to lift stay — Corporation was not entitled to equitable relief — Company was transparent as to its situation after bankruptcy took place — No bad faith claim was tenable — If court was in error on issue of equitable rights, company could be entitled to relief on basis of delay — Corporation had not provided evidence of its claimed damages — Claim of corporation remained unliquidated and unsecured.
Restitution and unjust enrichment --- General principles — When remedy available
Parties in bankruptcy matter were originally parties to contract for sale and purchase of natural gas — Bankrupt company was granted protection under Companies' Creditors Arrangement Act in 2019 — Bankrupt company sent corporation disclaimer notice, regarding contract between parties — Corporation successfully applied to find that contract was eligible financial contract — Company was indebted to third party lenders — Lenders sought declaration that they had first priority interest in company's property — Corporation claimed company was obligated to perform remainder of contract — Corporation also claimed equitable relief — Parties applied for above-noted relief — Lenders granted declaratory relief, as to first priority interest in property of company — Corporation's claim as to obligation dismissed — Corporation did not have right to subject funds or to lift stay — Corporation was not entitled to equitable relief — There was juristic reason for enrichment — Corporation could not claim constructive trust.

Table of Authorities

Cases considered by *B.E. Romaine J.*:

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Bank of Montreal v. Probe Exploration Inc. (2000), 2000 CarswellAlta 1659, 33 C.B.R. (4th) 173 (Alta. Q.B.) — followed

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Bellatrix Exploration Ltd., Re (2020), 2020 CarswellAlta 350, 77 C.B.R. (6th) 230 (Alta. Q.B.) — considered

Blue Range Resource Corp., Re (2000), 2000 ABCA 200, 2000 CarswellAlta 731, 261 A.R. 162, 225 W.A.C. 162, [2000] 11 W.W.R. 117, 84 Alta. L.R. (3d) 65 (Alta. C.A.) — considered

Blue Range Resource Corp., Re (2000), 2000 ABCA 239, 2000 CarswellAlta 1004, 192 D.L.R. (4th) 281, 20 C.B.R. (4th) 187, 266 A.R. 98, 228 W.A.C. 98, [2001] 2 W.W.R. 454, 87 Alta. L.R. (3d) 329 (Alta. C.A.) — followed

Blue Range Resource Corp., Re (2000), 2000 ABCA 285, 2000 CarswellAlta 1145, *(*sub nom. *Enron Canada Corp. v. National-Oilwell Canada Ltd.)* 193 D.L.R. (4th) 314, [2001] 2 W.W.R. 477, 271 A.R. 138, 234 W.A.C. 138, 87 Alta. L.R. (3d) 352 (Alta. C.A.) — considered

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 7882, 61 C.B.R. (5th) 200 (Ont. S.C.J. [Commercial List]) — considered

Cohen, Re (1956), 19 W.W.R. 14, 36 C.B.R. 21, 1956 CarswellAlta 1, 4 D.L.R. (2d) 528 (Alta. C.A.) — considered

Golden Griddle Corp. v. Fort Erie Truck & Travel Plaza Inc. (2005), 2005 CarswellOnt 9935, 29 C.B.R. (5th) 62, 277 D.L.R. (4th) 568 (Ont. S.C.J.) — considered

Hoard, Re (2014), 2014 ABQB 426, 2014 CarswellAlta 1205 (Alta. Q.B.) — considered

Hollinger Inc., Re (2013), 2013 ONSC 5431, 2013 CarswellOnt 9006, 3 C.B.R. (6th) 73, 90 E.T.R. (3d) 116 (Ont. S.C.J. [Commercial List]) — considered

Hollinger Inc., Re (2014), 2014 ONCA 282, 2014 CarswellOnt 4676 (Ont. C.A.) — referred to

Luscar Ltd. v. Pembina Resources Ltd. (1994), 24 Alta. L.R. (3d) 305, *(*sub nom. *Luscar Ltd. and Norcen v. Pembina Resources Ltd.)* 162 A.R. 35, 83 W.A.C. 35, [1995] 2 W.W.R. 153, 1994 CarswellAlta 251, 1994 ABCA 356 (Alta. C.A.) — considered

Ma, Re (2001), 2001 CarswellOnt 1019, 24 C.B.R. (4th) 68, 143 O.A.C. 52 (Ont. C.A.) — considered

Moore v. Sweet (2018), 2018 SCC 52, 2018 CSC 52, 2018 CarswellOnt 19478, 2018 CarswellOnt 19479, 43 C.C.P.B. (2nd) 161, 84 C.C.L.I. (5th) 1, 430 D.L.R. (4th) 315, [2019] I.L.R. I-6120, [2018] 3 S.C.R. 303 (S.C.C.) — considered

Soulos v. Korkontzilas (1997), 1997 CarswellOnt 1489, 212 N.R. 1, 9 R.P.R. (3d) 1, 46 C.B.R. (3d) 1, 146 D.L.R. (4th) 214, 100 O.A.C. 241, 17 E.T.R. (2d) 89, [1997] 2 S.C.R. 217, 1997 CarswellOnt 1490, 32 O.R. (3d) 716 (note) (S.C.C.) — considered

Target Canada Co., Re (2015), 2015 ONSC 1028, 2015 CarswellOnt 3274, 23 C.B.R. (6th) 303 (Ont. S.C.J.) — considered

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Statutes considered:

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

Generally — referred to

s. 50(12) — referred to

s. 50.4(11) [en. 1992, c. 27, s. 19] — referred to

s. 65.12(2) [en. 2005, c. 47, s. 44] — referred to

s. 69.4 [en. 1992, c. 27, s. 36(1)] — considered

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

Generally — referred to

s. 11.02(3) [en. 2005, c. 47, s. 128] — referred to

s. 18.6 [en. 1997, c. 12, s. 125] — considered

s. 32(1) — considered

s. 32(4) — considered

s. 32(7) — considered

101 While Bellatrix breached the GasEDI Agreement by non-performance, it has been transparent and candid throughout with respect to its position and conduct. Although it did not abide by the statutory 30 days notice under its notice of disclaimer, that was after BP refused to accept the disclaimer and advised Bellatrix of its view that the agreement was an EFC.

102 It is not unusual for a CCAA debtor to fail to perform uneconomic ongoing monthly contracts, both before and after filing, whether formally disclaimed or not, and such failure to perform is not per se bad faith.

103 The December payment has been held in trust pending a resolution of the issues of set-off and priority, so Bellatrix has not failed to act in good faith with respect to the payment. The timing of the disclaimer notice, while strategic, was not bad faith conduct, and Bellatrix has not, as alleged by BP, misled the Court or failed to comply with a Court order.

104 The Monitor has stated that it is satisfied that Bellatrix has acted in good faith throughout the proceedings.

105 As noted by Dr. Janis Sarra in "La bonne foi est une considération de base — Requiring Nothing Less than Good Faith in Insolvency Law Proceedings", Annual Review of Insolvency Law, eds Janis Sarra & Barbara Romaine, Toronto: Thomson Reuters Canada, 2014:

> The court will find bad faith conduct where a debtor, creditor or their professionals fail to meet the requirements to act candidly, honestly, forthrightly and reasonably in their dealings with one another and the court; where parties act capriciously and arbitrarily; or where they lie or otherwise knowingly mislead each other about matters relating to the insolvency proceedings.

106 Bellatrix has not exhibited conduct that would fall within these categories and has not acted in bad faith.

107 The First Lien Lenders and Bellatrix point out that BP failed to allege that Bellatrix was not acting in good faith through four stay applications, and only raised the allegation at the end of August, 2020. However, BP responds that, as Bellatrix as a concession to BP agreed to hold back an amount from the sale proceeds to cover BP's damages claim, it had no need to object to the stay extension. While I have not found bad faith by Bellatrix, I accept that BP's failure to object to the stay does not preclude its claim of bad faith in the circumstance.

4. Delay

108 The First Lien Lenders and Bellatrix submit that it would be inequitable to grant BP the super-priority it seeks for damages in priority to the stakeholders of Bellatrix.

109 They note that BP initially applied for various forms of relief, including orders directing Bellatrix to resume performance of the GasEDI Agreement and to remedy any existing default, but ultimately only pursued the issue of characterization of the GasEDI Agreement as an EFC. While BP may have been constrained by time limits in its initial application heard on January 23, 2020, it knew by February 25, 2020, that Jones, J's decision dealt only with the characterization of the GasEDI Agreement as an EFC, and that it was free to proceed with the remainder of the relief it sought before any other commercial duty judge. The order emanating from the decision grants BP leave to apply for further advice and direction with respect to the remaining relief.

110 While the pandemic interfered with regular commercial duty chambers in March and April, during Bellatrix's May 22, 2020 application before Hollins, J. to make interim distributions to certain priority and secured lenders. BP advised the Court that it may have a priority claim against Bellatrix and asked the Court to set aside US$14.5 million to be held in trust pending resolution of the disclaimer dispute with Bellatrix. The Court refused and suggested that BP bring its own application if it was concerned that it was facing disadvantage. It was not until August 7, 2020, in response to First Lien Lenders priority application, that BP brought a cross-application seeking relief similar to that it had originally sought in December, 2019.

111 The First Lien Lenders submit that it would be inequitable and prejudicial to the First Lien Lenders if BP were now allowed a priority claim in relation to Bellatrix's breach of the GasEDI Agreement. Bellatrix remains indebted to the First Lien

TAB 5

Most Negative Treatment: Distinguished
Most Recent Distinguished: Pacific Atlantic Pipeline Construction Ltd v. Coastal Gaslink Pipeline Ltd | 2023 ABKB 736, 2023 CarswellAlta 3220, [2024] 5 W.W.R. 175, 66 Alta. L.R. (7th) 175, 2023 A.C.W.S. 6398, [2024] A.W.L.D. 816 | (Alta. K.B., Dec 22, 2023)

2020 SCC 45, 2020 CSC 45
Supreme Court of Canada

C.M. Callow Inc. v. Zollinger

2020 CarswellOnt 18468, 2020 CarswellOnt 18469, 2020 SCC 45, 2020 CSC 45,
[2020] S.C.J. No. 45, 10 B.L.R. (6th) 1, 325 A.C.W.S. (3d) 201, 452 D.L.R. (4th) 44

C.M. Callow Inc. (Appellant) and Tammy Zollinger, Condominium Management Group, Carleton Condominium Corporation No. 703, Carleton Condominium Corporation No. 726, Carleton Condominium Corporation No. 742, Carleton Condominium Corporation No. 765, Carleton Condominium Corporation No. 783, Carleton Condominium Corporation No. 791, Carleton Condominium Corporation No. 806, Carleton Condominium Corporation No. 826, Carleton Condominium Corporation No. 839 and Carleton Condominium Corporation No. 877 (Respondents) and Canadian Federation of Independent Business and Canadian Chamber of Commerce (Interveners)

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

Heard: December 6, 2019
Judgment: December 18, 2020
Docket: 38463

Proceedings: reversing *CM Callow Inc. v. Zollinger* (2018), 86 B.L.R. (5th) 53, 429 D.L.R. (4th) 704, 2018 ONCA 896, 2018 CarswellOnt 18697, Gary T. Trotte J.A., Grant Huscroft J.A., P. Lauwers J.A. (Ont. C.A.); reversing *C.M. Callow Inc. v. Tammy Zollinger et al.* (2017), 2017 CarswellOnt 18587, 2017 ONSC 7095, M. O'Bonsawin J. (Ont. S.C.J.)

Counsel: Brandon Kain, Adam Goldenberg, Vivian Ntiri, Miriam Vale Peters, for Appellant
Anne Tardif, Rodrigue Escayola, David Plotkin, for Respondents
Catherine Beagan Flood, Nicole Henderson, for Intervener, Canadian Federation of Independent Business
Jeremy Opolsky, Winston Gee, for Intervener, Canadian Chamber of Commerce

Subject: Civil Practice and Procedure; Contracts; Property
Related Abridgment Classifications
Contracts
IX Performance or breach
IX.3 Obligation to perform
IX.3.a Sufficiency of performance
IX.3.a.i Duty to perform in good faith
Contracts
IX Performance or breach
IX.6 Breach
IX.6.g Miscellaneous
Contracts

XIV Remedies for breach
XIV.5 Damages
XIV.5.c Contract for service or repair

Headnote

Contracts --- Performance or breach — Obligation to perform — Sufficiency of performance — Duty to perform in good faith
In 2012, group of condominium corporations ("B Inc.") entered into two-year winter maintenance contract and separate summer maintenance contract with C Inc. — Pursuant to contract, B Inc. was entitled to terminate contract if C Inc. failed to give satisfactory service in accordance with its terms, and if for any other reason, C Inc.'s services were no longer required, B Inc. could terminate contract upon giving 10 days' written notice — In early 2013, B Inc. decided to terminate contract but chose not to inform C Inc. of its decision and based on discussions, C Inc. was under impression that it would get two-year renewal of contract — As result, during summer of 2013, C Inc. performed work above and beyond summer maintenance contract, at no charge, as incentive for renewal — After B Inc. informed C Inc. of its decision to terminate winter maintenance agreement, C Inc. brought action for breach of contract, alleging bad faith — In allowing action, trial judge awarded damages and ruled that B Inc. breached its contractual duty of honest performance by acting in bad faith — B Inc. successfully appealed, Court of Appeal holding that trial judge erred by improperly expanding duty of honest performance beyond terms of winter maintenance agreement, and C Inc. appealed — Appeal allowed — Organizing principle of good faith recognized in Bhasin v. Hrynew was not free-standing rule, but instead manifested itself through existing good faith doctrines — In this appeal, applicable good faith doctrine was duty of honesty in contractual performance — Duty to act honestly in performance of contract precluded active deception — B Inc. breached its duty by knowingly misleading C Inc. into believing winter maintenance agreement would not be terminated — By exercising termination clause dishonestly, it breached duty of honesty on matter directly linked to performance of contract, even if 10-day notice period was satisfied and irrespective of motive for termination.

Contracts --- Remedies for breach — Damages — Contract for service or repair
Dishonesty — In 2012, group of condominium corporations ("B Inc.") entered into two-year winter maintenance contract and separate summer maintenance contract with C Inc. — Pursuant to contract, B Inc. was entitled to terminate contract if C Inc. failed to give satisfactory service in accordance with its terms, and if for any other reason, C Inc.'s services were no longer required, B Inc. could terminate contract upon giving 10 days' written notice — In early 2013, B Inc. decided to terminate contract but chose not to inform C Inc. of its decision and based on discussions, C Inc. was under impression that it would get two-year renewal of contract — As result, during summer of 2013, C Inc. performed work above and beyond summer maintenance contract, at no charge, as incentive for renewal — After B Inc. informed C Inc. of its decision to terminate winter maintenance agreement, C Inc. brought action for breach of contract, alleging bad faith — In allowing action, trial judge awarded damages and ruled that B Inc. breached its contractual duty of honest performance by acting in bad faith — B Inc. successfully appealed, Court of Appeal holding that trial judge erred by improperly expanding duty of honest performance beyond terms of winter maintenance agreement, and C Inc. appealed — Appeal allowed — Duty of honest performance attracted damages according to ordinary contractual measure — Its breach was not tort, and basing damages in this case on reliance interest would set this contractual breach apart from ordinary measure of contractual damages, and it would also depart from measure as it was applied in Bhasin v. Hrynew — Ordinary approach was to award contractual damages corresponding to expectation interest — That was, damages should put injured party in position that it would have been in had duty been performed.

Contracts --- Performance or breach — Breach — Miscellaneous
In 2012, group of condominium corporations ("B Inc.") entered into two-year winter maintenance contract and separate summer maintenance contract with C Inc. — Pursuant to contract, B Inc. was entitled to terminate contract if C Inc. failed to give satisfactory service in accordance with its terms, and if for any other reason, C Inc.'s services were no longer required, B Inc. could terminate contract upon giving 10 days' written notice — In early 2013, B Inc. decided to terminate contract but chose not to inform C Inc. of its decision and based on discussions, C Inc. was under impression that it would get two-year renewal of contract — As result, during summer of 2013, C Inc. performed work above and beyond summer maintenance contract, at no charge, as incentive for renewal — After B Inc. informed C Inc. of its decision to terminate winter maintenance agreement, C Inc. brought action for breach of contract, alleging bad faith — In allowing action, trial judge awarded damages and ruled that B Inc. breached its contractual duty of honest performance by acting in bad faith — B Inc. successfully appealed, Court of Appeal holding that trial judge erred by improperly expanding duty of honest performance beyond terms of winter maintenance agreement, and C Inc. appealed — Appeal allowed — Duty of honest performance was contract law doctrine, not tort, and

therefore nexus with contractual relationship was required — Breach must be directly linked to performance of contract — Framework for abuse of rights in Quebec was useful to illustrate required direct link between dishonesty and performance from Bhasin v. Hrynew — Authorities from Quebec serve as persuasive authority, and comparison between common law and civil law as they evolve in Canada was particularly useful and familiar exercise for court — Like in Quebec civil law, no contractual right may be exercised dishonestly and therefore contrary to requirements of good faith — While duty of honest performance had similarities with civil fraud and estoppel, it was not subsumed by them.

Contrats --- Exécution ou défaut d'exécution — Obligation d'exécuter — Exécution acceptable — Obligation d'exécuter de bonne foi

En 2012, un groupe d'associations condominiales (« B Inc. ») a conclu un contrat d'entretien hivernal de deux ans et un contrat distinct d'entretien estival avec C Inc. — En vertu du contrat, B Inc. avait le droit de résilier ce contrat si C Inc. ne rendait pas un service satisfaisant, conformément aux dispositions du contrat, et si, pour quelque autre raison que ce soit, les services de C Inc. n'étaient plus requis, B Inc. pouvait résilier le contrat en donnant un préavis écrit de 10 jours — Au début de 2013, B Inc. a décidé de résilier le contrat d'entretien hivernal mais a choisi de ne pas informer C Inc. de sa décision, et sur la base de discussions avec B Inc., C Inc. croyait qu'elle allait probablement obtenir un renouvellement de deux ans du contrat — Conséquemment, pendant l'été 2013, C Inc. a exécuté des travaux à titre gratuit qui dépassaient ce qui était prévu dans le contrat d'entretien estival afin d'inciter B Inc. à renouveler le contrat — Après que B Inc. ait informé C Inc. de sa décision de résilier le contrat d'entretien hivernal, C Inc. a déposé une action en violation de contrat, soutenant que B Inc.avait agi de mauvaise foi — Juge de première instance a accueilli l'action, accordé des dommages-intérêts et estimé que B Inc. avait manqué à son obligation contractuelle d'exécution honnête en agissant de mauvaise foi — Appel interjeté par B Inc. a été accueilli, la Cour d'appel estimant que la juge de première instance avait commis une erreur en élargissant à tort l'obligation d'exécution honnête d'une manière qui dépassait le libellé du contrat d'entretien hivernal, et C Inc. a formé un pourvoi — Pourvoi accueilli — Principe directeur d'exécution de bonne foi reconnu dans l'arrêt Bhasin c. Hrynew n'est pas une règle autonome, mais se manifeste plutôt par les doctrines existantes en matière de bonne foi — Dans le présent pourvoi, la doctrine de la bonne foi applicable était celle de l'obligation d'honnêteté en matière d'exécution des contrats — Obligation d'agir honnêtement dans l'exécution du contrat empêchait de se livrer à une tromperie active — B Inc. a manqué à son obligation en induisant intentionnellement C Inc. en erreur, l'amenant ainsi à croire que le contrat d'entretien hivernal ne serait pas résilié — En se prévalant malhonnêtement de la clause de résiliation, B Inc. a manqué à l'obligation d'honnêteté au sujet d'une question directement liée à l'exécution du contrat, même si le délai de préavis de 10 jours a été respecté et sans égard aux raisons ayant motivé la résiliation.

Contrats --- Réparation du défaut — Dommages-intérêts — Contrat de service ou de réparation

Malhonnêteté — En 2012, un groupe d'associations condominiales (« B Inc. ») a conclu un contrat d'entretien hivernal de deux ans et un contrat distinct d'entretien estival avec C Inc. — En vertu du contrat, B Inc. avait le droit de résilier ce contrat si C Inc. ne rendait pas un service satisfaisant, conformément aux dispositions du contrat, et si, pour quelque autre raison que ce soit, les services de C Inc. n'étaient plus requis, B Inc. pouvait résilier le contrat en donnant un préavis écrit de 10 jours — Au début de 2013, B Inc. a décidé de résilier le contrat d'entretien hivernal mais a choisi de ne pas informer C Inc. de sa décision, et sur la base de discussions avec B Inc., C Inc. croyait qu'elle allait probablement obtenir un renouvellement de deux ans du contrat — Conséquemment, pendant l'été 2013, C Inc. a exécuté des travaux à titre gratuit qui dépassaient ce qui était prévu dans le contrat d'entretien estival afin d'inciter B Inc. à renouveler le contrat — Après que B Inc. ait informé C Inc. de sa décision de résilier le contrat d'entretien hivernal, C Inc. a déposé une action en violation de contrat, soutenant que B Inc. avait agi de mauvaise foi — Juge de première instance a accueilli l'action, accordé des dommages-intérêts et estimé que B Inc. avait manqué à son obligation contractuelle d'exécution honnête en agissant de mauvaise foi — Appel interjeté par B Inc. a été accueilli, la Cour d'appel estimant que la juge de première instance avait commis une erreur en élargissant à tort l'obligation d'exécution honnête d'une manière qui dépassait le libellé du contrat d'entretien hivernal, et C Inc. a formé un pourvoi — Pourvoi accueilli — Obligation d'exécution honnête donnait lieu à des dommages-intérêts suivant ce qui est habituellement accordé en matière contractuelle — Fait de manquer à cette obligation ne constituait pas un délit civil et, en l'espèce, fonder l'octroi de dommages-intérêts sur un intérêt reposant sur un élément de fiabilité écarterait cette atteinte contractuelle de ce qui est habituellement accordé en matière contractuelle et des principes établis dans l'arrêt Bhasin c. Hrynew — D'ordinaire, on accordait en matière contractuelle des dommages-intérêts correspondant à la perte du profit escompté — Cela signifiait que les dommages-intérêts devaient placer la partie lésée dans la situation où elle se serait trouvée s'il avait été satisfait à l'obligation contractuelle.

Contrats --- Exécution ou défaut d'exécution — Défaut d'exécution — Divers

En 2012, un groupe d'associations condominiales (« B Inc. ») a conclu un contrat d'entretien hivernal de deux ans et un contrat distinct d'entretien estival avec C Inc. — En vertu du contrat, B Inc. avait le droit de résilier ce contrat si C Inc. ne rendait pas un service satisfaisant, conformément aux dispositions du contrat, et si, pour quelque autre raison que ce soit, les services de C Inc. n'étaient plus requis, B Inc. pouvait résilier le contrat en donnant un préavis écrit de 10 jours — Au début de 2013, B Inc. a décidé de résilier le contrat d'entretien hivernal mais a choisi de ne pas informer C Inc. de sa décision, et sur la base de discussions avec B Inc., C Inc. croyait qu'elle allait probablement obtenir un renouvellement de deux ans du contrat — Conséquemment, pendant l'été 2013, C Inc. a exécuté des travaux à titre gratuit qui dépassaient ce qui était prévu dans le contrat d'entretien estival afin d'inciter B Inc. à renouveler le contrat — Après que B Inc. ait informé C Inc. de sa décision de résilier le contrat d'entretien hivernal, C Inc. a déposé une action en violation de contrat, soutenant que B Inc. avait agi de mauvaise foi — Juge de première instance a accueilli l'action, accordé des dommages-intérêts et estimé que B Inc. avait manqué à son obligation contractuelle d'exécution honnête en agissant de mauvaise foi — Appel interjeté par B Inc. a été accueilli, la Cour d'appel estimant que la juge de première instance avait commis une erreur en élargissant à tort l'obligation d'exécution honnête d'une manière qui dépassait le libellé du contrat d'entretien hivernal, et C Inc. a formé un pourvoi — Pourvoi accueilli — Obligation d'exécution honnête était une doctrine du droit des contrats, y manquer ne constituait pas un délit civil et, par conséquent, il devait y avoir un lien avec la relation contractuelle — Manquement doit être directement lié à l'exécution du contrat — Cadre d'analyse de l'abus de droit au Québec était utile afin d'illustrer le lien direct exigé entre la malhonnêteté et l'exécution dont il était question dans l'arrêt Bhasin c. Hrynew — Sources québécoises servaient d'autorités persuasives, et la comparaison entre la common law et le droit civil, au fil de leur évolution au Canada, était un exercice particulièrement utile pour la Cour — Tout comme en droit civil québécois, aucun droit contractuel ne peut être exercé malhonnêtement, ce qui reviendrait à contrevenir aux exigences de la bonne foi — Obligation d'exécution honnête offrait des similitudes avec la fraude civile et la préclusion, sans toutefois être subsumée sous ces notions.

In 2012, a group of condominium corporations ("B Inc.") entered into a two-year winter maintenance contract and a separate summer maintenance contract with C Inc. Pursuant to clause 9 of the winter maintenance contract, B Inc. was entitled to terminate that agreement if C Inc. failed to give satisfactory service in accordance with its terms. Clause 9 also provided that if, for any other reason, C Inc.'s services were no longer required, B Inc. could terminate the contract upon giving 10 days' written notice.

In early 2013, B Inc. decided to terminate the winter maintenance agreement but chose not to inform C Inc. of its decision at that time. Following discussions with B Inc., C Inc. thought that it was likely to get a two-year renewal of the contract, and during the summer of 2013, C Inc. performed work above and beyond the summer maintenance contract, at no charge, as an incentive for renewal.

B Inc. informed C Inc. of its decision to terminate the winter maintenance agreement in September 2013. C Inc. successfully brought an action for breach of contract, alleging bad faith. In allowing the action, the trial judge awarded damages and ruled that B Inc. breached its contractual duty of honest performance by acting in bad faith, specifically by failing to tell C Inc. that it intended to terminate the winter contract and by representing to C Inc. that the winter contract would be renewed.

B Inc. appealed. The Court of Appeal set aside the judgment, holding that the trial judge erred by improperly expanding the duty of honest performance beyond the terms of the winter maintenance agreement. C Inc. appealed.

Held: The appeal was allowed.

Per Kasirer J. (Wagner C.J.C., Abella, Karakatsanis, Martin JJ. concurring): The dispute turned on the way B Inc. exercised the termination clause. In this appeal, the applicable good faith doctrine was the duty of honesty in contractual performance. The duty to act honestly in the performance of the contract precluded active deception. B Inc. breached its duty by knowingly misleading C Inc. into believing the winter maintenance agreement would not be terminated. By exercising the termination clause dishonestly, it breached the duty of honesty on a matter directly linked to the performance of the contract, even if the 10-day notice period was satisfied and irrespective of the motive for termination.

The organizing principle of good faith recognized in Bhasin v. Hrynew was not a free-standing rule, but instead manifested itself through existing good faith doctrines. Insofar as the organizing principle in Bhasin spoke to a related idea that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily, this principle, unlike Quebec law, was not a free-standing rule but rather a standard that underpinned and manifested itself in more specific doctrines. The duty of honest performance was a contract law doctrine, not a tort, and therefore a nexus with the contractual relationship was required. A breach must be directly linked to the performance of the contract. The required direct link between dishonesty and

performance from Bhasin was made plain, by way of simple comparison, when one considered how the framework for abuse of rights in Quebec connected the manner in which a contractual right was exercised to the requirements of good faith. Specifically, the direct link existed when the party performed their obligation or exercised their right under the contract dishonestly. When read together, arts. 6, 7 and 1375 of the Civil Code of Québec pointed to this connection by providing that no contractual right may be exercised abusively without violating the requirements of good faith.

It was unnecessary to answer C Inc.'s argument that, irrespective of the question of honesty, B Inc. breached a duty to exercise a discretionary power in good faith. Nor was it necessary to extend Bhasin to recognize a new duty of good faith relating to what C Inc. had described as "active non-disclosure" of information germane to performance.

Per Brown J. (concurring) (Moldaver, Rowe JJ. concurring): Disposing of the present appeal was a simple matter of applying the decision in Bhasin. C Inc.'s claim should be resolved by applying only the duty of honest performance. As a universally applicable minimum standard, all contracts must be performed honestly. Contracting parties may therefore not lie to, or otherwise knowingly mislead, each other about matters directly linked to performance. The majority's reliance on the civilian doctrine of abuse of a right distorts the analysis in Bhasin and elided the distinction between honest performance and good faith in the exercise of a contractual discretion.

Per Côté J. (dissenting): The appeal should be dismissed. C Inc.'s recourse could not be based on a breach of the duty of honest performance. Although B Inc.'s conduct may not have been laudable, it did not fall within the category of active dishonesty prohibited by that duty. The obligations flowing from the duty of honest performance were negative obligations. Extending the duty beyond that scope would detract from certainty in commercial dealings. Therefore, silence could not be considered dishonest within the meaning of Bhasin unless there was a positive obligation to speak. The trial judge's understanding of "active dishonesty" was tainted by an error of law because she did not consider the principle that, in order to amount to a breach of the duty of honest performance, any active dishonesty had to be directly linked to the performance of the contract as per Bhasin.

En 2012, un groupe d'associations condominiales (« B Inc. ») a conclu un contrat d'entretien hivernal de deux ans et un contrat distinct d'entretien estival avec C Inc. En vertu de la clause 9 du contrat d'entretien hivernal, B Inc. avait le droit de résilier ce contrat si C Inc. ne rendait pas un service satisfaisant, conformément aux dispositions du contrat. La clause 9 prévoyait également que si, pour quelque autre raison que ce soit, les services de C Inc. n'étaient plus requis, B Inc. pouvait résilier le contrat en donnant un préavis écrit de 10 jours.

Au début de 2013, B Inc. a décidé de résilier le contrat d'entretien hivernal mais a choisi de ne pas informer C Inc. de sa décision à ce moment-là. À la suite de discussions avec B Inc., C Inc. croyait qu'elle allait probablement obtenir un renouvellement de deux ans du contrat d'entretien hivernal et pendant l'été 2013, C Inc. a exécuté des travaux à titre gratuit qui dépassaient ce qui était prévu dans le contrat d'entretien estival afin d'inciter B Inc. à renouveler le contrat.

B Inc. a informé C Inc. de sa décision de résilier le contrat d'entretien hivernal en septembre 2013. C Inc. a déposé une action alléguant une violation de contrat, soutenant que B Inc. avait agi de mauvaise foi. La juge de première instance a accueilli l'action, accordé des dommages-intérêts et estimé que B Inc. avait manqué à son obligation contractuelle d'exécution honnête en agissant de mauvaise foi, tout particulièrement en n'informant pas C Inc. de son intention de mettre fin au contrat d'entretien hivernal et en laissant entendre que le contrat était susceptible d'être renouvelé.

B Inc. a interjeté appel. La Cour d'appel a annulé le jugement, estimant que la juge de première instance avait commis une erreur en élargissant à tort l'obligation d'exécution honnête d'une manière qui dépassait le libellé du contrat d'entretien hivernal. C Inc. a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Kasirer, J. (Wagner, J.C.C., Abella, Karakatsanis, Martin, JJ., souscrivant à son opinion) : Le débat portait sur la façon dont B Inc. a exercé la clause de résiliation. Dans le présent pourvoi, la doctrine de la bonne foi applicable était celle de l'obligation d'honnêteté en matière d'exécution des contrats. L'obligation d'agir honnêtement dans l'exécution du contrat empêchait de se livrer à une tromperie active. B Inc. a manqué à son obligation en induisant intentionnellement C Inc. en erreur, l'amenant ainsi à croire que le contrat d'entretien hivernal ne serait pas résilié. En se prévalant malhonnêtement de la clause de résiliation, B Inc. a manqué à l'obligation d'honnêteté au sujet d'une question directement liée à l'exécution du contrat, même si le délai de préavis de 10 jours a été respecté et sans égard aux raisons ayant motivé la résiliation.

Le principe directeur d'exécution de bonne foi reconnu dans l'arrêt Bhasin c. Hrynew n'est pas une règle autonome, mais se manifeste plutôt par les doctrines existantes en matière de bonne foi. Bien que le principe directeur visé par l'arrêt Bhasin traduise l'idée connexe que les parties doivent de façon générale exécuter leurs obligations contractuelles de manière honnête et

raisonnable, et non de façon abusive ou arbitraire, ce principe, à la différence du droit québécois, n'était pas une règle autonome, mais plutôt une norme qui sous-tendait des règles plus particulières et s'y manifestait.

L'obligation d'exécution honnête était une doctrine du droit des contrats, y manquer ne constituait pas un délit civil et, par conséquent, il devait y avoir un lien avec la relation contractuelle. Un manquement doit être directement lié à l'exécution du contrat. Le lien direct exigé entre la malhonnêteté et l'exécution dont il était question dans l'arrêt Bhasin était clairement mis en évidence, par voie de simple comparaison, lorsque l'on considérait comment le cadre d'analyse de l'abus de droit au Québec liait la manière dont un droit contractuel était exercé aux exigences de la bonne foi. Plus précisément, le lien direct existait lorsqu'une partie s'acquittait de son obligation ou exerçait son droit prévu au contrat de façon malhonnête. Lus ensemble, les art. 6, 7 et 1375 du Code civil du Québec mettaient ce lien en exergue en prévoyant qu'aucun droit contractuel ne peut être exercé de façon abusive sans violer les exigences de la bonne foi.

Il était inutile de répondre à l'argument de C Inc. selon lequel, sans égard à la question d'honnêteté, B Inc. avait manqué à une obligation d'exercer un pouvoir discrétionnaire de bonne foi. Il n'était pas non plus nécessaire d'étendre la teneur de l'arrêt Bhasin pour reconnaître une nouvelle obligation d'agir de bonne foi liée à ce que C Inc. a décrit comme étant une « non-divulgation active » d'information ayant trait à l'exécution.

Brown, J. (souscrivant à l'opinion des juges majoritaires) (Moldaver, Rowe, JJ., souscrivant à son opinion) : Pour disposer du présent pourvoi, il suffisait d'appliquer l'arrêt Bhasin. La demande de C Inc. devrait être résolue en appliquant uniquement l'obligation d'exécution honnête. Selon la norme minimale universelle applicable, tous les contrats doivent être exécutés de manière honnête. Les parties contractantes ne doivent donc pas se mentir ni autrement s'induire intentionnellement en erreur au sujet de questions directement liées à l'exécution du contrat. Le fait que les juges majoritaires se fondent sur la notion d'abus de droit en droit civil faussait l'analyse décrite dans l'arrêt Bhasin et gommait la distinction entre l'exécution honnête et la bonne foi dans l'exercice d'un pouvoir discrétionnaire contractuel.

Côté, J. (dissidente) : Le pourvoi devrait être rejeté. Le recours de C inc. ne saurait être fondé sur un manquement à l'obligation d'exécution honnête. Bien que la conduite de B Inc. n'ait pas été louable, elle ne tombait pas dans la catégorie de la conduite malhonnête prohibée par l'obligation contractuelle d'exécution honnête. Les obligations découlant de l'exécution honnête sont négatives. Étendre davantage la portée de l'obligation d'exécution honnête écarterait la stabilité des opérations commerciales. Par conséquent, le silence ne saurait être considéré comme malhonnête au sens de l'arrêt Bhasin, à moins qu'il n'y ait une obligation positive de parler. L'analyse de la « tromperie active » par la juge de première instance relevait d'une compréhension erronée du droit puisqu'elle n'a accordé aucune considération au principe que, pour constituer un manquement à l'obligation d'exécution honnête, la tromperie active doit être, selon l'arrêt Bhasin, directement liée à l'exécution du contrat.

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Yam Seng Pte Ltd. v. International Trade Corp Ltd. (2013), [2013] EWHC 111, [2013] 1 All E.R. (Comm) 1321 (Eng. Q.B.) — referred to

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Bhasin v. Hrynew (2011), 2011 ABQB 637, 2011 CarswellAlta 1905, 96 B.L.R. (4th) 73, [2012] 9 W.W.R. 728 (Alta. Q.B.) — considered

Bhasin v. Hrynew (2014), 2014 SCC 71, 2014 CSC 71, 2014 CarswellAlta 2046, 2014 CarswellAlta 2047, [2014] 11 W.W.R. 641, 27 B.L.R. (5th) 1, 464 N.R. 254, 379 D.L.R. (4th) 385, 20 C.C.E.L. (4th) 1, [2014] 3 S.C.R. 494, 584 A.R. 6, 623 W.A.C. 6, 4 Alta. L.R. (6th) 219 (S.C.C.) — followed

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Colonial Real Estate Co. v. Sisters of Charity (1918), 57 S.C.R. 585, 45 D.L.R. 193, 1918 CarswellQue 26 (S.C.C.) — considered

Danny's Construction Co. c. Birdair inc. (2013), 2013 QCCA 580, 2013 CarswellQue 3007 (C.A. Que.) — considered

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Fidler v. Sun Life Assurance Co. of Canada (2006), 2006 SCC 30, 2006 CarswellBC 1596, 2006 CarswellBC 1597, [2006] 8 W.W.R. 1, 2006 C.E.B. & P.G.R. 8202 (headnote only), *(*sub nom. *Sun Life Assurance Co. of Canada v. Fidler)* [2006] I.L.R. 1-4521, 39 C.C.L.I. (4th) 1, 350 N.R. 40, 227 B.C.A.C. 39, 374 W.A.C. 39, 57 B.C.L.R. (4th) 1, 53 C.C.E.L. (3d) 1, *(*sub nom. *Sun Life Assurance Co. of Canada v. Fidler)* 271 D.L.R. (4th) 1, [2006] 2 S.C.R. 3, *(*sub nom. *Sun Life Assurance Company of Canada v. Fidler)* 2007 C.L.L.C. 210-015, [2006] R.R.A. 525 (S.C.C.) — considered

Garland v. Consumers' Gas Co. (2004), 2004 SCC 25, 2004 CarswellOnt 1558, 2004 CarswellOnt 1559, 237 D.L.R. (4th) 385, 43 B.L.R. (3d) 163, 319 N.R. 38, 186 O.A.C. 128, 9 E.T.R. (3d) 163, [2004] 1 S.C.R. 629, 72 O.R. (3d) 80 (note), 42 Alta. L. Rev. 399, 72 O.R. (3d) 80, 2004 CSC 25 (S.C.C.) — considered

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Cases considered by *Côté J.* (dissenting):

Bhasin v. Hrynew (2014), 2014 SCC 71, 2014 CSC 71, 2014 CarswellAlta 2046, 2014 CarswellAlta 2047, [2014] 11 W.W.R. 641, 27 B.L.R. (5th) 1, 464 N.R. 254, 379 D.L.R. (4th) 385, 20 C.C.E.L. (4th) 1, [2014] 3 S.C.R. 494, 584 A.R. 6, 623 W.A.C. 6, 4 Alta. L.R. (6th) 219 (S.C.C.) — considered in a minority or dissenting opinion

Housen v. Nikolaisen (2002), 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235, 2002 CSC 33 (S.C.C.) — considered in a minority or dissenting opinion

Statutes considered by *Kasirer J.*:

Code civil du Québec, L.Q. 1991, c. 64

en général — referred to

art. 6 — considered

art. 7 — considered

art. 1375 — considered

Statutes considered by *Brown J.*:

Code civil du Québec, L.Q. 1991, c. 64

en général — referred to

art. 6 — considered

art. 7 — considered

art. 1375 — considered

of honest performance in Quebec civil law most typically imposes negative obligations — to refrain from lying, for example — in the measure of the abuse of a contractual right (Baudouin and Jobin, at No. 161). Care must be taken, I hasten to say, not to confuse the [TRANSLATION] "duty to act faithfully" recognized in this regard, with the fiduciary duty of loyalty that stands outside of good faith in both legal traditions.

87 I would add that, as Cromwell J. made plain, the recognition of the duty to act honestly in performance does not necessarily mean that the ideal spoken to in the organizing principle of good faith set forth in *Bhasin* might not manifest itself otherwise. Even within the limited compass of corrective justice, circumstances may arise in which the organizing principle would encourage the view that contractual rights must be exercised in a manner that was neither capricious nor arbitrary, for example, or that some duty to cooperate between the parties be imposed, though recognizing that, contrary to fiduciary duties, "good faith performance does not engage duties of loyalty to the other contracting party or a duty to put the interests of the other contracting party first" (*Bhasin*, at para. 65). But for present purposes, it is not necessary to go that further step: I am of the view that where the exercise of a contractual right is undertaken dishonestly, the exercise is in breach of contract and this wrong must be corrected. That is what happened here.

88 The question that remains is whether Baycrest lied to or knowingly misled Callow and thus breached the duty to act honestly.

89 I recognize that in cases where there is no outright lie present, like the case before us, it is not always obvious whether a party "knowingly misled" its counterparty. Yet, Baycrest is wrong to suggest that nothing stands between the outright lie and silence. Elsewhere, as in the law of misrepresentation, for instance, one encounters examples of courts determining whether a misrepresentation was present, regardless of whether there was some direct lie (see A. Swan, "The Obligation to Perform in Good Faith: Comment on *Bhasin v. Hrynew*" (2015), 56 *Can. Bus. L.J.* 395, at p. 402). As Professor Waddams has written, "[a]n incomplete statement may be as misleading as a false one, and such half-truths have frequently been treated as legally significant misrepresentations." Ultimately, he wrote, "it is open to the court to hold that the concealment of the material facts can, when taken with general statements, true in themselves but incomplete, turn those statements into misrepresentations" (*The Law of Contracts* (7th ed. 2017), at No. 441). Similarly, where a party makes a statement it believes to be true, but later circumstances affect the truth of that earlier statement, courts have found, in various contexts, that the party has an obligation to correct the misrepresentation (see *Xerex Exploration Ltd. v. Petro-Canada*, 2005 ABCA 224, 47 Alta. L.R. (4th) 6 (Alta. C.A.), at para. 58; see also C. Mummé, "*Bhasin v. Hrynew*: A New Era for Good Faith in Canadian Employment Law, or Just Tinkering at the Margins?" (2016), 32 *Intl J. Comp. Lab. L. & Ind. Rel.* 117, at p. 123).

90 These examples encourage the view that the requirements of honesty in performance can, and often do, go further than prohibiting outright lies. Indeed, the concept of "misleading" one's counterparty — the term invoked separately by Cromwell J. — will in some circumstances capture forms of silence or omissions. One can mislead through action, for example, by saying something directly to its counterparty, or through inaction, by failing to correct a misapprehension caused by one's own misleading conduct. To me these are close cousins in the catalogue of deceptive contractual practices (see, e.g., *Yam Seng Pte Ltd. v. International Trade Corp Ltd.*, [2013] EWHC 111, [2013] 1 All E.R. (Comm) 1321 (Eng. Q.B.), at para. 141).

91 At the end of the day, whether or not a party has "knowingly misled" its counterparty is a highly fact-specific determination, and can include lies, half-truths, omissions, and even silence, depending on the circumstances. I stress that this list is not closed; it merely exemplifies that dishonesty or misleading conduct is not confined to direct lies. No reviewable error has been shown in the finding of dishonesty that took place in anticipation of the exercise of clause 9 here. I would not interfere with the trial judge's view here on a matter that is owed deference. Deference should be shown to the trial judge in reviewing her discretionary exercise of weighing the evidence, especially given credibility played a part in her analysis, as she explained.

92 Reading the whole of the first instance judgment, I see no consequential error in the account given by the trial judge of the law on the duty of honest performance. She did not base her conclusions on some free-standing duty to disclose information. Instead, she examined whether Baycrest knowingly misled Callow as to the standing of the winter maintenance agreement, and thus wrongfully exercised its right of termination. Despite this, however, Baycrest argues that the trial judge erred in failing to

recognize that its conduct did not reach the "much higher standard" spoken to in *Bhasin*. I disagree. No such error has been shown.

93 It is helpful for our purposes to recall that on the facts in *Bhasin*, part of the dishonest conduct concerned the respondent Can-Am's plans to reorganize its activities in Alberta. Its plan contemplated invoking its contractual right of non-renewal to force a merger between Mr. Bhasin and his competitor, Mr. Hrynew. In effect, this reorganization would have given Mr. Bhasin's business to Mr. Hrynew. Can-Am, however, had said nothing of its plan to Mr. Bhasin. When Mr. Bhasin first heard of the merger plans he questioned an official of Can-Am about its intentions. "[T]he official 'equivocated'", Cromwell J. explained, "and did not tell him the truth that from Can-Am's perspective this was a 'done deal'" (para. 100). Cromwell J. later concluded that "Can-Am's breach of contract consisted of its failure to be honest with Mr. Bhasin about its contractual performance and, in particular, with respect to its settled intentions with respect to renewal" (para. 108). Cromwell J. wrote: "The trial judge made a clear finding of fact that Can-Am 'acted dishonestly toward Bhasin in exercising the non-renewal clause'. There is no basis to interfere with that finding on appeal. It follows that Can-Am breached its duty to perform the Agreement honestly" (para. 94 (references omitted)).

94 It is true that Baycrest remained silent about its decision to terminate Callow's contract and that clause 9, on its face, did not impose on it a duty to disclose its intention except for on the 10-day notice requirement. That said, it had to refrain, as the trial judge said, from "deceiv[ing] Callow" through a series of "active communications" (para. 66). When it failed to refrain from doing so in anticipation of exercising its termination right, it deceived Callow into thinking it would leave the existing winter services agreement intact.

95 These "active communications", as I understand the trial judge's findings of fact, came in two forms. First, Mr. Peixoto made statements to Mr. Callow suggesting that a renewal of the winter maintenance agreement was likely. As the trial judge found, "[a]fter his discussions with Mr. Peixoto and Mr. Campbell, Mr. Callow thought that he was likely to get a two-year renewal of his winter maintenance services contract and [it was] satisfied with his services [under the existing agreement which had one winter to run]. This assumption is also supported by the documentary evidence, especially by the private e-mails between Mr. Peixoto and Mr. Campbell" (para. 41).

96 Baycrest attempts to recast the significance of this finding, arguing that Mr. Callow only had casual discussions with two of the JUC members — Mr. Peixoto and Mr. Campbell — about the possibility of a contract renewal. Such casual discussions, it says, cannot rise to the level of a lie. This position ignores the key finding in the trial judge's reasons that it was Mr. Peixoto — the JUC member who negotiated the main pricing terms with Callow for the winter maintenance agreement — who made statements to Mr. Callow suggesting that a renewal was likely (paras. 23 and 40-43). After making credibility findings against Mr. Peixoto, the trial judge found that he had "led Mr. Callow to believe that all was fine with the winter [contract]" and that Baycrest was "interested in a future extension of Callow's contracts" (para. 47). This dishonesty did not take place in the abstract: the trial judge found it to be relevant to the exercise of clause 9.

97 The second form of "active communications" that deceived Callow was related to the "freebies" Callow had offered Baycrest in the summer of 2013. As the trial judge found, Callow performed this free work because Mr. Callow wanted to provide an incentive for Baycrest to renew the winter maintenance agreement. Baycrest, for its part, gladly accepted the services offered by Callow.

98 Again, Baycrest attempts to recast the significance of these findings, arguing that "there is nothing inherently unlawful or unfair about accepting a contractor's incentives offered in the hopes of securing a new contract or the renewal of an existing contract" (R.F., at para. 112). Whether or not that is the case, I again stress that Mr. Peixoto "understood that the work performed by Callow was a 'freebie' to add an incentive for the boards to renew his winter maintenance services contract" and "advised Mr. Callow that he would tell the other board members about this work" (trial reasons, at para. 43). These active communications by Baycrest suggested, deceptively, that there was hope for renewal and, perforce, the current contract would not be terminated.

99 Considering Baycrest's conduct as a whole over those few months, it was certainly reasonable for Mr. Callow, who was led to believe that a renewal was likely, to infer that Baycrest had not decided to terminate the ongoing contract. Moreover,

TAB 6

2023 ONSC 2291, 2023 CarswellOnt 5203

2023 ONSC 2291
Ontario Superior Court of Justice

Malhotra v. City of Brampton

2023 CarswellOnt 5203, 2023 ONSC 2291

THE MATTER OF THE BANKRUPTCY OF VERINDER MALHOTRA OF THE CITY OF BRAMPTON IN THE REGIONAL MUNCIPALITY OF PEEL

Reg. Ilchenko

Heard: November 24, 2022
Judgment: January 31, 2023
Docket: 32-1758002

Counsel: Philip Gertler, Fred Tayar, for Bankrupt, Verinder Malhotra
Fred Tayar, for Kiran Malhotra, wife of the Bankrupt
Ted Laan, for Creditor, Gurdeep Nagra
Brandon Jaffe, for A. Farber and Partners Inc., the Bankruptcy Trustee of the Bankruptcy Estate of Verinder Malhotra (the "Trustee") not appearing on this expungement Motion and Trustee not opposing the relief sought by the Bankrupt

Subject: Civil Practice and Procedure; Estates and Trusts; Insolvency; Property
Related Abridgment Classifications
Bankruptcy and insolvency
IX Proving claim
IX.4 Miscellaneous
Headnote
Bankruptcy and insolvency --- Proving claim — Miscellaneous
Table of Authorities
Cases considered by *Reg. Ilchenko*:

Badger, Re (1929), 11 C.B.R. 118, [1929] 3 W.W.R. 568, 24 Sask. L.R. 229, *(*sub nom. *Ostrander & Co. v. Canada Credit Men's Trust Assn.)* [1930] 2 D.L.R. 88, 1929 CarswellSask 3 (Sask. C.A.) — referred to

Bellatrix Exploration Ltd (Re) (2020), 2020 ABQB 809, 2020 CarswellAlta 2545, 86 C.B.R. (6th) 191 (Alta. Q.B.) — considered

Beynon, Re (2003), 2003 CarswellOnt 3515, 45 C.B.R. (4th) 172, [2003] O.T.C. 832 (Ont. S.C.J.) — referred to

CWB Maxium Financial Inc v. 2026998 Alberta Ltd (2021), 2021 ABQB 137, 2021 CarswellAlta 392, 88 C.B.R. (6th) 196, [2021] 7 W.W.R. 299, 25 Alta. L.R. (7th) 3 (Alta. Q.B.) — considered

Karataglidis, Re (2003), 2003 CarswellOnt 5795, 47 C.B.R. (4th) 241 (Ont. S.C.J.) — referred to

Marsuba Holdings Ltd., Re (1998), 1998 CarswellBC 2792, 8 C.B.R. (4th) 268 (B.C. S.C.) — considered

McIntosh v. Parent (1924), 55 O.L.R. 552, [1924] 4 D.L.R. 420, 1924 CarswellOnt 212 (Ont. C.A.) — considered

Roberts v. E. Sands & Associates Inc. (2013), 2013 BCSC 902, 2013 CarswellBC 1618, 4 C.B.R. (6th) 1 (B.C. S.C.) — considered

Roberts v. E. Sands & Associates Inc. (2014), 2014 BCCA 122, 2014 CarswellBC 846, 10 C.B.R. (6th) 263, 353 B.C.A.C. 217, 603 W.A.C. 217, 60 B.C.L.R. (5th) 259 (B.C. C.A.) — considered

Royal Bank v. Insley (2010), 2010 SKQB 17, 2010 CarswellSask 47, 64 C.B.R. (5th) 105, *(*sub nom. *Insley (Bankrupt), Re)* 352 Sask. R. 56 (Sask. Q.B.) — considered

Syndic d'Isolation Techno-Pro inc., Re (2019), 2019 CarswellQue 3527, 71 C.B.R. (6th) 285, 2019 QCCS 5825 (C.S. Que.) — considered

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

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9354-9186 Québec inc. v. Callidus Capital Corp. (2020), 2020 SCC 10, 2020 CSC 10, 2020 CarswellQue 3772, 2020 CarswellQue 3773, 78 C.B.R. (6th) 1, 444 D.L.R. (4th) 373, 1 B.L.R. (6th) 1, [2020] 1 S.C.R. 521 (S.C.C.) — considered

Statutes considered:

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

Generally — referred to

s. 4.2 [en. 2019, c. 29, s. 133] — considered

s. 4.2(2) [en. 2019, c. 29, s. 133] — considered

s. 37 — considered

s. 38 — referred to

s. 116 — referred to

s. 125 — considered

s. 135 — considered

s. 135(5) — considered

s. 201 — considered

s. 201(1) — considered

s. 205 — referred to

s. 206 — referred to

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

Generally — referred to

s. 18.6 [en. 1997, c. 12, s. 125] — considered

Rules considered:

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

Generally — referred to

R. 14 — referred to

MOTION by bankrupt for order that certain claim be expunged or reduced, and for order modifying decision of trustee.

***Reg. Ilchenko*:**

I. Overview

1 This motion was brought by the Bankrupt for the relief set out in his Motion Record dated February 24, 2019 (the "*Expungement Motion*"), requesting, *inter alia*:

198 The Bankrupt has raised in his Factum and in Oral Argument before me the issue that the conduct of Nagra in taking contrary positions relating to the existence of the Governing Agreement, which I have found on the evidence to exist and be enforceable, was an abuse of process, citing *Carling* and *Mcintosh v Parent*, these contrary positions being:

> 1) at the Sentencing Hearing, as discussed in detail where Nostrand testified for Nagra's benefit as to the existence and substance of the Governing Agreement without naming it as such;
>
> 2) with respect to the settlement of the Vermont Negligence Action which appears from the Trial Balance to be the source of the vast majority of the remaining funds in the possession of the Trustee, which were obtained as a result of the Trustee taking the position that the Governing Agreement existed and should have been monumented by Nostrand, while Nagra was an inspector of the Estate instructing the Trustee;
>
> 3) In the Brampton Collection Action where Nagra denied the existence of the Governing Agreement;
>
> 4) On this Motion where Nagra denied the existence of the Governing Agreement;
>
> 5) In the Proof of Claim where Nagra did not reveal the existence of the position of the Bankrupt and the evidence of Nostrand about the existence of the Governing Agreement;

199 However the Bankrupt did not specifically plead the duty of Good Faith under s.4.2 of the BIA on this Motion.

200 Given my findings under the provisions of s.135(5) that the Nagra Claim is to be expunged under that test, I do not have to make a determination under the provisions of s.4.2 of the BIA.

201 I note the specific words of s.4.2(2) "...on application by any interested person" may place the statutory limit Riordan, S.C.J mentions in *Techno-Pro*.

202 The rather astounding evidence on this Motion of the conduct of Nagra, had the Bankrupt raised s.4.2 of the BIA as a ground on this Motion, could fit within the tests set out by Mah, J. in *CWB* that the Court is to consider under s.4.2 of the BIA:

> "...Overall, given the comments of the Supreme Court of Canada in *Callidus*, I am prepared to say that the intent and policy objectives of the BIA should inform the Court's consideration of the propriety of creditor behaviour."

And

> "• Interested persons in proceedings under the BIA are statutorily required to act in good faith with respect to those proceedings.
>
> . . .
>
> • Whether dishonesty has occurred in a given case is fact-specific and may, depending on the circumstances, include lies, half-truths, omissions and even silence."

203 And similarly in *Bellatrix*:

> "The court will find bad faith conduct where a debtor, creditor or their professionals fail to meet the requirements to act candidly, honestly, forthrightly and reasonably in their dealings with one another and the court; where parties act capriciously and arbitrarily; or where they lie or otherwise knowingly mislead each other about matters relating to the insolvency proceedings."

204 The evidence before me of Nagra's conduct in:

TAB 7

2021 ABQB 137
Alberta Court of Queen's Bench

CWB Maxium Financial Inc v. 2026998 Alberta Ltd

2021 CarswellAlta 392, 2021 ABQB 137, [2021] 7 W.W.R. 299, [2021] A.W.L.D. 2089, [2021] A.W.L.D. 2090, [2021] A.W.L.D. 2091, [2021] A.W.L.D. 2092, [2021] A.W.L.D. 2093, [2021] A.W.L.D. 2126, [2021] A.W.L.D. 2127, [2021] A.W.L.D. 2128, [2021] A.W.L.D. 2135, [2021] A.W.L.D. 2152, 25 Alta. L.R. (7th) 3, 331 A.C.W.S. (3d) 229, 88 C.B.R. (6th) 196

CWB Maxium Financial Inc. and Canadian Western Bank (Plaintiffs) and 2026998 Alberta Ltd., Grandin Prescription Centre Inc., 517751 Alberta Ltd., 1396987Alberta Ltd., 1396966 Alberta Ltd. and Harold Douglas Loder (Defendants)

Douglas R. Mah J.

Heard: January 11-12, 2021
Judgment: February 23, 2021
Docket: Edmonton 2003-04457

Counsel: Terrence M. Warner, Spencer Norris, for Plaintiffs
Jim Schmidt, for Defendants
Ryan F.T. Quinlan, for Interim Receiver, MNP Ltd.

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Evidence; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
III Applications for bankruptcy orders
III.2 Application by only creditor
Bankruptcy and insolvency
III Applications for bankruptcy orders
III.5 Practice and procedure on application
Bankruptcy and insolvency
V Bankruptcy and receiving orders
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.2 Orders
Bankruptcy and insolvency
XX Miscellaneous
Estoppel
IV Practice and procedure
IV.3 Miscellaneous
Evidence
VI Witnesses
VI.4 Credibility
VI.4.a Duty of judge in assessing
Evidence
VII Examination of witnesses
VII.4 Cross-examination
VII.4.m Effect of failure to cross-examine

Guarantee and indemnity
II Guarantee
II.1 Contract of guarantee
II.1.d Consideration
II.1.d.ii Forbearance to sue
Personal property security
I Nature and scope of legislation
I.10 Miscellaneous

Headnote

Bankruptcy and insolvency --- Bankruptcy petitions for receiving orders — Petition by only creditor

Plaintiffs, which were comprised of M Inc. and CWB, with M Inc. being wholly owned subsidiary of CWB, were creditors, and defendant, which included L Group, which owned and operated pharmacies, were debtors — M Inc. was incorporated in Ontario in 2016 in conjunction with CWB's acquisition of certain assets of M Financial Services Inc. (MFSI) and D Financial Services (DFS), and MFSI and DFS were related companies but operated as one larger enterprise — In 2014, L, who was principal of corporate defendant, moved entirety of L Group's loan portfolio to major bank, and L had granted personal guarantees to bank and guaranteed L Group's indebtedness, L Group's cash flow was reduced, L unsuccessfully requested that bank consider refinancing, and recovery action was started — 195 (which was amalgamation of MFSI and DFS) acquired bank's debt and security, and DFS, had acquired loan related to purchase of L Group, and it was agreed between L and DFS that 114 (L Group company that owned C pharmacy) would execute new promissory note and amount was not paid — Drug supplier, K had one outstanding loan guarantee and this was part of bank's security for L Group indebtedness, it was assigned to 195, and having acquired bank's debt and security, 195 carried on with receivership application, causing PwC to be court-appointed as Receiver over L Group in 2016 — PwC reported in 2017 that shortfall to 195 was $2.37 million, and M Inc. said amount remaining unpaid from C Pharmacy, that had been converted to unpaid new promissory note, was part of shortfall, that amount was reduced to $970,000, after 195 reached settlement of $1.4 million with K in respect of its $2 million guarantee of L — Interim receivership order has been in place since March 2020 and extended several times, pending final determination, and M Ltd. was appointed interim receiver — Plaintiffs brought application for final receivership order — Application granted — Application of good faith doctrines in contractual context may lead to finding that transgressing party was liable in damages for breach of contract, and adopting those doctrines to inform good faith requirement in s. 4.2 of Bankruptcy and Insolvency Act (BIA) may lead to invocation of broad discretionary authority to grant "any order that it considers appropriate in the circumstances" — Secured creditor seeking Receivership Order was "interested person" subject to good faith requirement, and its conduct in events preceding application was covered by that requirement, where that conduct was factually and temporally connected to proceedings, i.e. such conduct is "with respect to" BIA proceeding — Remedy, at least in this case and given broad discretion of court under s. 4.2 of BIA, may include denial of Receivership Order, and conduct of party alleged to have breached good faith requirement should be assessed in light of intent and policy objectives of BIA .

Personal property security --- Nature and scope of legislation — Miscellaneous

Plaintiffs, which were comprised of M Inc. and CWB, with M Inc. being wholly owned subsidiary of CWB, were creditors, and defendant, which included L Group, which owned and operated pharmacies, were debtors — M Inc. was incorporated in Ontario in 2016 in conjunction with CWB's acquisition of certain assets of M Financial Services Inc. (MFSI) and D Financial Services (DFS), and MFSI and DFS were related companies but operated as one larger enterprise — In 2014, L, who was principal of corporate defendant, moved entirety of L Group's loan portfolio to major bank, and L had granted personal guarantees to bank and guaranteed L Group's indebtedness, L Group's cash flow was reduced, L unsuccessfully requested that bank consider refinancing, and recovery action was started — 195 (which was amalgamation of MFSI and DFS) acquired bank's debt and security, and DFS, had acquired loan related to purchase of L Group, and it was agreed between L and DFS that 114 (L Group company that owned C pharmacy) would execute new promissory note and amount was not paid — Drug supplier, K had one outstanding loan guarantee and this was part of bank's security for L Group indebtedness, it was assigned to 195, and having acquired bank's debt and security, 195 carried on with receivership application, causing PwC to be court-appointed as Receiver over L Group in 2016 — PwC reported in 2017 that shortfall to 195 was $2.37 million, and M Inc. said amount remaining unpaid from C Pharmacy, that had been converted to unpaid new promissory note, was part of shortfall, that amount was reduced to $970,000, after 195 reached settlement of $1.4 million with K in respect of its $2 million guarantee of L — Interim receivership

order has been in place since March 2020 and extended several times, pending final determination, and M Ltd. was appointed interim receiver — Plaintiffs brought application for final receivership order — Application granted — Defendants relied on s. 66(1) of Alberta Personal Property Security Act (PPSA) regarding good faith requirement, and requirement of good faith here was joined with concurrent duty to act in commercially reasonable manner — Requirement as it appeared in s. 66(1) of PPSA, with regard to secured creditor acquiring or discharging right as described in that section, would not be different than good faith requirement in s. 4.2 of BIA, as it pertained to conduct of creditors, i.e. it prohibited dishonesty and misrepresentation in acquisition or exercise of right — Since standards of good faith and commercial reasonableness were conjunctive, breach of one of them was enough to attract consequences .

Bankruptcy and insolvency --- Bankruptcy petitions for receiving orders — Practice and procedure on petition — Evidentiary issues

Plaintiffs, which were comprised of M Inc. and CWB, with M Inc. being wholly owned subsidiary of CWB, were creditors, and defendant, which included L Group, which owned and operated pharmacies, were debtors — M Inc. was incorporated in Ontario in 2016 in conjunction with CWB's acquisition of certain assets of M Financial Services Inc. (MFSI) and D Financial Services (DFS), and MFSI and DFS were related companies but operated as one larger enterprise — In 2014, L, who was principal of corporate defendant, moved entirety of L Group's loan portfolio to major bank, and L had granted personal guarantees to bank and guaranteed L Group's indebtedness, L Group's cash flow was reduced, L unsuccessfully requested that bank consider refinancing, and recovery action was started — 195 (which was amalgamation of MFSI and DFS) acquired bank's debt and security, and DFS, had acquired loan related to purchase of L Group, and it was agreed between L and DFS that 114 (L Group company that owned C pharmacy) would execute new promissory note and amount was not paid — Drug supplier, K had one outstanding loan guarantee and this was part of bank's security for L Group indebtedness, it was assigned to 195, and having acquired bank's debt and security, 195 carried on with receivership application, causing PwC to be court-appointed as Receiver over L Group in 2016 — PwC reported in 2017 that shortfall to 195 was $2.37 million, and M Inc. said amount remaining unpaid from C Pharmacy, that had been converted to unpaid new promissory note, was part of shortfall, that amount was reduced to $970,000, after 195 reached settlement of $1.4 million with K in respect of its $2 million guarantee of L — Interim receivership order has been in place since March 2020 and extended several times, pending final determination, and M Ltd. was appointed interim receiver — Plaintiffs brought application for final receivership order — Application granted — Evidentiary objection was valid with respect to some of documents, as hearing of matter was cast as summary trial — It was ruled that viva voce evidence was not necessary and that trial would be on record and evidence that was extraneous to record should not be entered — In summary trial of this nature, record consisted of various affidavits filed by parties, transcripts of questioning that occurred on those affidavits, exhibits entered or referred to during questioning and responses to undertakings, if any, and, accordingly, court was confined to record.

Evidence --- Examination of witnesses — Cross-examination — Effect of failure to cross-examine

Plaintiffs, which were comprised of M Inc. and CWB, with M Inc. being wholly owned subsidiary of CWB, were creditors, and defendant, which included L Group, which owned and operated pharmacies, were debtors — M Inc. was incorporated in Ontario in 2016 in conjunction with CWB's acquisition of certain assets of M Financial Services Inc. (MFSI) and D Financial Services (DFS), and MFSI and DFS were related companies but operated as one larger enterprise — In 2014, L, who was principal of corporate defendant, moved entirety of L Group's loan portfolio to major bank, and L had granted personal guarantees to bank and guaranteed L Group's indebtedness, L Group's cash flow was reduced, L unsuccessfully requested that bank consider refinancing, and recovery action was started — 195 (which was amalgamation of MFSI and DFS) acquired bank's debt and security, and DFS, had acquired loan related to purchase of L Group, and it was agreed between L and DFS that 114 (L Group company that owned C pharmacy) would execute new promissory note and amount was not paid — Drug supplier, K had one outstanding loan guarantee and this was part of bank's security for L Group indebtedness, it was assigned to 195, and having acquired bank's debt and security, 195 carried on with receivership application, causing PwC to be court-appointed as Receiver over L Group in 2016 — PwC reported in 2017 that shortfall to 195 was $2.37 million, and M Inc. said amount remaining unpaid from C Pharmacy, that had been converted to unpaid new promissory note, was part of shortfall, that amount was reduced to $970,000, after 195 reached settlement of $1.4 million with K in respect of its $2 million guarantee of L — Plaintiffs brought application for final receivership order — Application granted — L was cross-examined on core contradictory matters, which included origin of residual indebtedness, whether he had been misled in 2019-2020 about whether restructuring would occur, and what he knew about roles of M Inc. and CWB in approving restructuring — It was found that much of objection related

to detail, not necessarily central issue, plaintiffs' counsel chose not to cross-examine but rather to challenge L's evidence with reference to other evidence, and uncontradicted evidence did not necessarily mean that it must be accepted for its truth — It was found that M Inc. did not engage in misrepresentation or dishonesty in dealing with L's refinancing request, M Inc. did approve restructuring, and it was just not on terms that L wanted, and in particular, in end, L rejected concept of using forbearance agreement as framework for restructuring.

Evidence --- Witnesses — Credibility — Duty of judge in assessing

Plaintiffs, which were comprised of M Inc. and CWB, with M Inc. being wholly owned subsidiary of CWB, were creditors, and defendant, which included L Group, which owned and operated pharmacies, were debtors — M Inc. was incorporated in Ontario in 2016 in conjunction with CWB's acquisition of certain assets of M Financial Services Inc. (MFSI) and D Financial Services (DFS), and MFSI and DFS were related companies but operated as one larger enterprise — In 2014, L, who was principal of corporate defendant, moved entirety of L Group's loan portfolio to major bank, and L had granted personal guarantees to bank and guaranteed L Group's indebtedness, L Group's cash flow was reduced, L unsuccessfully requested that bank consider refinancing, and recovery action was started — 195 (which was amalgamation of MFSI and DFS) acquired bank's debt and security, and DFS, had acquired loan related to purchase of L Group, and it was agreed between L and DFS that 114 (L Group company that owned C pharmacy) would execute new promissory note and amount was not paid — Drug supplier, K had one outstanding loan guarantee and this was part of bank's security for L Group indebtedness, it was assigned to 195, and having acquired bank's debt and security, 195 carried on with receivership application, causing PwC to be court-appointed as Receiver over L Group in 2016 — PwC reported in 2017 that shortfall to 195 was $2.37 million, and M Inc. said amount remaining unpaid from C Pharmacy, that had been converted to unpaid new promissory note, was part of shortfall, that amount was reduced to $970,000, after 195 reached settlement of $1.4 million with K in respect of its $2 million guarantee of L — Plaintiffs brought application for final receivership order — Application granted — It could not be seen in evidence where L was promised particular form of restructuring, and evidence showed that M Inc., throughout fall of 2019 and into early 2020, was working assiduously toward restructuring that L was seeking — It was also apparent that there were concerns expressed at M Inc. about pharmacy's ongoing viability which resulted in ultimate decision-maker at CWB approving revised form of restructuring premised on executed forbearance agreement — McG, who was manager at M Inc., was also clear that any refinancing proposal required higher approval, and while McG certainly made recommendation to credit committee, it could not be seen where either M Inc. or McG promised specific outcome to refinancing request — It was found that M Inc. did what it said it would do and did not take steps to enforce its demands until it had reached tend of road with L with regard to restructuring discussions, and when such discussions failed, both sides expected, as reasonable commercial parties would expect, that suspension of enforcement action would end.

Guarantee and indemnity --- Guarantee — Contract of guarantee — Consideration — Forbearance to sue

Plaintiffs, which were comprised of M Inc. and CWB, with M Inc. being wholly owned subsidiary of CWB, were creditors, and defendant, which included L Group, which owned and operated pharmacies, were debtors — M Inc. was incorporated in Ontario in 2016 in conjunction with CWB's acquisition of certain assets of M Financial Services Inc. (MFSI) and D Financial Services (DFS), and MFSI and DFS were related companies but operated as one larger enterprise — In 2014, L, who was principal of corporate defendant, moved entirety of L Group's loan portfolio to major bank, and L had granted personal guarantees to bank and guaranteed L Group's indebtedness, L Group's cash flow was reduced, L unsuccessfully requested that bank consider refinancing, and recovery action was started — 195 (which was amalgamation of MFSI and DFS) acquired bank's debt and security, and DFS, had acquired loan related to purchase of L Group, and it was agreed between L and DFS that 114 (L Group company that owned C pharmacy) would execute new promissory note and amount was not paid — Drug supplier, K had one outstanding loan guarantee and this was part of bank's security for L Group indebtedness, it was assigned to 195, and having acquired bank's debt and security, 195 carried on with receivership application, causing PwC to be court-appointed as Receiver over L Group in 2016 — PwC reported in 2017 that shortfall to 195 was $2.37 million, and M Inc. said amount remaining unpaid from C Pharmacy, that had been converted to unpaid new promissory note, was part of shortfall, that amount was reduced to $970,000, after 195 reached settlement of $1.4 million with K in respect of its $2 million guarantee of L — Interim receivership order has been in place since March 2020 and extended several times, pending final determination, and M Ltd. was appointed interim receiver — Plaintiffs brought application for final receivership order — Application granted — It was found that when M Inc. said it would not resile from major components, L's signing of forbearance agreement was left on "take it or leave it" basis — From M Inc.'s perspective, L wanted M Inc. to strip away some of core components which, it seemed, it felt was necessary to

protect its interests — It was not believed that M Inc., in failing to give in to L's objections to forbearance agreement, engaged in bad faith, as M Inc. was entitled to do what it felt was reasonably necessary, such as insist on "essence" of agreement, to protect its interests — L was similarly entitled to do what he believed was necessary to protect his interests, and both did so, and that was why matter was now in litigation.

Bankruptcy and insolvency --- Practice and procedure in courts — Orders — Miscellaneous

Plaintiffs, which were comprised of M Inc. and CWB, with M Inc. being wholly owned subsidiary of CWB, were creditors, and defendant, which included L Group, which owned and operated pharmacies, were debtors — M Inc. was incorporated in Ontario in 2016 in conjunction with CWB's acquisition of certain assets of M Financial Services Inc. (MFSI) and D Financial Services (DFS), and MFSI and DFS were related companies but operated as one larger enterprise — In 2014, L, who was principal of corporate defendant, moved entirety of L Group's loan portfolio to major bank, and L had granted personal guarantees to bank and guaranteed L Group's indebtedness, L Group's cash flow was reduced, L unsuccessfully requested that bank consider refinancing, and recovery action was started — 195 (which was amalgamation of MFSI and DFS) acquired bank's debt and security, and DFS, had acquired loan related to purchase of L Group, and it was agreed between L and DFS that 114 (L Group company that owned C pharmacy) would execute new promissory note and amount was not paid — Drug supplier, K had one outstanding loan guarantee and this was part of bank's security for L Group indebtedness, it was assigned to 195, and having acquired bank's debt and security, 195 carried on with receivership application, causing PwC to be court-appointed as Receiver over L Group in 2016 — PwC reported in 2017 that shortfall to 195 was $2.37 million, and M Inc. said amount remaining unpaid from C Pharmacy, that had been converted to unpaid new promissory note, was part of shortfall, that amount was reduced to $970,000, after 195 reached settlement of $1.4 million with K in respect of its $2 million guarantee of L — Interim receivership order has been in place since March 2020 and extended several times, pending final determination, and M Ltd. was appointed interim receiver — Plaintiffs brought application for final receivership order — Application granted — It was found satisfactory that statement made by M Inc.'s counsel before Associate Chief Justice, concerning retention of management during period of Interim Receivership, was not misleading, intended to mislead or recklessly made — It aligned with what happened with regard to day-to-day management of pharmacy, and it was acknowledged that L did lose his salary as result of business decision made by Interim Receiver — In these circumstances, it could not be seen how failure to disclose exact steps involved in internal approval process or levels of authority within organization, in case of private lender, amounted to breach of good-faith requirement — Good faith in private commercial relations was not same as duty of fairness and transparency with regard to decision-making in public law realm.

Estoppel --- Practice and procedure — Miscellaneous

Plaintiffs, which were comprised of M Inc. and CWB, with M Inc. being wholly owned subsidiary of CWB, were creditors, and defendant, which included L Group, which owned and operated pharmacies, were debtors — M Inc. was incorporated in Ontario in 2016 in conjunction with CWB's acquisition of certain assets of M Financial Services Inc. (MFSI) and D Financial Services (DFS), and MFSI and DFS were related companies but operated as one larger enterprise — In 2014, L, who was principal of corporate defendant, moved entirety of L Group's loan portfolio to major bank, and L had granted personal guarantees to bank and guaranteed L Group's indebtedness, L Group's cash flow was reduced, L unsuccessfully requested that bank consider refinancing, and recovery action was started — 195 (which was amalgamation of MFSI and DFS) acquired bank's debt and security, and DFS, had acquired loan related to purchase of L Group, and it was agreed between L and DFS that 114 (L Group company that owned C pharmacy) would execute new promissory note and amount was not paid — Drug supplier, K had one outstanding loan guarantee and this was part of bank's security for L Group indebtedness, it was assigned to 195, and having acquired bank's debt and security, 195 carried on with receivership application, causing PwC to be court-appointed as Receiver over L Group in 2016 — PwC reported in 2017 that shortfall to 195 was $2.37 million, and M Inc. said amount remaining unpaid from C Pharmacy, that had been converted to unpaid new promissory note, was part of shortfall, that amount was reduced to $970,000, after 195 reached settlement of $1.4 million with K in respect of its $2 million guarantee of L — Interim receivership order has been in place since March 2020 and extended several times, pending final determination, and M Ltd. was appointed interim receiver — Plaintiffs brought application for final receivership order — Application granted — Defendants relied on M Inc.'s promise of restructuring and McG's advice to L that October 2019 demands would not be enforced as constituting words and conduct that altered existing legal relationship — Context was that parties were in midst of restructuring discussions and McG was in process of putting together restructuring proposal, and those words could not possibly be construed by reasonable

commercial persons as meaning that M Inc. had forever relinquished its enforcement rights — Estoppel failed as defence in this case.

Bankruptcy and insolvency --- Bankruptcy and receiving orders — Miscellaneous

Plaintiffs, which were comprised of M Inc. and CWB, with M Inc. being wholly owned subsidiary of CWB, were creditors, and defendant, which included L Group, which owned and operated pharmacies, were debtors — M Inc. was incorporated in Ontario in 2016 in conjunction with CWB's acquisition of certain assets of M Financial Services Inc. (MFSI) and D Financial Services (DFS), and MFSI and DFS were related companies but operated as one larger enterprise — In 2014, L, who was principal of corporate defendant, moved entirety of L Group's loan portfolio to major bank, and L had granted personal guarantees to bank and guaranteed L Group's indebtedness, L Group's cash flow was reduced, L unsuccessfully requested that bank consider refinancing, and recovery action was started — 195 (which was amalgamation of MFSI and DFS) acquired bank's debt and security, and DFS, had acquired loan related to purchase of L Group, and it was agreed between L and DFS that 114 (L Group company that owned C pharmacy) would execute new promissory note and amount was not paid — Drug supplier, K had one outstanding loan guarantee and this was part of bank's security for L Group indebtedness, it was assigned to 195, and having acquired bank's debt and security, 195 carried on with receivership application, causing PwC to be court-appointed as Receiver over L Group in 2016 — PwC reported in 2017 that shortfall to 195 was $2.37 million, and M Inc. said amount remaining unpaid from C Pharmacy, that had been converted to unpaid new promissory note, was part of shortfall, that amount was reduced to $970,000, after 195 reached settlement of $1.4 million with K in respect of its $2 million guarantee of L — Interim receivership order has been in place since March 2020 and extended several times, pending final determination, and M Ltd. was appointed interim receiver — Plaintiffs brought application for final receivership order — Application granted — It was accepted that transparent, Court-supervised process under which Receiver uses its expertise and professional contacts provided best option for selling pharmacy as going concerned and maximizing recovery for all concerned, including L and it was just and convenient to appoint receiver — It was found that L's allegations against M Inc., did not constitute grounds on which to refuse final order of receivership based on "just and convenient" test — Given factual findings, it was further found there had been no breach of good-faith requirement in either context because neither M Inc. nor its representatives engaged in dishonesty or lying in its dealings with L, either at time of initiating loans in 2017 or during restructuring talks.

Bankruptcy and insolvency --- Miscellaneous

Plaintiffs, which were comprised of M Inc. and CWB, with M Inc. being wholly owned subsidiary of CWB, were creditors, and defendant, which included L Group, which owned and operated pharmacies, were debtors — M Inc. was incorporated in Ontario in 2016 in conjunction with CWB's acquisition of certain assets of M Financial Services Inc. (MFSI) and D Financial Services (DFS), and MFSI and DFS were related companies but operated as one larger enterprise — In 2014, L, who was principal of corporate defendant, moved entirety of L Group's loan portfolio to major bank, and L had granted personal guarantees to bank and guaranteed L Group's indebtedness, L Group's cash flow was reduced, L unsuccessfully requested that bank consider refinancing, and recovery action was started — 195 (which was amalgamation of MFSI and DFS) acquired bank's debt and security, and DFS, had acquired loan related to purchase of L Group, and it was agreed between L and DFS that 114 (L Group company that owned C pharmacy) would execute new promissory note and amount was not paid — Drug supplier, K had one outstanding loan guarantee and this was part of bank's security for L Group indebtedness, it was assigned to 195, and having acquired bank's debt and security, 195 carried on with receivership application, causing PwC to be court-appointed as Receiver over L Group in 2016 — PwC reported in 2017 that shortfall to 195 was $2.37 million, and M Inc. said amount remaining unpaid from C Pharmacy, that had been converted to unpaid new promissory note, was part of shortfall, that amount was reduced to $970,000, after 195 reached settlement of $1.4 million with K in respect of its $2 million guarantee of L — Interim receivership order has been in place since March 2020 and extended several times, pending final determination, and M Ltd. was appointed interim receiver — Plaintiffs brought application for final receivership order — Application granted — It was found that M Inc. had failed to disclose that CWB had ultimate decision-making authority with regard to restructuring, however it was also found that L would have some general understanding, as businessperson of his experience, that there was approval process beyond McG — In result, there was no defence based on lack of good faith, and no remedy was available to defendants under s. 4.2 of BIA or s. 66(1) of PPSA, and conclusion regarding s. 4.2 took into account intent and policy objectives of BIA — Here, proceedings have not been invoked for some oblique or improper purpose but rather to subject assets of insolvent debtor to orderly, Court-supervised process for benefit of interested parties — These reasons should not be read as ringing endorsement

of M Inc.'s conduct and gaps in communication no doubt contributed to L's suspicions and what now has been year's worth of costly litigation.

Table of Authorities

Cases considered by *Douglas R. Mah J.*:

Arrangement relatif à Nemaska Lithium inc. (2020), 2020 QCCS 1884, 2020 CarswellQue 5543 (Que. Bktcy.) — considered

B & R Development Corp. v. Trail South Developments Inc. (2012), 2012 ABCA 351, 2012 CarswellAlta 2016, 72 Alta. L.R. (5th) 336, [2013] 3 W.W.R. 706, (sub nom. *410675 Alberta Ltd. v. Trail South Developments Inc.)* 539 A.R. 157, (sub nom. *410675 Alberta Ltd. v. Trail South Developments Inc.)* 561 W.A.C. 157, 27 R.P.R. (5th) 177 (Alta. C.A.) — referred to

Bhasin v. Hrynew (2014), 2014 SCC 71, 2014 CSC 71, 2014 CarswellAlta 2046, 2014 CarswellAlta 2047, [2014] 11 W.W.R. 641, 27 B.L.R. (5th) 1, 464 N.R. 254, 379 D.L.R. (4th) 385, 20 C.C.E.L. (4th) 1, [2014] 3 S.C.R. 494, 584 A.R. 6, 623 W.A.C. 6, 4 Alta. L.R. (6th) 219 (S.C.C.) — considered

Browne v. Dunn (1893), 6 R. 67 (U.K. H.L.) — considered

C.M. Callow Inc. v. Zollinger (2020), 2020 SCC 45, 2020 CSC 45, 2020 CarswellOnt 18468, 2020 CarswellOnt 18469, 452 D.L.R. (4th) 44, 10 B.L.R. (6th) 1 (S.C.C.) — considered

E Dehr Delivery Ltd v. Dehr (2018), 2018 ABQB 846, 2018 CarswellAlta 2288, 75 Alta. L.R. (6th) 380, 64 C.B.R. (6th) 39, 9 P.P.S.A.C. (4th) 65, [2019] 2 W.W.R. 360 (Alta. Q.B.) — considered

MTM Commercial Trust v. Statesman Riverside Quays Ltd. (2010), 2010 ABQB 647, 2010 CarswellAlta 2041, 70 C.B.R. (5th) 233, 98 C.L.R. (3d) 198 (Alta. Q.B.) — followed

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

Generally — referred to

45 I need to comment on one further Quebec case concerning *when* the good faith requirement arises. The addition of section 4.2 to the BIA was concurrent with insertion of the identically-worded section 18.6 in the *CCAA*. In *Arrangement Relating to Nemaska Lithium Inc*, 2020 QCCS 1884, Gouin JCS held at paras 23-25 that the good faith requirement in section 18.6 arises only *after* the proceedings (in this case, restructuring) are initiated. This runs counter to my statement above that the good faith requirement in the section 4.2 covers previous conduct where it involves events precipitating Court involvement.

46 Importantly, in *Nemaska*, Gouin JCS was dealing with an application by an unsecured creditor for payment of an unpaid account for the manufacture of custom equipment, incurred prior to the granting of the initial Order under the *CCAA*, which Order included the usual stay provision. The applicant alleged that Nemaska's representatives had engaged in bad faith during the negotiations for the manufacturing contract and relied on section 18.6 to avoid operation of the stay and get paid before any other creditors.

47 Gouin CJS, in my view, rightly rejected the application on the basis that awarding payment to the creditor at this stage would seriously thwart the reorganization effort and was antithetical to the purpose of the *CCAA*. The creditor's remedy was to file a claim in the proceedings, not to skirt the proceedings by means of section 18.6.

48 In *Nemaska*, the conduct of Nemaska alleged by the creditor was unconnected to the *CCAA* proceedings. Here, the defendants are saying, in effect, that the *bringing* of a receivership application, in the circumstances they allege, lacks good faith. Within this context, I am prepared to say that section 4.2 of the BIA applies.

49 Still, the effect of section 4.2 should not reach back into time indefinitely. The conduct in question must be connected to the proceedings. The prospect of receivership proceedings first materialized with the sending of the first set of demand letters in October 2019. The sending of the demand letters and Maxium's conduct in relation to the loans thereafter, when receivership loomed, can be said factually and temporally to be connected to or "in respect of" the proceedings.

50 The next question is: where does one look to find the content of this good faith requirement?

51 In the contractual context, in Bhasin v Hrynew 2014 SCC 71 at para 33, the Court recognized good faith as a general organizing principle under the common law of contract, which (at para 66):

> ... manifests itself through the existing doctrines about the types of situations and relationships in which the law requires, in certain respects, honest, candid, forthright or reasonable contractual performance. Generally, claims of good faith will not succeed if they do not fall within these existing doctrines. But we should also recognize that this list is not closed ...

52 In this context (at para 65), the Supreme Court of Canada comments that the duty of good faith does not require one party to serve the interests of the other but rather not to undermine the other's interests in bad faith. It is not elevated to a fiduciary duty. Then at para 73, the Court imposes a duty of honesty in contractual performance as a key aspect of the duty of good faith:

> ... I would hold that there is a general duty of honesty in contractual performance. This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance. Recognizing a duty of honest performance flowing directly from the common law organizing principle of good faith is a modest, incremental step. The requirement to act honestly is one of the most widely recognized aspects of the organizing principle of good faith: see Swan and Adamski, at § 8.135; O'Byrne, "Good Faith in Contractual Performance: Recent Developments", at p. 78; Belobaba; ***Greenberg v. Meffert*** (1985), 1985 CanLII 1975(ON CA), 50 O.R. (2d) 755 (C.A.), at p. 764; Gateway Realty, at para. 38, *per* Kelly J.; ***Shelanu Inc. v. Print Three Franchising Corp***. (2003), 2003 CanLII 52151 (ON CA), 64 O.R. (3d) 533 (C.A.), at para. 69. For example, the duty of honesty was a key component of the good faith requirements which have been recognized in relation to termination of employment contracts: ***Wallace***, at para. 98; ***Honda Canada***, at para. 58.

53 A closer analogy to the present case is found in the Supreme Court of Canada's recent decision in *CM Callow Inc v Zollinger*, 2020 SCC 45 where the Court agreed with the trial judge who found that the defendant condo corporations (through their agent Zollinger) had by means of omission or silence misled the plaintiff into believing its snow removal contract would be renewed, when in actuality the decision had been made months earlier to terminate it. By making the plaintiff believe that the contract would be renewed, the defendants induced the plaintiff to provide an entire summer season of free services as an incentive for renewal.

54 In *Callow*, the Court extended the general duty of honesty in contractual performance to the exercise of discretionary decisions, even where the decision-maker has an absolute right by contract to make the decision.

55 In speaking for the majority, Kassirer J helpfully observes with regard to modes of dishonesty:

> [90] These examples encourage the view that the requirements of honesty in performance can, and often do, go further than prohibiting outright lies. Indeed, the concept of "misleading" one's counterparty — the term invoked separately by Cromwell J. — will in some circumstances capture forms of silence or omissions. One can mislead through action, for example, by saying something directly to its counterparty, or through inaction, by failing to correct a misapprehension caused by one's own misleading conduct. To me these are close cousins in the catalogue of deceptive contractual practices (see, e.g., ***Yam Seng Pte Ltd. v. International Trade Corp. Ltd.***, [2013] E.W.H.C. 111, [2013] 1 All E.R. (Comm.) 1321 (Q.B.), at para. 141).
>
> [91] At the end of the day, whether or not a party has "knowingly misled" its counterparty is a highly fact-specific determination, and can include lies, half- truths, omissions, and even silence, depending on the circumstances. I stress that this list is not closed; it merely exemplifies that dishonesty or misleading conduct is not confined to direct lies. ...

56 The relationship between lender and debtor is contractual. The remedy of receivership sought from the Court is a contractual component and its initiation is subject to the exercise of the lender's discretion, although the legal test is statutory. The good faith to be exhibited must be "in respect of" *BIA* proceedings which, as I concluded, encompasses not only conduct in the course of such proceedings but also the conduct that precipitated the proceedings, as it relates to the indebtedness in question and the relationship between lender and borrower.

57 The application of good faith doctrines in the contractual context may lead to a Court finding that the transgressing party is liable in damages for breach of contract. Adopting those doctrines to inform the good faith requirement in section 4.2 of the BIA may lead to the Court invoking a broad discretionary authority to grant "any order that it considers appropriate in the circumstances", which presumably includes denial of the requested receivership order.

58 At least so far as a creditor invoking insolvency proceedings is concerned, I find it appropriate to import common law concepts stated in *Bhasin* and developed in *Callow* [1] , as cited above, to give content to the notion of "good faith" as found in section 4.2 of the BIA. I temper that statement only by saying that the Court must also remain cognizant of and seek to advance the policy objectives underlying the *BIA*.

59 I summarize and conclude on this point as follows:

- Interested persons in proceedings under the *BIA* are statutorily required to act in good faith with respect to those proceedings.

- A secured creditor seeking a Receivership Order is an "interested person" subject to the good faith requirement, and its conduct in events preceding the application is covered by that requirement, where that conduct is factually and temporally connected to the proceedings, i.e. such conduct is "with respect to" *BIA* proceedings.

- Based on previous caselaw, the statutory requirement of good faith in the insolvency context requires that an interested party not bring or conduct proceedings for an oblique motive or improper purpose.

TAB 8

2023 NSSC 388
Nova Scotia Supreme Court

Chester Basin Seafood Group Inc (re)

2023 CarswellNS 1016, 2023 NSSC 388, 10 C.B.R. (7th) 85, 2023 A.C.W.S. 5995

IN THE MATTER OF: The bankruptcy of Chester Basin Seafood Group Inc.

Reg. Raffi A. Balmanoukian

Heard: November 24, 2023
Judgment: December 1, 2023
Docket: 45611, Estate No. 51-3007018

Counsel: Sharon Kour, for Chester Basin Seafood Group Inc.
Joshua Santimaw, for Grant Thornton Limited, Proposal Trustee
Stephen Kingston, Graham Headley (Articled Clerk), for Proposed Debtor-In-Possession Lender, 451497 Nova Scotia Limited
Gavin D.F. MacDonald, for Secured Creditor, Toronto-Dominion Bank
Dennis Clarke, for Secured Creditor, Pluto Investments Inc.

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.5 Practice and procedure
Headnote
Bankruptcy and insolvency --- Proposal — Practice and procedure
Debtor business notified creditors it intended to make proposal in bankruptcy — Business brought application for extension of time to file proposal and related relief — Application granted — All parties consented to relief save debtor in possession finanacing — Administration charge approved — Parties did not act in bad faith and there was no juristic reason not to extend time for proposal — Debtor in possession financing approved — Debtor was in need of cash, stakeholders had confidence in debtor, and financing increased chance of viable proposal.
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Statutes considered:

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

s. 4.2 [en. 2019, c. 29, s. 133] — referred to

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

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

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

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Generally — referred to

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R. 6 — referred to

R. 6(4) — referred to

APPLICATION by debtor for extension of time to bring proposal and related relief in bankruptcy proceedings.

***Reg. Raffi A. Balmanoukian*:**

1 I heard this multi-faceted application by the consent of the parties, pursuant to Section 192(1)(j) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended (the "BIA"). That is a tribute to the numerous participating counsel; by coming to that consent, this matter was heard on an expedited basis and included matters over which I otherwise would not have had jurisdiction. All stakeholders conducted themselves, to each other and to the Court, with the utmost courtesy, professionalism, and candour. The Court is grateful.

2 At the conclusion of the hearing, I granted the Order as sought and as drafted, with reasons to follow. These are they.

3 Chester Basin Seafood Group Inc. ("Chester Basin" or "the Company") has seen better days. On November 7, 2023, it filed a Notice of Intention to Make a Proposal under the BIA. Its initial 30-day period has not yet expired, however, despite considerable initial activity to which I will return, it is apparent that it would not be in a position to make that proposal before the initial period expired. It is to the credit of the parties that they did not wait until the last minute to ask for an extension under s. 50.4(9) of the BIA, and in fact brought the Court "into the loop" as early as November 14 (by correspondence from Mr. Santimaw asking for a date assignment in anticipation of filing). Although documentation came in up to and including the day of hearing, the bulk of it came on November 21, allowing the Court adequate time for review (it also allowed some "breathing room" for the matter to be referred to a Justice on such issues over which I did not have non-consensual jurisdiction, if it turned out a party did not consent to my hearing such items [1]). It also appeared that other major creditors were kept apprised as matters developed — in other words, this application was not "dropped" on them at the last minute. That, too, reflects prudence and mutual respect.

4 The initial application sought the following, which I have rearranged for the order in which I will address them in this decision:

- An abridgment of notice and service periods pursuant to Rule 6 of the BIA General Rules;
- Approval of a $100,000 Administration Charge pursuant to s. 64.2 of the BIA;
- A 45-day extension for the time in which to make a proposal, pursuant to s. 50.4(9) of the BIA; and
- Approval of a $1.1 million dollar debtor-in-possession ("DIP") priority charge pursuant to s. 50.6 of the BIA.

5 At the hearing, I again confirmed that all consented to my hearing all of these matters on the merits [2] .

Abridgement of time and service, and a note on CRA

6 No party objected to the application for abridgement of time. For the reasons noted above, I considered it appropriate as well. [3]

7 I was satisfied that secured creditors had been served, subject to the abridgement noted above. I expressed concern that the Canada Revenue Agency was not on the service list, given that some of the relief I was being asked to provide had the potential to take priority to debt that may be owing to them. In this, I cited the comments of Justice Moir in *Re Rosedale Farms Limited et al*, 2017 NSSC 160. I agree wholeheartedly with his comment at paragraph 45: "We do not take rights away from people without giving them an opportunity to be heard." He went on to say:

> [50] Section 50.6 of the *Bankruptcy and Insolvency Act* was created by S.C. 2007, c. 36, s. 18. Subsection 50.6(2) empowers the court to order "priority over the claim of any secured creditor" for DiP financing security. Subsection 50.6(1) allows for the financing and its security but only "on notice to the secured creditors who are likely to be affected by the security or charge". These clear words answer any notion there may have been that secured creditors may lose their rights without having an opportunity to be heard.

> [51] The Canada Revenue Agency received no notice of the motion for DiP financing. Therefore, even if the *Income Tax Act* did not give the deemed trust for unremitted holdings priority over all security including that for DiP financing, the charging order would not bind Revenue.
>
> [52] The parties supporting priority for the DiP charge complain that they were unaware of the debt for unremitted withholdings. Again, there is a narrow and a broader response.
>
> [53] The statute does not require notice only to the secured creditors of which the party seeking a charging order is aware.
>
> [54] More broadly, an insolvent business with employees might well be in default of their obligation to remit funds withheld from employees. While the exact amount may not be known right away, the fact of a sizable default was ascertainable through a review of bank records by the interim receiver. Those would show when payrolls were met and whether payments were remitted to Revenue. [emphases added]

8 I went on to note that the balance sheet in evidence shows an HST receivable, and that the corporate accumulated deficit makes it unlikely that there are net income taxes owing. The Proposal Trustee represented to the Court that there are no other (known) CRA obligations (i.e., payroll remittances, excise). In a leisurely situation, I may well have adjourned the matter for this to be properly proven [4] ; however, given this representation coupled with my own reading of the balance sheet and the amount sought to be placed in priority, I accept in these *narrow* circumstances that it was appropriate to proceed, including counsel's representation that CRA will be served on a go-forward basis.

The Administration Charge

9 Section 64.2 of the BIA reads:

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

10 Just prior to the hearing, counsel for The Toronto-Dominion Bank ("TD") advised that the affected stakeholders agreed to amend the amount of the Administration Charge from $100,000 to $50,000. My canvass of the Courtroom confirmed this.

11 Once again, that consensus is helpful. But it does not bind the Court. I am in concert with no less an authority than Ontario's Chief Justice Morawetz that one of the weakest arguments in favour of issuance of an order is "because we agree." It is but a factor to be taken into consideration in the proper and judicial exercise of the Court's discretion.

12 The affected known commercial stakeholders whose priority would be affected were served; my comments with respect to CRA are above.

13 Upon my review of the work done and which is expected immediately to be done by the Company's professional advisors and Proposal Trustee, and in my own review of the size of the Company's balance sheet and enterprise, I believe the $50,000 is fair and reasonable, and I approve it.

The 50.4(9) Extension

14 Once again, there was consensus that I should grant the requested extension of time to make a proposal pursuant to 50.4(9) of the BIA, which reads:

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

15 And, once again, that consensus is helpful and of guidance, but is not binding and does not fetter the Court's discretion.

16 With that said, I was and am satisfied that the tests of lack of material prejudice and the likelihood of the development of a viable proposal were cleared with room to spare. In particular, the evidence was that the Company is moving into its most active part of the year (the silver hake harvest) and that the prospects of financial viability to the benefit of creditors will increase, not decrease, in the immediate future as its vessels are put back into service (as I will discuss under the DIP application). I heard nothing to indicate a present lack of confidence from senior lenders in the current management.

17 I wish to add a word on the remaining branch of the test, namely good faith. Counsel for the Company cites the decision of Justice Goodfellow in *Re H&H Fisheries*, 2005 NSSC 346 for the proposition that good faith is, in effect, the absence of bad faith. He said, at para. 17:

> The converse of good faith is bad faith and bad faith requires a motivation and conduct that is unacceptable.

18 Respectfully, I don't think that Justice Goodfellow's comment goes that far. To the extent it might, however, I believe those 2005 comments have been superseded by at least two developments: The addition of Section 4.2 of the BIA which requires *all* proceedings to be conducted in good faith; and the pronouncements of the Supreme Court of Canada on good faith in such cases as *Bhasin v. Hrynew*, 2014 SCC 71; *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45; and *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7.

19 While these cases deal with the good-faith exercise of *contractual* rights and obligations, they go further and speak of "honest performance" and "appropriate regard" for the other party (while recognizing that legitimate self-interest does not contradict those obligations). Put another way, I read the good faith requirements in the BIA as a positive obligation, not as the "absence of negatives." I further emphasize that this test is not a mere catechism, to be satisfied by a bald statement that "we are acting in good faith and with due diligence." The Court should have sufficient material upon which to make that evaluation, itself.

20 I leave for another day, and perhaps for a more close-run thing, a more fulsome and robust discussion of this point. For current purposes, it is adequate to observe the steps taken by the Company in the last three weeks. Mr. Teixeira outlines these at paragraph 76 of his affidavit, and the Proposal Trustee at Paragraph 29 of its First Report. In summary, these include discussions with major stakeholders (which as this decision illustrates, have been at least partially fruitful), arrangement of DIP

financing (to be discussed), continuance of operations (including dealing with suppliers), and at least some activity to solicit new investment. [5] Both of these documents are both comprehensive and candid and were of considerable assistance.

21 Having found that the 50.4(9) test is met, I must turn to whether I should exercise my discretion in granting the extension. There is no juristic reason in this instance of a first extension not to do so. The application is granted.

The DIP Financing

22 Finally — and the only matter of disagreement among participants for current purposes — was the application to approve $1.1 million in debtor-in-possession priority financing in favour of 4519497 Nova Scotia Limited, a company controlled by Mr. Teixeira. That loan is in two tranches - $450,000 to repair two of the company's three vessels, currently both out of commission; and $600,000 for working capital. It is worth noting that Mr. Teixeira claims he has advanced another $200,000 to get the third vessel back in the water (no retroactive priority is, or could be, claimed from the Court for this advance — BIA 50.6). Other shareholders also apparently have direct or indirect investments in, or loans to, the Company.

23 Section 50.6 of the BIA reads, in part:

> **50.6 (1)** On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.
>
> . . .
>
> **(3)** The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.
>
> . . .
>
> **(5)** In deciding whether to make an order, the court is to consider, among other things,
>
> (a) the period during which the debtor is expected to be subject to proceedings under this Act;
>
> (b) how the debtor's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the debtor's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
>
> (e) the nature and value of the debtor's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.
>
> [emphasis added]

24 TD, through counsel, objects to the terms of the proposed loan, namely a 15% interest rate and a 1.5% commitment fee, for a six month term (resulting in an effective interest rate somewhere north of 18%, depending on the timing and amount of drawdown). I share those concerns, and invited submissions on whether I have authority to modify the terms, or only the "amount" as contemplated by s. 50.6(1) of the BIA.

TAB 9

2023 NSSC 238
Nova Scotia Supreme Court

Atlantic Sea Cucumber Limited (Re)

2023 CarswellNS 596, 2023 NSSC 238, 2023 A.C.W.S. 3781, 8 C.B.R. (7th) 123

In the Matter of: The intention to make a proposal by Atlantic Sea Cucumber Limited

Reg. Raffi A. Balmanoukian

Heard: July 17, 2023
Judgment: July 21, 2023
Docket: 45461, Estate No. 51-2939212

Counsel: Darren O'Keefe, Caitlin Fell, for Applicant, Atlantic Sea Cucumber Limited
Joshua Santimaw, for Trustee, MSI Spergel Inc.
Gavin D.F. MacDonald, Meaghan Kells, for Objecting Creditor, Weihai Tawei Haiyang Aquatic Food Co. Ltd.

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.5 Practice and procedure
Headnote
Bankruptcy and insolvency --- Proposal — Time period to file — Extension of time
Debtor applied for extension of time to file proposal — Application sought to have matter heard on emergency basis — Hearing took place on ex parte basis — Application dismissed — Although there were difficulties with proposal, proposal met low standard for viability — Debtor had not done due diligence — Debtor had not taken necessary steps to determine who creditors were and what status they held — Debtor appeared to expect that justice would approve initial order under Companies' Creditors Arrangement Act — Order did not meet specifications for approval — Application was not made in good faith — Applicable law as to extension was permissive rather than mandatory — Judge did not exercise discretion in favour of debtor, as conditions were not met Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s 50.4(9).
Table of Authorities
Cases considered by *Reg. Raffi A. Balmanoukian*:
Dynamic Transport Inc., Re (2016), 2016 NBCA 70, 2016 CarswellNB 595, 2016 CarswellNB 596, 45 C.B.R. (6th) 45 (N.B. C.A.) — referred to
Entegrity Wind Systems Inc., Re (2009), 2009 PESC 25, 2009 CarswellPEI 47, 56 C.B.R. (5th) 1, 289 Nfld. & P.E.I.R. 347, 890 A.P.R. 347 (P.E.I. S.C.) — referred to
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Kocken Energy Systems Inc., Re (2017), 2017 NSSC 80, 2017 CarswellNS 187, 50 C.B.R. (6th) 168 (N.S. S.C.) — referred to
NS United Kaiun Kaisha, Ltd. v. Cogent Fibre Inc. (2015), 2015 ONSC 5139, 2015 CarswellOnt 12962, 30 C.B.R. (6th) 315 (Ont. S.C.J.) — referred to
Nautican v. Dumont (2020), 2020 PESC 15, 2020 CarswellPEI 30, 79 C.B.R. (6th) 243 (P.E.I. S.C.) — referred to
R. v. Desmond (2020), 2020 NSCA 1, 2020 CarswellNS 15, 53 M.V.R. (7th) 1, 384 C.C.C. (3d) 461 (N.S. C.A.) — referred to
Royalton Banquet & Convention Centre Ltd., Re (2007), 2007 CarswellOnt 3796, 33 C.B.R. (5th) 278 (Ont. S.C.J.) — referred to

Scotian Distribution Services Limited (Re) (2020), 2020 NSSC 131, 2020 CarswellNS 256, 78 C.B.R. (6th) 258 (N.S. S.C.) — referred to
T & C Steel Ltd., Re (2022), 2022 SKKB 236, 2022 CarswellSask 534 (Sask. K.B.) — referred to
Weihai Taiwei Haiyang Aquatic Food Co. Ltd. v. Atlantic Sea Cucumber Ltd. (2023), 2023 NSSC 27, 2023 CarswellNS 81 (N.S. S.C.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 4.2(1) [en. 2019, c. 29, s. 133] — referred to
s. 50.4(9) [en. 1992, c. 27, s. 19] — considered
s. 50.4(9)(a) [en. 1992, c. 27, s. 19] — referred to
s. 50.4(9)(b) [en. 1992, c. 27, s. 19] — referred to
s. 50.4(9)(c) [en. 1992, c. 27, s. 19] — referred to
s. 95 — referred to
s. 137 — referred to

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

Interpretation Act, R.S.N.S. 1989, c. 235
Generally — referred to

Proceeding: Motion/Application to Extend.

APPLICATION by debtor in bankruptcy proceedings for extension of time to file proposal.

***Reg. Raffi A. Balmanoukian*:**

1 On July 19, 2023, I wrote to Counsel in the form attached, dismissing the application by Atlantic Sea Cucumber Limited ("ASC" or "Debtor") for an extension of time to file a proposal pursuant to s. 50.4(9) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 as amended (the "BIA"), following an unsuccessful application to convert the matter to a proceeding under the *Companies Creditors Arrangement Act*, RSC 1985, c. C-36, as amended (the "CCAA"). This exension application also sought to abridge time for making that application, and for the matter to be heard by a Justice or by the Registrar on an emergency basis, *ex parte*. The Trustee, MSI Spergel Inc. (the "Trustee") supported this application. The objecting creditor, Weihai Tawei Haiyang Aquatic Food Co. Ltd. ("WTH") did not. This document is to put that communication in reportable form. With the exception of this introductory paragraph, and to add paragraph numbers, there have been no changes from the body of that letter, and it is so reproduced below.

2 On Monday, July 17, 2023 at 4:00 pm, I heard this application on an emergency basis. At the conclusion of that hearing, I gave a 'bottom line' decision dismissing the application, with reasons to follow, in accordance with the Court of Appeal's comments in *R. v. Desmond*, 2020 NSCA 1 respecting written supplements to oral decisions. As I understand an appeal has been filed (which I have not seen), I will do so in this format and in a summary fashion.

3 On May 1, 2023, the Debtor filed a Notice of Intention to make a proposal. On May 26, 2023, Debtor's counsel filed a first application to extend time pursuant to s. 50.4(9) of the BIA. I granted it (and an application for abridgement of time) on May 31, 2023, which was the last day of the initial stay. Mr. MacDonald, for WTH, did not object to the abridgement but did object to the extension (or in the alternative sought a shorter extension). I granted the extension for the full 45 days, given that a 30 day period proposed by Mr. MacDonald as an alternative to a refusal would coincide with the Canada Day weekend. However, I expressed significant concern both with the timing of the application, in light of the timing of the Trustee's first report (May 24, 2023) and observed that there may have been incomplete communication between Trustee and Debtor for a period of time

between the initial NOI and the Trustee's first report. I emphasized to all parties that I would be seeking fulsome evidence of substantive progress, should a further extension be sought.

4 On July 6, 2023, the Debtor sought to convert to CCAA proceedings. That was heard, I understand on a contested basis, before Justice Rosinski on July 13, 2023, two days before the BIA stay was set to expire. No prior application was made to extend the BIA stay. I was advised by counsel that the determination to seek to proceed under the CCAA was made in "late June" and that it was deemed to be a "no brainer" that the initial CCAA order would be granted, notwithstanding that it was to be contested.

5 On the afternoon of July 13, 2023, Justice Rosinski heard the CCAA application and I understand that was dismissed on Friday, July 14, 2023 with reasons that are yet to follow.

6 WTH asserts that the BIA stay expired on Saturday, July 15. It argues that the federal *Interpretation Act*, not the Civil Procedure Rules, applies and that Saturdays "count" for such purposes. As such, the application for extension of time that was filed and heard on Monday, July 17 was out of time. That application also sought to abridge time, and for the matter to be heard *ex parte* (although WTH, the Trustee, and perhaps others were in fact served).

7 That application was filed with the Supreme Court, not with me as Rule 9(5) of the BIA *General Rules* require; in fairness, the cover email to the Court sought either a Justice or the Registrar, and the matter was redirected to me.

8 I did not explicitly deal with the *ex parte* element of the application, as the objecting creditor and trustee in fact appeared, and I was prepared for the sake of argument to accept that the July 17 application was not out of time.

9 I was presented with the Trustee's second report, which was principally if not exclusively for the CCAA proceedings. I was also advised that the Trustee had completed an inventory and the report contains a cash flow projection (including $325,000 in professional fees over four months on $800,000 in sales), and obtained an opinion on the "validity and enforceability" of security granted by the Debtor to a non-arm's length entity.

10 WTH objects to various assumptions and elements in this opinion, including under ss. 95 and 137 of the BIA and the *Statute of Elizabeth*. It points out that the security was granted just after Justice Coughlan's decision in favour of WTH against the Debtor (2023 NSSC 27), and just two months prior to the Debtor's NOI, although it purports to secure advances made in 2018.

11 Because of this dispute (and continuing developments in determining creditors), it is currently unclear whether WTH has a 'veto' on any proposal or not. Although I am cognizant of Justice Moir's decision in *Kocken*, (2017 NSSC 80) that adverse statements by a veto-holder with respect to a proposal are not determinative of its ultimate viability, in these circumstances I did pay some attention to WTH's comments, for reasons to which I will return.

12 Against that backdrop, I considered (using the assumption that the application was not in fact out of time to begin with) the three part test in s. 50.4(9) BIA, which may be summarized as present and continuing good faith and diligence, the "likelihood" of an ultimate viable proposal, and lack of material prejudice to any creditor. I further considered whether, should the test be met, granting an extension would be a proper exercise of my resultant discretion. I will discuss the 50.4(9) requirements in inverse order.

Prejudice

13 WTH concedes that an extension would not materially prejudice it under 50.4(9)(c). I agree.

Proposal viability

14 I was asked for a ten day extension, following Justice Rosinski's oral decision. This was not ultimately for the purposes of getting a proposal out to creditors or before the Court, but to assemble the materials to make a *further* extension application. In short, the "no brainer" that the Debtor thought it had in obtaining the CCAA initial order caught the Debtor with its pants down when the application was refused at a minutes-to-midnight deadline.

15 This is not the test under 50.4(9)(b) respecting "proposal viability" although I conclude that the application fails not for lack of viability, but under 50.4(9)(a)'s requirement for good faith and due diligence or, if I am wrong, because I would not exercise my discretion in favour of the Debtor.

16 In *Re T&C Steel Ltd. et al*2022 SKKB 236, Justice Scherman reviewed the "viability" test, particularly in the context of a second (or subsequent) application, as follows:

> [7] In *Enirgi Group Corp. v Andover Mining Corp.*, 2013 BCSC 1833, 6 CBR (6th) 32 [Enirgi Group], the Court said:
>
> > [66] Turning to s. 50.4(9)(b), a viable proposal is one that would be reasonable on its face to a reasonable creditor; "this ignores the possible idiosyncrasies of any specific creditor": Cumberland [[1994] OJ No 132 (Ont Ct J)] at para. 4. It follows that Enirgi's views about any proposal are not necessarily determinative. The proposal need not 2022 SKKB 236 (CanLII) - 4 - be a certainty and "likely" means "such as might well happen." (Baldwin [[1994] OJ No 271 (Ont Ct J)], paras. 3-4). And Enirgi's statement that it has lost faith in Andover is not determinative under s. 50.4(9): Baldwin at para. 3; Cantrail at paras. 13-18).

17 The Court went on to cite my own decision in *Re Scotian Distribution Services Limited*, 2020 NSSC 131, drawing a distinction between a "first extension" and a subsequent one. Justice Scherman was quite critical of the dearth of information before it, granting the second extension by the proverbial skin of its teeth.

18 In summary, the test for the likelihood of a viable proposal is an objective one: *Nautican v. Dumont*2020 PESC 15 at paras. 16-18. Chief Justice Kennedy put it this way (invoking the inimitable Justice Farley in the process) in *Re Scotian Rainbow Ltd. et al*, (2000), 186 NSR (2d) 154 at para. 17 *et seq.*:

> [17] As to s. 50.4(9)(b), that the insolvent person would likely be able to make a viable proposal of the extension being applied for were granted. Counsel for the primary creditor Shur Gain, in support of the applicant, has brought to this Court's attention the case of *Re Baldwin Valley Investors Inc.* (1994), 23 C.B.R. (3d) 219. In that matter Justice Farley of the Ontario Court of Justice (General Division) (which it then was), Justice Farley considers the phrase a viable proposal as set out in subsection (b) of s. 50.4(9). He says that that phrase should take on a meaning akin to one that seems reasonable, a proposal that seems reasonable on its face to the reasonable creditor. Reasonable on its face to the reasonable creditor. Justice Farley says this ignores the possible idiosyncrasies of any specific creditor. Justice Farley also examines the meaning of the word 'likely', and refers to the Concise Oxford Dictionary of current English where likely is defined, and I quote:
>
> > Might well happen or turn out to be the thing specified.
>
> [18] Might well happen or turn out to be the thing specified...I am in agreement with Justice Farley's determinations as to the meaning of these words, and I adopt his findings as to their meanings for our purposes. When I make reference to those words for our purposes, I am adopting Justice Farley's definitions.

19 While I have very considerable doubts in the context of a second extension of "viability," particularly given WTH's express loss of confidence in the Debtor and its ability to drive a proposal, given the objectivity of the test and the binding comments of Justice Moir in *Kocken* , I am compelled on a bare balance of probabilities *for current purposes* to conclude that the "viability" test, as interpreted by the caselaw, has been met.

Good faith and due diligence

20 That leaves us with 50.4(9)(a) — the due diligence and good faith tests — and with my discretion.

21 Mr. O'Keefe urges that in his experience, the 59.4(9)(a) inquiry is little more than a catechism — a recitation by the Trustee that good faith and due diligence are at hand. I do not accept that is appropriate. It is a determination to be made by the Court, not by the Trustee. It is also something of an exercise in "don't ask a barber if you need a haircut." I observed this in stark relief at the initial extension application when the Trustee's representative (a different individual from that later involved

in the file) became quite agitated when I challenged the timeline leading up to that initial (and successful) extension application and whether developments to that date passed the "due diligence" test."

22 The current case is something of an unusual situation in that although there were notable developments between May 31 and July 6, they were primarily if not exclusively geared towards converting the insolvency to CCAA proceedings. As I read the BIA, the "good faith and due diligence" requirement relates to the development of a viable proposal, not to other insolvency options. In *Re Royalton Banquet and Convention Centre Ltd.* 2007 CanLii 1970 (Ont. SC), the Court refused an extension when nothing had been done "in preparing the proposal." While there was no indication on whether any other work had been done at all (unlike the present case), I read this as supporting the view that due diligence relates to moving the (likely viable) proposal forward — not other options.

23 Again, it appears that the Debtor thought a Justice would "rubber stamp" an initial CCAA order, filed on the eve of the expiry of the initial BIA extension, and when it was unsuccessful was left scrambling for a second BIA extension — not having left time either for a Justice to consider the CCAA application in a timely fashion, or to make a timely application to extend the 50.4 timeline should that be unsuccessful (as it ultimately was). As I discuss below, as well, I question whether in the last 75 days, more could have been done to determine who are the creditors and what is their status. On balance, I am not convinced that what has been done, in these circumstances, are adequate to satisfy me to a civil standard of due diligence.

24 Which brings me to good faith. There are two places where this is relevant: directly, in the 50.4(9)(a) test, and more holistically under Section 4.2(1) of the BIA.

25 I begin by observing that a failure to prove good faith is not the same as a finding of bad faith. It does not require malice or caprice or abuse of process. It is an affirmative test — that there is good faith; not the presence or absence of bad faith.

26 At all Court stages of this and the CCAA proceeding, there have been distinct flavours of attempts to "strong arm" the Court by compressing timelines where the upshot has been "you have to sign this or disaster will result." It will be recalled that the initial 50.4(9) extension was filed on May 26 (together with an application for abridgement of time) and was heard on the very last possible day. The CCAA application was heard on the last juridical day before that extension expired (having been filed seven days prior). The CCAA materials make the point that if the initial CCAA order was not granted, a disastrous bankruptcy would follow; when that was rejected, the Debtor returned (arguably out of time) to this Court making the same argument, and sought to do so *ex parte* (although again, in fairness, having in fact given short notice to adverse parties).

27 I was not presented with any reason for this. It is not consistent with good faith and fair dealing. It is, conversely, consistent with attempting to compel the Court to the Debtor's agenda and objectives.

28 Inconsistent with good faith as well is the current state of affairs. Distilled, it is this: "we were unsuccessful in the CCAA application. We don't have any additional materials to put in front of you; we don't even know what the creditor matrix is going to look like, given a potential substantial additional creditor and the security dispute. So give us ten days to pull that all together because we didn't think we would fail on the CCAA application."

29 In *Cogent Fibre Inc.*, 2015 ONSC 5139, Justice Penny said this, which I find completely consistent with my prior comments on "recalcitrant creditors" not being determinative but yet not relieving the Debtor of its burden under 50.4(9):

> [17] In effect, Cogent says it needs more time to continue discussions with its two major creditors when at least one of those creditors (a creditor with veto power) has not engaged in any discussions with Cogent and has no intention of doing so. Cogent's position is, I find, entirely tautological.
>
> [18] In his factum and in oral submissions, counsel for Cogent emphasized the rehabilitative nature of the proposal sections. He relied heavily on recent Ontario and B.C. authority to the effect that a veto-empowered creditor's statement that it will never agree to a proposal is not dispositive of whether to terminate or refuse to extend a stay. I quite agree with this position and the supporting law. Creditors often, for strategic reasons, say they will never agree.

> [19] Nevertheless, it seems to me there must be a certain forthrightness on the part of the debtor about what is sought to be achieved. There must also be an air of reality about the likelihood of any proposal being viable.
>
> [emphases added]

30 In this case, the Debtor is essentially saying, "we need more time to get a third extension request in front of you, because we didn't get what we wanted under the CCAA. We know there will be a sale, but we can't tell you yet what that is going to look like or who is going to be voting in what proportions on it." I cannot consider that, on a balance of probabilities, to be "forthright....about what is to be achieved," or in furtherance of good faith. It is at least questionable whether it meets the test of due diligence as well.

31 In making these comments, I wish to be clear that I am not making negative aspersions as to any individual. I am not privy to the communications among Debtor, Trustee, or Counsel. I am aware that the Debtor's principal is in China and that this posed logistical and perhaps language barriers. This was not a new development and existed at least from the original NOI onward. What is clear is that, for whatever reason, the Debtor found itself in a situation that was awkward at best and out of time at worst, and expected the Court essentially as a matter of right or rote, to fix it.

Discretion

32 Finally, I turn to my discretion. 50.4(9) is permissive, not mandatory. It states that I "may" grant an extension (assuming it to be made in time) if the three part test is met. I have assumed the application was timely, and concluded the test was not met. If I am right on the first point and wrong on the second, however, I would not exercise my discretion in favour of the Debtor.

33 The case law recognizes that a 50.4(9) extension is a discretionary order, if the conditions for its exercise have been met: see *Re Dynamic Transport*2016 NBCA 70 at paras. 4 and 9; *Re Entegrity Wind Systems Inc.*2009 PESC 25 at para. 30; *Re Entegrity Wind Systems Inc.*2009 PESC 33 at para. 36; *Royalton Banquet and Convention Centre Ltd.* 2007 CanLii 1970 (Ont. SC).

34 Thrice in this insolvency has the Debtor come forward on an "emergency" basis, in effect seeking forgiveness not permission. There are circumstances when that comes with the territory of insolvency. The subject can be on occasions sedate, in others it can develop in real time. However, here it was known both that there was a substantial adversarial and opposing creditor, that the Court was concerned with the prior timelines, and that the Creditor would be seeking to convert to CCAA proceedings no later than late June. It frankly appears that the Creditor did indeed consider such an application to be what counsel described to me as a "no brainer" and got caught flat-footed when (again at the last possible moment) the initial CCAA order was refused.

35 It was argued that while this may have been a strategic or procedural mistake, the Debtor should not be held to account for that, given the alleged inimical consequences of a bankruptcy. While both the CCAA and BIA 50.4(9) arguments focused on this alleged destruction of value, no evidence of that was presented to me. I pointed out that a bankrupt can make a proposal (50(1) BIA), and this was argued to be undesirable given the dynamics of who would be "driving the bus" in a bankruptcy proposal versus an insolvency proposal. I did not find that persuasive in convincing me to exercise my discretion if I am wrong in finding that the 50.4(9) "good faith and due diligence" tests have failed. Indeed, it may well be that a change of drivers is exactly what is needed to move the sale process forward, given the other disputes in the file.

36 As I have said, I am aware that my "bottom line" decision is under appeal, on grounds that I have neither seen nor heard. These reasons will illustrate the basis upon which that decision was made.

37 Costs were not argued before me. In the circumstances, that issue should it arise is best left to the appellate Justice.

38 Mr. O'Keefe, solicitor for the Debtor, is to provide a copy of this decision to the service list forthwith.

Application dismissed.

End of Document

TAB 10

2008 ABCA 214
Alberta Court of Appeal

Adeco Exploration Co. v. Hunt Oil Co. of Canada Inc.

2008 CarswellAlta 1043, 2008 ABCA 214, [2008] A.W.L.D. 3288, [2008] A.W.L.D. 3311, [2008] A.W.L.D. 3312, 171 A.C.W.S. (3d) 453, 433 W.A.C. 33, 437 A.R. 33, 48 B.L.R. (4th) 161, 94 Alta. L.R. (4th) 270

Adeco Exploration Company Ltd., Shaman Energy Corporation and Rana Resources Ltd. (Respondents / Plaintiffs) and Hunt Oil Company of Canada, Inc. (Appellant / Defendant) and Adeco Exploration Company Ltd. and Shaman Energy Corporation (Respondents / Third Parties)

K. Ritter, C. O'Brien, P. Rowbotham JJ.A.

Heard: March 12, 2008
Judgment: June 9, 2008
Docket: Calgary Appeal 0701-0176-AC

Proceedings: affirming *Adeco Exploration Co. v. Hunt Oil Co. of Canada Inc.* (2007), 2007 CarswellAlta 1953 (Alta. Q.B.)

Counsel: C.A. Crang for Respondents / Plaintiffs
M.E. Killoran, K. Osaka for Appellant / Defendant

Subject: Natural Resources; Contracts; Torts; Estates and Trusts; Property

Related Abridgment Classifications

Natural resources
III Oil and gas
III.6 Exploration and operating agreements
III.6.b Joint operating agreement
Torts
XV Negligence
XV.1 Duty and standard of care
XV.1.h Gross negligence
Torts
XV Negligence
XV.1 Duty and standard of care
XV.1.j Fiduciary duty

Headnote

Natural resources --- Oil and gas — Exploration and operating agreements — Joint operating agreement

Parties entered into operating agreement regarding exploration and drilling for oil wherein defendant had 75 per cent interest, and plaintiffs A and S had 16.6675 percent interest and 8.3325 percent interest respectively — On application by defendant, Crown refused to grant continuation of certain section of parties' leased property unless they could provide additional evidence of productivity — Plaintiffs were not made aware of Crown's requirement for further evidence — Defendant did not provide evidence, and leases were not continued — Plaintiffs' action for damages for breach of operating agreement, breach of fiduciary duty, and negligence was allowed — Defendant appealed — Appeal dismissed — Trial judge erred in finding that defendant owed plaintiffs fiduciary duty — However, defendant was grossly negligent in failing to continue leases and consequently, defendant was solely responsible for plaintiffs' losses.

Torts --- Negligence — Duty and standard of care — Fiduciary duty

Parties entered into operating agreement regarding exploration and drilling for oil wherein defendant had 75 per cent interest, and plaintiffs A and S had 16.6675 percent interest and 8.3325 percent interest respectively — On application by defendant,

Crown refused to grant continuation of certain section of parties' leased property unless they could provide additional evidence of productivity — Plaintiffs were not made aware of Crown's requirement for further evidence — Defendant did not provide evidence, and leases were not continued — Plaintiffs' action for damages for breach of operating agreement, breach of fiduciary duty, and negligence was allowed — Defendant appealed — Appeal dismissed — Trial judge erred in finding that defendant owed plaintiffs fiduciary duty — However, defendant was grossly negligent in failing to continue leases and consequently, defendant was solely responsible for plaintiffs' losses.

Torts --- Negligence — Duty and standard of care — Gross negligence

Parties entered into operating agreement regarding exploration and drilling for oil wherein defendant had 75 per cent interest, and plaintiffs A and S had 16.6675 percent interest and 8.3325 percent interest respectively — On application by defendant, Crown refused to grant continuation of certain section of parties' leased property unless they could provide additional evidence of productivity — Plaintiffs were not made aware of Crown's requirement for further evidence — Defendant did not provide evidence, and leases were not continued — Plaintiffs' action for damages for breach of operating agreement, breach of fiduciary duty, and negligence was allowed — Defendant appealed — Appeal dismissed — Trial judge erred in finding that defendant owed plaintiffs fiduciary duty — However, defendant was grossly negligent in failing to continue leases and consequently, defendant was solely responsible for plaintiffs' losses.

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Amoco Canada Petroleum Co. v. Quantel Engineering (1981) Ltd. (2002), 2002 CarswellAlta 1362, 2002 ABQB 521, 318 A.R. 335 (Alta. Q.B.) — referred to

Brinkerhoff International Inc. v. Numac Energy Inc. (1997), 1997 CarswellAlta 821, [1998] 1 W.W.R. 322, 53 Alta. L.R. (3d) 4, 209 A.R. 195, 160 W.A.C. 195 (Alta. C.A.) — referred to

Consolidated-Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co. (1979), *(*sub nom. *Exportations Consolidated-Bathurst Ltée c. Mutual Boiler & Machinery Insurance Co.)* [1980] 1 S.C.R. 888, 112 D.L.R. (3d) 49, 1979 CarswellQue 157, 1979 CarswellQue 157F, 32 N.R. 488, [1980] I.L.R. 1-1176 (S.C.C.) — referred to

Erehwon Exploration Ltd. v. Northstar Energy Corp. (1993), 15 Alta. L.R. (3d) 200, 108 D.L.R. (4th) 709, 52 C.P.R. (3d) 170, [1994] 3 W.W.R. 488, 147 A.R. 1, 1993 CarswellAlta 225 (Alta. Q.B.) — followed

Frame v. Smith (1987), 1987 CarswellOnt 969, 78 N.R. 40, [1987] 2 S.C.R. 99, 42 D.L.R. (4th) 81, 23 O.A.C. 84, 42 C.C.L.T. 1, [1988] 1 C.N.L.R. 152, 9 R.F.L. (3d) 225, 1987 CarswellOnt 347 (S.C.C.) — considered

Hodgkinson v. Simms (1994), 57 C.P.R. (3d) 1, 5 E.T.R. (2d) 1, [1994] 3 S.C.R. 377, 95 D.T.C. 5135, 97 B.C.L.R. (2d) 1, 117 D.L.R. (4th) 161, 171 N.R. 245, 1994 CarswellBC 438, 1994 CarswellBC 1245, [1994] 9 W.W.R. 609, 49 B.C.A.C. 1, 80 W.A.C. 1, 22 C.C.L.T. (2d) 1, 16 B.L.R. (2d) 1, 6 C.C.L.S. 1 (S.C.C.) — considered

Holland v. Toronto (City) (1926), [1927] S.C.R. 242, [1927] 1 D.L.R. 99, 1926 CarswellOnt 77, 59 O.L.R. 628 (S.C.C.) — followed

Housen v. Nikolaisen (2002), 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 286 N.R. 1, [2002] 7 W.W.R. 1, 2002 CarswellSask 178, 2002 CarswellSask 179, 2002 SCC 33, 30 M.P.L.R. (3d) 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] 2 S.C.R. 235 (S.C.C.) — followed

Huff v. Price (1990), 1990 CarswellBC 267, 46 C.P.C. (2d) 209, 76 D.L.R. (4th) 138, 51 B.C.L.R. (2d) 282 (B.C. C.A.) — considered

International Corona Resources Ltd. v. LAC Minerals Ltd. (1989), 44 B.L.R. 1, 35 E.T.R. 1, *(*sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.)* 69 O.R. (2d) 287, *(*sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.)* 61 D.L.R. (4th) 14, 101 N.R. 239, 36 O.A.C. 57, *(*sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.)* [1989] 2 S.C.R. 574, 6 R.P.R. (2d) 1, *(*sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.)* 26 C.P.R. (3d) 97, 1989 CarswellOnt 126, 1989 CarswellOnt 965 (S.C.C.) — followed

Jager v. Liberty Mutual Fire Insurance Co. (2001), 31 C.C.L.I. (3d) 159, 93 Alta. L.R. (3d) 391, 281 A.R. 273, 248 W.A.C. 273, [2001] 9 W.W.R. 272, [2002] I.L.R. I-4039, 2001 CarswellAlta 826, 2001 ABCA 163 (Alta. C.A.) — considered

Kingston (City) v. Drennan (1897), 27 S.C.R. 46, 1897 CarswellOnt 21 (S.C.C.) — followed

Luscar Ltd. v. Pembina Resources Ltd. (1994), 24 Alta. L.R. (3d) 305, *(*sub nom. *Luscar Ltd and Norcen v. Pembina Resources Ltd.)* 162 A.R. 35, 83 W.A.C. 35, [1995] 2 W.W.R. 153, 1994 CarswellAlta 251 (Alta. C.A.) — considered
Luscar Ltd. v. Pembina Resources Ltd. (1995), [1995] 8 W.W.R. lxxv, 193 N.R. 398 (note), 184 A.R. 159 (note), 122 W.A.C. 159 (note), 31 Alta. L.R. (3d) xli, [1995] 3 S.C.R. vii (S.C.C.) — referred to
McCain Produce Co. v. Canadian National Railway (1980), 1980 CarswellNB 37, 30 N.B.R. (2d) 476, 70 A.P.R. 476, 113 D.L.R. (3d) 584 (N.B. C.A.) — considered
McCain Produce Co. v. Canadian National Railway (1981), 1981 CarswellNB 26, 1981 CarswellNB 26F, [1981] 2 S.C.R. 219, 35 N.B.R. (2d) 511, 88 A.P.R. 511, 123 D.L.R. (3d) 764, 38 N.R. 534 (S.C.C.) — referred to
McCulloch v. Murray (1942), [1942] S.C.R. 141, 1942 CarswellNS 15, [1942] 2 D.L.R. 179 (S.C.C.) — followed
Meyer v. Partec Lavalin Inc. (2001), 94 Alta. L.R. (3d) 250, 281 A.R. 339, 248 W.A.C. 339, 11 C.C.E.L. (3d) 56, [2001] 8 W.W.R. 628, 2001 ABCA 145, 2001 CarswellAlta 804 (Alta. C.A.) — considered
Meyer v. Partec Lavalin Inc. (2002), 2002 CarswellAlta 142, 2002 CarswellAlta 143, 299 A.R. 327 (note), 266 W.A.C. 327 (note), 289 N.R. 198 (note) (S.C.C.) — referred to
Missouri Pac. Ry. Co. v. Shuford (1888), 72 Tex. 165, 10 S.W. 408 (U.S. Tex. S.C.) — referred to
Morel v. Lefrancois (1906), 38 S.C.R. 75, 4 C.B.R. 113, 1906 CarswellQue 26 (S.C.C.) — referred to
Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co. (1993), [1993] 2 W.W.R. 433, *(*sub nom. *Simcoe & Erie General Insurance Co. v. Reid Crowther & Partners Ltd.)* [1993] I.L.R. 1-2914, 13 C.C.L.I. (2d) 161, 83 Man. R. (2d) 81, 36 W.A.C. 81, 6 C.L.R. (2d) 161, [1993] 1 S.C.R. 252, 147 N.R. 44, 99 D.L.R. (4th) 741, 1993 CarswellMan 96, 1993 CarswellMan 343, [1993] 1 S.C.R. 10 (S.C.C.) — referred to
United Canso Oil & Gas Ltd. v. Washoe Northern Inc. (1991), 121 A.R. 1, 1991 CarswellAlta 584 (Alta. Q.B.) — considered

APPEAL by defendant from judgment reported at *Adeco Exploration Co. v. Hunt Oil Co. of Canada Inc.* (2007), 2007 CarswellAlta 1953 (Alta. Q.B.), finding defendant liable for plaintiffs' losses.

***K. Ritter J.A.*:**

1 The appellant, Hunt Oil Company of Canada Inc. ("Hunt Oil"), appeals the trial judge's decision finding Hunt Oil liable to the respondents, Adeco Exploration Company Ltd. ("Adeco") and Shaman Energy Corporation ("Shaman"), for failing to continue oil and gas leases of joint interest, and solely liable to Rana Resources Ltd. ("Rana") for losses it will incur as a result of the discontinuation of those same leases. The appeal raises issues of contractual interpretation, negligence, gross negligence and breach of fiduciary duty, and is of significance to the oil and gas industry in Alberta since it involves the interpretation of an agreement commonly used in the industry.

Background

2 Hunt Oil, Adeco, and Shaman jointly owned certain oil and gas leases issued by the province of Alberta, respecting lands in an oil play in central Alberta known as the Rosevear Bluesky A Oil Pool. Hunt Oil's interest in the leases was 75%, Adeco owned 16.66675% and Shaman owned an 8.3325% interest in the leases. Rana was a royalty owner, holding a 3% royalty interest respecting production from the leases.

3 Effective September 23, 1993 Hunt Oil, Shaman, Adeco and Rana entered into a royalty agreement. The leases at issue, acquired at a provincial land auction held in May 1996, were not initially covered by the royalty agreement, but the agreement was amended in 1998 to include them. The two leases at issue each had a primary term of five years, from May 2, 1996, and included the right to extend the primary term upon certain obligations being fulfilled.

4 On March 17, 1994, Hunt Oil, Adeco and Shaman entered into a joint operating agreement (the "JOA"), which incorporated the terms of the 1990 version of the Canadian Association of Petroleum Landmen Operating Procedure (the "CAPL"), and assigned Hunt Oil the role of operator. On February 26, 1997, Hunt Oil, Adeco and Shaman entered into an inclusion agreement, making the two leases at issue part of, and subject to, the terms of the JOA and, by extension, the 1990 CAPL.

She responded to the effect that there was nothing more and that Hunt Oil would have to let the leases lapse, which is precisely what occurred.

53 It is clear that continuation in this case was a simple matter. What was missing was available to Hunt Oil or could have been produced by it with minimal effort. When Hunt Oil's land agent responded to the request for more information, either she was clearly wrong or the technical person who informed her was clearly wrong. Moreover, the process of renewal had been in place for many years. What was required for renewal was readily available to Hunt Oil on a guide provided by Alberta Energy and on its website, referred to in that guide. Most importantly, although Hunt Oil says that it had a system in place for continuing leases, that system was dreadfully deficient. No alarm bells rang when the rejection letters were received by it. The employee who filed the initial application clearly did not know what was required to ensure continuation of the leases, nor did the employee who received and dealt with the rejection notices. It would have been an easy matter to have in place an employee who knew and understood the continuation process, or to arrange oversight by such a person. It would also have been an easy matter to require that all rejections be referred to someone up the management chain.

54 The system that existed at Hunt Oil, at the relevant time, was largely *ad hoc* and last minute. Little surprise arises from that system's failure, especially when it is coupled with personnel providing advice that is clearly wrong.

55 It is evident from this discussion that Hunt Oil was negligent, but was it grossly negligent? The case law directs that gross negligence amounts to "very great negligence": *Kingston (City) v. Drennan* (1897), 27 S.C.R. 46 (S.C.C.) at 60. It has been described as "conscious wrongdoing" or "a very marked departure" from the standard of care required: see *McCulloch v. Murray*, [1942] S.C.R. 141 (S.C.C.) at 145; *United Canso Oil & Gas Ltd. v. Washoe Northern Inc.* (1991), 121 A.R. 1 (Alta. Q.B.) at para. 345. In *Holland v. Toronto (City)*, [1927] S.C.R. 242, 59 O.L.R. 628 (S.C.C.) at 634, Anglin C.J.C. described "the character and the duration of the neglect to fulfill [the] duty, including the comparative ease or difficulty of discharging it" as "important, if not vital, factors in determining whether the fault (if any) ... is so much more than merely ordinary neglect that it should be held to be a verygreat, or gross, negligence". Conscious indifferenceequates to gross negligence: *Missouri Pac. Ry. Co. v. Shuford*, 72 Tex. 165, 10 S.W. 408 (U.S. Tex. S.C. 1888) at 411.

56 Hunt Oil argues it was not consciously indifferent since it had a system for renewal in place. However, as I have stated, that system involved a great deal of *ad hoc* response to crises by personnel lacking requisite knowledge and skills. It was a system that contemplated no problems, and no doubt worked so long as the continuation involved leases on producing lands. It did not come close to addressing what was required for continuations on non-producing lands.

57 What Hunt Oil did may be likened to a system in a law office in which an untrained, unknowing person, tasked with ensuring claims are filed in time to meet limitations, upon having a claim rejected by the relevant filing office, checks with someone else, who has no understanding of the process. In turn, the person checked with either provides a response that we are doomed, or, checks with another person who erroneously provides that response. I would have no hesitation in determining the responsible lawyer or firm to be grossly negligent in relying on such a system. It amounts to no system at all. It relies on luck to ensure that claims are filed in time.

58 I conclude that Hunt Oil was grossly negligent by failing to continue the leases. Therefore, regardless of its success regarding other issues on this appeal, it remains liable to the respondents under the terms of the agreements among the parties.

4. Were Adeco and Shaman Guilty of Contributory Negligence?

59 Hunt Oil argues that Adeco and Shaman both had the requisite knowledge to take corrective procedures or warn Hunt Oil that its continuation efforts were deficient, but failed to do so. Hunt Oil says they were therefore contributorily negligent. In advancing this argument, Hunt Oil focuses on two points in time. First, Hunt Oil says the evidence established that it gave Adeco and Shaman everything it had submitted to Alberta Energy in May 2001, contemporaneously with its application for continuance. Second, it says that on receipt of the August 3, 2001 letter of rejection from Alberta Energy, it immediately sent copies of the letter to each of Adeco and Shaman. Hunt Oil argues that Adeco and Shaman were well aware of what it sent to Alberta Energy and that, as experienced oil and gas entities, they were also well aware of what was necessary to obtain

TAB 11

Most Negative Treatment: Not followed
Most Recent Not followed: Zheng v. Anderson Square Holdings Ltd. | 2023 BCSC 2215, 2023 CarswellBC 3698 | (B.C. S.C., Nov 29, 2023)

1994 CarswellOnt 255
Ontario Court of Justice (General Division [Commercial List]), In Bankruptcy

Cumberland Trading Inc., Re

1994 CarswellOnt 255, [1994] O.J. No. 132, 23 C.B.R. (3d) 225, 45 A.C.W.S. (3d) 199

Re proposal of CUMBERLAND TRADING INC.

Farley J.

Judgment: January 24, 1994
Docket: Doc. 31-282225

Counsel: *Kevin J. Zych*, for secured creditor, Skyview International Finance Corporation.
Jeff Carhart, for debtor, Cumberland Trading Inc.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.6 Miscellaneous
Headnote
Bankruptcy --- Proposal — General
Proposals — Notice of intention — Secured creditor moving for declaration that stay of proceedings no longer operated to prevent it from enforcing its security — Secured creditor not quantifying material prejudice to it resulting from continued operation of stay — Motion dismissed.
A secured creditor demanded payment in full of its operating financing loan to the debtor and gave notice of intention to enforce its security under the *Bankruptcy and Insolvency Act* (the "Act"). Two days before the expiration of the time to repay, the debtor filed a notice of intention to make a proposal. A stay of proceedings under s. 69 of the Act resulted. The secured creditor indicated that it would not approve any proposal the debtor might make; it held 95 per cent of the debtor's admitted secured creditors' claims and 67 per cent of all creditors' claims. It argued that the continued operation of the stay would be materially prejudicial to its rights.
The secured creditor brought a motion for a declaration that the stay provisions of ss. 69 and 69.1 of the Act no longer operated to prevent it from enforcing its security. It also moved for a declaration that the 30-day period to file a proposal provided in s. 50.4(8) was terminated and for an order removing the debtor's choice for trustee under the notice of intention to file a proposal and substituting another.
Held:
The motion for a declaration regarding the stay was dismissed; the motion for a declaration that the 30-day period was terminated and for an order substituting another trustee was allowed.
The secured creditor was not entitled to the benefit of s. 69.4(*a*). Its claim that it would be materially prejudiced by the continued operation of the stay was not supported by sufficient evidence. The secured creditor argued that the only way the debtor now had to finance its operations was by turning the secured creditor's accounts receivable and inventory into cash, thereby eroding the secured creditor's security. However, the secured creditor did not quantify the prejudice to it from these actions, nor did it quantify the expected deterioration of its security if the stay was not lifted.

Table of Authorities

Cases considered:

Inducon Development Corp., Re (1992), 8 C.B.R. (3d) 308 (Ont. Gen. Div.) — *referred to*

N.T.W. Management Group Ltd., Re (1993), 19 C.B.R. (3d) 162 (Ont. Bktcy.) — *not followed*

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

Statutes considered:

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

s. 50.4(1)

s. 50.4(8)

s. 50.4(11)

s. 69

s. 69.1

s. 69.4

s. 244

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

Motions by secured creditor for declaration that stay provisions of *Bankruptcy and Insolvency Act* no longer operated to prevent it from enforcing its security, for declaration that 30-day period to file proposal had terminated and for order allowing substitution of trustee.

***Farley J.*:**

1 Skyview International Finance Corporation ("Skyview") brought this motion for a declaration that the stay provisions (ss. 69 and 69.1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended ("BIA") no longer operate in respect of Skyview taking steps to enforce its security (including accounts receivable and inventory) given by Cumberland Trading Inc. ("Cumberland") which it has been financing for the last 9 years. In addition Skyview moved for a declaration that the 30 day period to file a proposal mentioned in s. 50.4(8) BIA was terminated. Thirdly, Skyview was asking for an order removing Doane Raymond Limited ("Doane") which was Cumberland's choice as trustee and substituting A. Farber Associates ("Farber") as trustee under the Notice of Intention to File a Proposal of Cumberland. In the alternative to the relief awarded in the last two aspects, Skyview wished to have an order appointing Farber as interim receiver.

2 On January 5, 1994 Skyview demanded payment in full of its operating financing loan to Cumberland and gave a s. 244 BIA notice of its intention to enforce its security in ten days. The affidavit filed on behalf of Skyview indicated that Cumberland was not cooperating with it in providing appropriate financial information for the last half year. This was disputed in the affidavit filed by Cumberland. Suffice it to say that there has been a falling out between the two. Skyview asserted that it was owed $966,478 and that there was an exposure to it under a guarantee given on Cumberland's behalf to a potential of approximately $200,000 U.S. Skyview's deadline for repayment was January 16th. On January 14th Cumberland filed with the Official Receiver a Notice of Intention to make a Proposal (s. 50.4(1) BIA) and pursuant to s. 69 BIA there would be a stay of proceedings upon this filing.

3 Skyview's president swore that:

> 21. In light of the unpleasant and frustrating experience Skyview has had to endure over the preceding 3 to 4 months with Cumberland, including specifically the persistent refusal by Cumberland to account for its sales from the Retail Business, the misrepresentation of Cumberland's pre-sold orders referred to above and particularly its secretive purported "termination" of its direction to accord to pay sums to Skyview in reduction of Cumberland's indebtedness, Skyview's faith

> and confidence in the management of Cumberland has been irreparably damaged such that Skyview would not be prepared to vote in terms of any proposal which Cumberland may make.

and further that

> 24. The continued operation of a stay of proceedings preventing Skyview from enforcing its security will be materially prejudicial to the rights of Skyview. The assets of Skyview consist primarily of inventory and receivables (both from the Distribution Business and the Retail Business). With each day that passes Cumberland is converting its inventory (financed by Skyview) into cash (primarily in the Retail Business) and receivables (primarily in the Distribution Business) and it is Skyview's fear that those sums will be used by Cumberland to pay its other creditors and to fund the professional costs which it inevitably must incur in formulating and implementing a proposal. This fear is especially heightened insofar as the receivables generated from the Retail Business are concerned as they are under the direct and immediate control of Cumberland and are not collected by Accord.

4 Cumberland's Notice of Intention to File a Proposal acknowledges that Skyview is owed $750,000. On that basis Skyview has 95% in value of Cumberland's admitted secured creditors' claims and 67% of all creditors' claims of whatever nature. No matter what, Skyview's claim is so large that Skyview cannot be swamped in any class in which it could be put. Clearly Skyview would have a veto on any vote as to a proposal, at least so far as the secured class, assuming the secureds are treated as a separate class. This leaves the interesting aspect that under the BIA regime one could have a proposal turned down by the secured creditor class but approved by the unsecured creditor class and effective vis-à-vis this latter class, but with the secured class being able to enforce their security. One may question the practicality a proposal affecting only unsecured creditors becoming effective in similar circumstances to this situation.

5 Cumberland's essential position is that it must have some time under BIA to see about reorganizing itself. While I am mindful that both BIA and the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") should be classified as debtor friendly legislation since they both provide for the possibility of reorganization (as contrasted with the absence of creditor friendly legislation which would allow, say, creditors to move for an increase in interest rates if inflation became rampant), these acts do not allow debtors absolute immunity and impunity from their creditors. I would also observe that all too frequently debtors wait until virtually the last moment, the last moment or, in some cases, beyond the last moment before even beginning to think about reorganization (and the attendant support that any successful reorganization requires from the creditors). I noted the lamentable tendency of debtors to deal with these situations as "last gasp" desperation moves in *Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 308 (Ont. Gen. Div.). To deal with matters on this basis minimizes the chances of success, even if "success" may have been available with earlier spadework. It is true that under BIA an insolvent person can get an automatic stay by merely filing a Notice of Intention to File a Proposal — as opposed to the necessity under CCAA of convincing the court of the appropriateness of granting a stay (and the nature of the stay). However BIA does not guarantee the insolvent person a stay without review for any set period of time. To keep the playing field level and dry so that it remains in play, a creditor or creditors can apply to the court to cut short the otherwise automatic (or extended) stay; in this case Skyview is utilizing s. 50.4(11) to do so.

6 Cumberland relies upon *Re N.T.W. Management Group Ltd.* (1993), 19 C.B.R. (3d) 162 (Ont. Bktcy.), a decision of Chadwick J. Skyview asserts that *N.T.W.* is distinguishable or incorrectly decided and secondly that the philosophy of my decision in *Re Triangle Drugs Inc.* (1993), 16 C.B.R. (3d) 1 (Ont. Bktcy.) should prevail. In *Triangle Drugs* I allowed the veto holding group of unsecured creditors to in effect vote at an advance poll in a situation where there appeared to be a gap in the legislation. The key section of BIA is s. 50.4(11) which provides:

> The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that
>
> (*a*) the insolvent person has not acted, or is not acting, in good faith and with due diligence,

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

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

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

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

It does not seem to me that there is any gap in this sector of the legislation.

7 As the headnote in *N.T.W.* stated, Chadwick J. viewed a situation similar to this one as requiring that the debtor must have an opportunity to put forth its proposal when he stated at p. 163:

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

However I note that in this instance Cumberland has filed its Notice of Intention to File a Proposal the day before Skyview's s. 244 notice would have allowed it to take control of the security. Cumberland's president swore that:

> 2. The efforts which Cumberland is currently undertaking represent a bona fide effort, made in good faith, to restructure its finances in order to preserve the business of the company for the benefit of all of the creditors of the company, including Skyview. It is my belief that the proposal process will represent a significantly better treatment of all such creditors then would be available through either an enforcement by Skyview of its security against the assets of Cumberland, a bankruptcy of Cumberland or other processes available in the circumstances.

and further that:

> I intend to submit a proposal, pursuant to the provisions of the Bankruptcy and Insolvency Act, which represents the most advantageous treatment available, in my view, to all of the creditors of Cumberland and which allows for the continued viability of the business of Cumberland. This proposal is being prepared, and will be presented, in complete good faith. In the course of reviewing and preparing this proposal material with Mr. Godbold, I have determined that the legitimate claim of Skyview does not, in fact, represent in excess of 66-2/3 of all of the claims against Cumberland. At this time, Doane Raymond Limited is already in the position of Trustee under the proposal, in accordance with the provisions of the Bankruptcy and Insolvency Act. In addition, as noted above, I am prepared to consent to the appointment of Doane Raymond Limited as interim receiver of Cumberland. In the circumstances, I respectfully submit that the stay in favour of Cumberland pursuant to the Bankruptcy and Insolvency Act should not be lifted.

No explanation was given as to the lower share indicated for Skyview but in any event there was no assertion that Skyview lost its veto.

8 However we do not have any indication of what this proposal proposes to be — notwithstanding that 10 days have now passed since Cumberland filed its Notice of Intention to File a Proposal and five days since Skyview served Cumberland with this motion. In a practical sense one would expect, given Skyview's veto power and its announced position, that Cumberland would have to present "something" to get Skyview to change its mind — e.g. an injection of fresh equity or a take out of Skyview's loan position. However there was not even a germ of a plan revealed — but merely a bald assertion that the proposal being worked on would be a better result for everyone including Skyview. This is akin to trying to box with a ghost. While I agree with the logic of Chadwick J. when he said at p. 168 of *N.T.W.* that:

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

9 However this analysis does not seem to address the test involved. With respect I do not see this logical aspect as coming into play in s. 50.4(11)(*c*) which reads:

> The court may, on application by ... a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) ... if the court is satisfied that
>
> . . . . .
>
> (*c*) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or
>
> . . . . .
>
> and where the court declares the period in question terminated, paragraphs (8)(*a*) to (*c*) thereupon apply as if that period had expired.

It seems to me that clause (*c*) above deals specifically with the situation where there has been no proposal tabled. It provides that there is no absolute requirement that the creditors have to wait to see what the proposal is before they can indicate they will vote it down. I do not see anything in BIA which would affect a creditor (or group of creditors) with a veto position from reaching the conclusion that nothing the insolvent debtor does will persuade the creditor to vote in favour of whatever proposal may be forthcoming. I think that this view is strengthened when one considers that the court need only be satisfied that "the insolvent person will not *likely* be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors ..." (emphasis added). This implies that there need not be a certainty of turndown. The act of making the proposal is one that is still yet to come. I am of the view that Skyview's position as indicated above is satisfactory proof that Cumberland will not likely be able to make a proposal that will be accepted by the creditors of Cumberland.

10 Skyview of course also has the option of proceeding under s. 69.4 BIA which provides:

> A creditor who is affected by the operation of sections 69 to 69.3 may apply to the court for a declaration that those sections no longer operate in respect of that creditor, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied
>
> (*a*) that the creditor is likely to be materially prejudiced by the continued operation of those sections; or
>
> (*b*) that it is equitable on other grounds to make such a declaration.

11 Is Skyview entitled to the benefit of s. 69.4(*a*) BIA? I am of the view that the material prejudice referred to therein is an objective prejudice as opposed to a subjective one — i.e., it refers to the degree of the prejudice suffered vis-à-vis the indebtedness and the attendant security and not to the extent that such prejudice may affect the creditor *qua* person, organization or entity. If it were otherwise then a "big creditor" may be so financially strong that it could never have the benefit of this clause. In this situation Skyview's prejudice appears to be that the only continuing financing available to Cumberland is that generated by turning Chamberland's accounts receivable and inventory (pledged to Skyview) into cash to pay operating expenses during the period leading up to a vote on a potential proposal, which process will erode the security of Skyview, without any replenishment. However Skyview does not go the additional step and make any quantitative (or possibly qualitative) analysis as to the extent of such prejudice so that the court has an idea of the magnitude of materiality. In other words, Skyview presently

estimates that it would be fortunate to realize $450,000 on Cumberland's accounts receivables and inventory, but it does not go on to give any foundation for a conclusion that in the course of the next month $x of this security would be eaten up or alternatively that the erosion would likely be in the neighbourhood of $y per day of future operations. The comparison would be between the "foundation" of a maximum of $450,000 and what would happen as to deterioration therefrom if the stay is not lifted. I note there was no suggestion by Cumberland that there would be no erosion of Skyview's position by, say, getting a cash injection or by improving margins by increasing revenues or decreasing expenses. Skyview's request for its first relief request is dismissed since in my view Skyview did not engage in the correct comparison of material prejudice.

12 I note that Cumberland does not oppose Skyview's request for an interim receiver. But for my conclusion that Skyview succeeds in its second relief request (to have the 30 day period in which to file a proposal terminated) and the ancillary third relief request of substitution of Farber for Doane as trustee, I would have granted the fourth relief request of appointing Farber as interim receiver. I would also award Skyview costs of $600 payable out of the estate of Cumberland from the proceeds first realized.

Order accordingly.

TAB 12

Most Negative Treatment: Distinguished
Most Recent Distinguished: Schendel Management Ltd., Re | 2019 ABQB 545, 2019 CarswellAlta 1457, 73 C.B.R. (6th) 13, [2019] A.W.L.D. 3043, [2019] A.W.L.D. 3044, 1 Alta. L.R. (7th) 385, [2020] 10 W.W.R. 443, 308 A.C.W.S. (3d) 472 | (Alta. Q.B., Jul 19, 2019)

2013 BCSC 1833
British Columbia Supreme Court

Enirgi Group Corp. v. Andover Mining Corp.

2013 CarswellBC 3026, 2013 BCSC 1833, [2013] B.C.W.L.D. 9307, 233 A.C.W.S. (3d) 557, 6 C.B.R. (6th) 32

In the Supreme Court of British Columbia in Bankruptcy and Insolvency

In the Matter of the notice of Intention to Make a Proposal of Andover Mining Corp.

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

Enirgi Group Corporation Creditor and Andover Mining Corp. Insolvent Person

Steeves J.

Heard: September 24, 2013
Judgment: October 4, 2013
Docket: Vancouver B131136

Counsel: D.R. Brown, M. Nied for Creditor
M.R. Davies for Insolvent Person

Subject: Insolvency; Contracts; Corporate and Commercial
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.5 Practice and procedure
Headnote
Bankruptcy and insolvency --- Proposal — Time period to file — Extension of time
Creditor held three promissory notes against debtor — Debtor filed intention to file proposal — Debtor brought application for extension of time for filing proposal for period of 45 days — Creditor brought application for declaration that debtor's attempt to file proposal be immediately terminated, debtor be deemed bankrupt and trustee be appointed — Parties disputed which application should prevail — Application by debtor allowed; application by creditor dismissed with leave to reapply — Debtor had significant assets — It was likely that debtor would be able to present viable proposal — Debtor acted in good faith and with due diligence in attempting to construct proposal — There was no material prejudice to creditor if extension was granted — If debtor presented proposal, creditor would have opportunity to decide its position — Debtor was entitled to have its application considered on merits — If debtor's application was not meritorious it was logical to proceed with creditor's application.
Table of Authorities
Cases considered by *Steeves J.*:
Baldwin Valley Investors Inc., Re (1994), 1994 CarswellOnt 253, 23 C.B.R. (3d) 219 (Ont. Gen. Div. [Commercial List]) — considered

Cantrail Coach Lines Ltd., Re (2005), 10 C.B.R. (5th) 164, 2005 BCSC 351, 2005 CarswellBC 581 (B.C. Master) — followed
Com/Mit Hitech Services Inc., Re (1997), 47 C.B.R. (3d) 182, 1997 CarswellOnt 2753 (Ont. Bktcy.) — considered
Convergix Inc., Re (2006), 307 N.B.R. (2d) 259, 795 A.P.R. 259, 24 C.B.R. (5th) 289, 2006 NBQB 288, 2006 CarswellNB 460 (N.B. Q.B.) — considered
Cumberland Trading Inc., Re (1994), 23 C.B.R. (3d) 225, 1994 CarswellOnt 255 (Ont. Gen. Div. [Commercial List]) — considered
Entegrity Wind Systems Inc., Re (2009), 56 C.B.R. (5th) 1, 2009 PESC 25, 2009 CarswellPEI 47, 890 A.P.R. 347, 289 Nfld. & P.E.I.R. 347 (P.E.I. S.C.) — considered
Forest & Marine Financial Corp., Re (2009), 2009 BCCA 319, 2009 CarswellBC 1738, 54 C.B.R. (5th) 201, [2009] 9 W.W.R. 567, 461 W.A.C. 271, 273 B.C.A.C. 271, 96 B.C.L.R. (4th) 77 (B.C. C.A.) — referred to
N.T.W. Management Group Ltd., Re (1993), 1993 CarswellOnt 208, 19 C.B.R. (3d) 162 (Ont. Bktcy.) — considered
Pacific Shores Resort & Spa Ltd., Re (2011), 2011 BCSC 1775, 2011 CarswellBC 3500, 75 C.B.R. (5th) 248 (B.C. S.C. [In Chambers]) — referred to
Plancher Heritage Ltée / Heritage Flooring Ltd., Re (2004), 2004 NBQB 168, 2004 CarswellNB 358, 3 C.B.R. (5th) 60, (sub nom. *Heritage Flooring Ltd., Re)* 732 A.P.R. 1, (sub nom. *Heritage Flooring Ltd., Re)* 279 N.B.R. (2d) 1 (N.B. Q.B.) — considered
St. Isidore Meats Inc. / Viandes St. Isidore Inc. v. Paquette Fine Foods Inc. (1997), 1997 CarswellOnt 1524, 46 C.B.R. (3d) 280, 36 O.T.C. 76 (Ont. Bktcy.) — considered
Triangle Drugs Inc., Re (1993), 16 C.B.R. (3d) 1, 12 O.R. (3d) 219, 1993 CarswellOnt 178 (Ont. Bktcy.) — considered
1252206 Alberta Ltd. v. Bank of Montreal (2009), 2009 CarswellAlta 900, 2009 ABQB 355 (Alta. Q.B.) — considered

Statutes considered:

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

Pt. III — referred to

s. 47.1 [en. 1992, c. 27, s. 16(1)] — referred to

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

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

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

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

s. 50.4(11) [en. 1992, c. 27, s. 19] — considered

s. 50.4(11)(b) [en. 1992, c. 27, s. 19] — considered

s. 50.4(11)(c) [en. 1992, c. 27, s. 19] — considered

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

APPLICATION by debtor for extension of time for filing proposal; APPLICATION by creditor for declaration that debtor's attempt to file proposal be immediately terminated, debtor be deemed bankrupt and trustee be appointed.

***Steeves J.*:**

Introduction

39 The result in *Baldwin* was that the debtor's application under s. 50.4(9) was denied. There does not appear to have been an application for termination under 50.4(11), unlike the subject case. At para. 8, the court did contrast the provisions by saying that, if the debtor had been successful in its application to extend, it would have been a "Pyrrhic victory" because the creditor bank would have been able "to come right back in a motion based on s. 50.4(11)(c)."

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

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

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

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

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

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

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

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

The approach in Cantrail

TAB 13

2015 ONSC 5139
Ontario Superior Court of Justice

NS United Kaiun Kaisha, Ltd. v. Cogent Fibre Inc.

2015 CarswellOnt 12962, 2015 ONSC 5139, 257 A.C.W.S. (3d) 520, 30 C.B.R. (6th) 315

NS United Kaiun Kaisha, Ltd., Moving Party (Respondent in the Proposal) and Cogent Fibre Inc., Responding Party (Applicant in the Proposal)

Penny J.

Heard: August 12, 2015
Judgment: August 17, 2015
Docket: 31-2016058

Counsel: Doug Smith, Roger Jaipargas for NS United Kaiun Kaisha, Ltd.
Ken Kraft, Sara-Ann Van Allen for Cogent Fibre Inc.
Sam Babe for Proposal Trustee

Subject: Civil Practice and Procedure; Evidence; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
II Assignments in bankruptcy
II.3 Miscellaneous

Headnote

Bankruptcy and insolvency --- Assignments in bankruptcy — Procedure on assignment

Debtor was woodchipping business and had five year shipping contract with creditor — Creditor was successful in arbitration, and next day debtor made notice in bankruptcy — Debtor had assets of approximately $261,000 and no operations, revenues or cash flow — Creditor was only significant non-contingent current creditor, although arbitration proceedings were in progress with another business — Debtor brought motion for extension of 30-day stay, creditor brought motion to terminate stay — Debtor's motion dismissed, creditor's motion granted — Debtor not acting in good faith, not using due diligence, and was not likely to make viable proposal — Unlikely that stay would allow for acceptable proposal to be put forth — Evidence of debtor was vague and there was no evidence of what it would be able to offer creditors in proposal — Debtor had not put forth outline of any plan or proposal despite no business being conducted — There was no attempt being made to rehabilitate business — Creditor had veto over proposal and refused to negotiate with debtor.

Table of Authorities

Cases considered by *Penny J.*:

Cantrail Coach Lines Ltd., Re (2005), 2005 BCSC 351, 2005 CarswellBC 581, 10 C.B.R. (5th) 164 (B.C. Master) — considered

Cumberland Trading Inc., Re (1994), 23 C.B.R. (3d) 225, 1994 CarswellOnt 255 (Ont. Gen. Div. [Commercial List]) — considered

Enirgi Group Corp. v. Andover Mining Corp. (2013), 2013 BCSC 1833, 2013 CarswellBC 3026, 6 C.B.R. (6th) 32 (B.C. S.C.) — considered

Janodee Investments Ltd. v. Pellegrini (2001), 2001 CarswellOnt 1232, 25 C.B.R. (4th) 47 (Ont. S.C.J.) — considered

Statutes considered by *Penny J.*:

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

Generally — referred to

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

s. 50.4(11) [en. 1992, c. 27, s. 19] — considered

MOTION by debtor for extension of 30 day bankruptcy stay, MOTION by creditor to terminate order.

***Penny J.*:**

1 In a brief handwritten endorsement of August 12, 2015, I dismissed the motion of the debtor, Cogent Fibre Inc., for an extension of the 30- day stay under s. 50.4(9) of the *Bankruptcy and Insolvency Act* and allowed the motion of the judgment creditor, NS United Kaiun Kaisha, Ltd. for an order terminating the 30-day stay under s. 50.4(11) of the BIA, with reasons to follow. These are those reasons.

2 Cogent is in the woodchip business. It had a five-year shipping contract with NS United. There was a dispute which became the subject of an arbitration commenced in February 2012. An arbitral award was made against Cogent for Cdn$15.3 million in January 2015. In July 2015, the District Court for the Southern District of New York confirmed the award. The day after the release of the confirming judgment, Cogent filed its NOI.

3 In an affidavit sworn in collateral bankruptcy proceedings in New York, Mr. Montrop, a director of Cogent, deposed that Cogent's management decided to wind down Cogent's business well before the release of the arbitral award or confirming judgment. It did so, he said, on the basis not only of pending maritime arbitrations but other factors including a "hostile market."

4 Mr. Montrop's evidence is, however, that Cogent was prompted to file its NOI on the basis of its "belief" that NS United "will expeditiously seek to record the judgment and proceed with collection actions."

5 The evidence is that Cogent currently has assets of approximately $261,000 and has no operations, revenues or cash flow. The professional fees of these proceedings are being paid by its parent corporation.

6 Cogent currently has one material, non-contingent creditor — NS United. There are no secured creditors. Another maritime shipping company, NYK, also instituted arbitration proceedings against Cogent. NYK alleges it is owed about $10.9 million. There has been no hearing and there is, obviously, no decision or award. Those proceedings are currently stayed. The NYK claim is entirely contingent. There is no evidence that NYK it at all interested in whatever it is that Cogent has discussed. I was advised that NYK takes no position on the motions before me. It is conceded by Cogent that NS United has a veto over any proposal.

The Cogent Motion to Extend

7 Section 50.4(9) sets out a three-part, conjunctive test for the grant of an extension of the 30-day stay. The court may grant an extension, not to exceed 45 days, if satisfied on the evidence tendered in the application that:

> (i) the insolvent person has acted, and is acting, in good faith and with due diligence;
>
> (ii) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
>
> (iii) no creditor would be materially prejudiced if the extension being applied for were granted

8 There is no doubt that the intent of the BIA proposal sections is to give the insolvent person an opportunity to put forward a plan. The purpose of the legislation is rehabilitation, not liquidation. Insolvent companies should have the chance to put forward their proposal.

9 I am not satisfied, however, on the evidence provided by Cogent that it has acted and is acting in good faith and with due diligence. I am also not satisfied on the evidence provided by Cogent that it would likely be able to make a viable proposal if the extension being applied for were granted.

10 I say this principally of the basis of the vague, somewhat vacuous, affidavit evidence of Mr. Montrop filed in support of the Cogent motion and in response to the NS United motion.

11 His evidence amounts to this:

(a) Cogent has engaged in settlement discussions with NYK with a view to making a proposal to NYK;

(b) Cogent has offered to meet with NS United;

(c) Cogent is working towards a proposal; and

(d) Cogent requires additional time to continue discussions with NYK and NS United.

12 There is not a hint of what Cogent has to offer NYK and not a hint of what kind of proposal Cogent has in mind. Counsel for Cogent argues that because the settlement discussions are without prejudice, it cannot disclose them. I do not find that argument persuasive. Nothing prevents Cogent from describing its plan or what it hopes to achieve in a proposal.

13 Although Cogent has offered to meet with NS United, NS United has no interest in meeting with Cogent and has not done so.

14 Cogent says it is working towards a proposal but, in the face of this motion, has not provided even a hint of what that proposal might look like. At its highest, it involves talking to the two shipping companies and hoping to make a deal. Counsel made submissions about possible tax losses which may have value but there was not a mote of evidence to this effect.

15 In this case, the 30-day stay expires at midnight on August 14, 2015. Cogent has taken the position, on these motions, that if its request for an extension is denied, it will file a proposal of some kind on Monday, August 17, 2015. That, it suggests, would automatically extend the stay for another 21 days.

16 I find it difficult to understand how Cogent could plan to file a proposal on Monday, August 17 but was unable to provide at least the outline of this proposal on Wednesday, August 12. There was no explanation given for this apparent contradiction.

17 In effect, Cogent says it needs more time to continue discussions with its two major creditors when at least one of those creditors (a creditor with veto power) has not engaged in any discussions with Cogent and has no intention of doing so. Cogent's position is, I find, entirely tautological.

18 In his factum and in oral submissions, counsel for Cogent emphasized the rehabilitative nature of the proposal sections. He relied heavily on recent Ontario and B.C. authority to the effect that a veto-empowered creditor's statement that it will never agree to a proposal is not dispositive of whether to terminate or refuse to extend a stay. I quite agree with this position and the supporting law. Creditors often, for strategic reasons, say they will never agree.

19 Nevertheless, it seems to me there must be a certain forthrightness on the part of the debtor about what is sought to be achieved. There must also be an air of reality about the likelihood of any proposal being viable.

20 The 30-day stay (or any extension thereof) is meant to give the debtor time to deal with multiple parties, many moving pieces and potentially complex business and financial arrangements. Here, there is no active business. There are no complex financial arrangements. There are no assets. There are only two material creditors, at least one of which, NS United, has a veto over any proposal. There are, in effect, almost no moving pieces. In the face of a motion to terminate the stay, one would have thought the debtor would be motivated to come up with the best evidence it could of what its proposal might be and, specifically, why an extension is necessary to further the development of that proposal. Yet the debtor has chosen to put forward no concrete evidence but to rely on vague, conclusory assertions.

21 It is this failure to give even a hint of what a proposal might look like, or to provide any content for the bald and conclusory statement that more time is needed to further negotiations (particularly where it is unclear that there are any negotiations), which

leads me to the conclusion that Cogent has not met its onus of proving, on a balance of probabilities, that it has acted in good faith and with due diligence and that it is likely to be able to make a viable proposal if only it is given more time.

22 I am also driven to the conclusion that Cogent's emphasis on so-called "rehabilitation" is empty rhetoric in this case. The evidence filed by Cogent in the New York bankruptcy court makes it clear that there is no ongoing effort to "rehabilitate" this company. Management had already decided to wind down its operations before the NS United arbitration award was granted. The summary balance sheets filed by the proposal trustee indicate that Cogent is already well under way with its "wind-down." It went from $3.27 million in assets in 2013 to $5.024 million in 2014 to $261,476 in 2015.

23 Counsel for the debtor submitted in oral argument that perhaps the company could be restarted. There is no evidence whatsoever to support such a contention - indeed, all of the evidence is very much to the contrary.

24 For these reasons the debtor's motion to extend the stay under s. 50.4(9) is dismissed.

The NS United Motion to Terminate

25 Section 50.4(11) of the BIA provides that where a debtor files a notice of intention to make a proposal, a creditor can apply to the court to terminate the initial 30-day stay on one or more of four disjunctive grounds:

> (i) the insolvent person has not acted, or is not acting, in good faith and with due diligence;
>
> (ii) the insolvent person will not likely be able to make a viable proposal before the expiration of the 30-day period;
>
> (iii) the insolvent person will not likely to be able to make a proposal, before the expiration of the 30-day period that will be accepted by the creditors; or
>
> (iv) the creditors as a whole would be materially prejudiced if the application to terminate was rejected by the court.

26 NS United took the position that Cogent had not discharged its onus of proving it was acting in good faith and with due diligence on the motion to extend but did not positively assert this ground on the motion to terminate. NS United relies on the second and third grounds of s. 50.4(11).

27 It is clear from the very existence of s. 50.4(11), as well as judicial authority, that while an insolvent debtor is entitled to an automatic stay simply by filing a notice of intention to make a proposal, the BIA does not guarantee an insolvent person a stay without review. There is no absolute immunity from creditors. Section 50.4(11) of the BIA empowers the court to terminate the 30-day stay where the statutory conditions for doing so are met.

28 With respect to the probability of filing a viable proposal at all, I again refer to the paucity of evidence about what a proposal might look like. The debtor has utterly failed to provide even a hint of its plan for a proposal. The facts before the court, from Cogent management's own sworn statement, are that Cogent was already being "wound down" before the arbitral award prompted its filing of a NOI. The evidence before the court, therefore, is that management's plan is not to "rehabilitate" this company.

29 As mentioned earlier, Cogent's stated intention to file a proposal of some sort on the last day, in order to buy another 21 days, seems to me not only disingenuous but to highlight the lack of any concrete proposal. There is simply no evidence to suggest there is any plan in the offing at all, much less one that would probably appear reasonable to a reasonable creditor.

30 Cogent's gambit boils down to this: its proposal depends on negotiating a compromise with its only material, non-contingent creditor. That creditor, however, will not, and is under no obligation to, negotiate any compromise with Cogent.

31 On the second ground, likely to be acceptable to creditors, I agree with Cogent that the mere fact that NS United has a veto power over any proposal is not dispositive on a motion to terminate under s. 50.4(11). It is, however, one factor to be taken into account.

32 What adds credibility to NS United's position that it will, under no circumstances, agree to any proposal is the complete paucity of evidence that any plan is even possible, much less viable and likely to be accepted by creditors.

33 Counsel for Cogent sought to distinguish between the "harsher" line taken by the Ontario courts in cases such as *Cumberland Trading Inc., Re* [1994 CarswellOnt 255 (Ont. Gen. Div. [Commercial List])] and the more "liberal" approach taken in B.C. and other provinces in cases like *Cantrail Coach Lines Ltd., Re* [2005 CarswellBC 581 (B.C. Master)] and *Enirgi Group Corp. v. Andover Mining Corp.* [2013 CarswellBC 3026 (B.C. S.C.)] Counsel argued that the more liberal approach is more in keeping with the rehabilitative purpose of the proposal sections of the BIA and current views of how these provisions should be applied.

34 I am not convinced these cases are in conflict. The exercise of the discretion under ss. 50.4(9) and (11) of the BIA is highly fact dependent. *Cumberland*, for example, was a case where a proposal had already been filed; the issue was whether to terminate the 21-day stay. The facts of *Cantrail* and *Enirgi* can also be readily distinguished from the present case. In *Cantrail*, the debtor presented evidence of a pending proposal under which the objecting creditor might be paid out in full. In *Enirgi*, likewise, there was evidence that the debtor had significant assets - in other words, the debtor had something to work with.

35 Here, the debtor has essentially nothing to work with, which might explain why it has been so reluctant to come forward with anything concrete. Cogent has no active business, no revenue, no cash flow and effectively no assets. The inference to be drawn from the complete absence of any hint of a concrete proposal is, in these circumstances, that there is no basis for a viable plan and certainly no basis for a conclusion, on a balance of probabilities, that there is likely to be any proposal that would be acceptable to the veto-empowered creditor NS United.

36 Lax J. said in *Janodee Investments Ltd. v. Pellegrini* [2001 CarswellOnt 1232 (Ont. S.C.J.)] (April 12, 2001), "the proposal sections of the BIA are intended to give a debtor some breathing room. They are not intended to create an obstacle course for creditors."

37 Cogent admits that its only hope for a proposal is to negotiate a compromise with NS United; yet NS United has no interest, and no obligation to engage, in that negotiation.

38 Even applying what counsel for Cogent describes as the more "liberal" or debtor-friendly approach, on the evidence, NS United has discharged its burden under s. 50.4(11). NS United has, I find, proven on a balance of probabilities that it is not likely that Cogent will be able to make a viable proposal and, even if that were likely, the proposal will not likely be accepted by the requisite level of creditor support.

39 For these reasons, NS United's motion to terminate the 30-day stay is granted.

40 No order as to costs.

Motion by creditor granted, motion by debtor dismissed.

End of Document

TAB 14

1997 CarswellOnt 1524
Ontario Court of Justice, General Division (In Bankruptcy)

St. Isidore Meats Inc. / Viandes St. Isidore Inc. v. Paquette Fine Foods Inc.

1997 CarswellOnt 1524, [1997] O.J. No. 1863, 36 O.T.C. 76, 46 C.B.R. (3d) 280, 71 A.C.W.S. (3d) 17

St. Isidore Meats Inc./Viandes St. Isidore Inc., Applicant v. Paquette Fine Foods Inc. and Raymond Chabot Inc., Trustee in the Proposal of Paquette Fine Foods Inc., Respondents

Chadwick J.

Judgment: April 25, 1997
Docket: Ottawa 33-093805

Counsel: *Charles M. Gibson*, for proposing debtor/applicant.
Stanley J. Kershman, for secured creditor/respondent.

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.3 Effect of proposal
Bankruptcy and insolvency
VI Proposal
VI.5 Practice and procedure
Headnote
Bankruptcy --- Proposal — Effect of proposal — Effect on other legal processes
Defendant was insolvent person under Bankruptcy and Insolvency Act — Affidavit evidence clearly indicated that plaintiff would not vote for proposal, and defendant was unlikely to file viable proposal — Plaintiff would be materially prejudiced if stay of its action to enforce its security was continued — Stay of plaintiff's action was lifted — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.
Bankruptcy --- Proposal — Practice and procedure
Defendant put forth no meaningful financial plan to support proposal under Bankruptcy and Insolvency Act — Affidavit evidence clearly indicated that plaintiff would not vote for proposal and defendant was unlikely to file viable proposal — Defendant's motion for a 45-day extension to file proposal was dismissed — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.
The plaintiff sold a food processing plant to the defendant for $800,000. The plaintiff took back a first mortgage in the amount of $750,000, and registered the mortgage against the property. A security agreement was also registered. The defendant ultimately defaulted on the mortgage payments, and the plaintiff served a notice of intention to enforce security under the *Bankruptcy and Insolvency Act*. The defendant filed notice of its intention to file a proposal under the Act. The defendant did not put forth any meaningful plan that would support a proposal. It was clear from affidavit material that the plaintiff would not vote for the defendant's proposal in relation to either the secured debt or the unsecured debt, and, accordingly, the proposal would fail. The defendant brought a motion for a 45-day extension in order to file the proposal. The plaintiff brought a cross-motion to terminate the proposal, and for an order lifting the stay of the plaintiff's action to enforce the security.
Held: The defendant's motion was dismissed; the plaintiff's cross-motion was granted.
It was established that the defendant was an insolvent person under the Act, and the plaintiff would be materially prejudiced if the stay of its action to enforce the security was continued. Accordingly, the stay should be lifted.
The defendant did not establish that it would be likely to make a viable proposal if the extension being applied for were granted. Accordingly, the defendant's motion for an extension should be dismissed.

Table of Authorities

Cases considered by *Chadwick J.*:

Cumberland Trading Inc., Re (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div. [Commercial List]) — applied

Doaktown Lumber Ltd., Re (1995), 36 C.B.R. (3d) 136 (N.B. Q.B.) — applied

N.T.W. Management Group Ltd., Re (1993), 19 C.B.R. (3d) 162 (Ont. Bktcy.) — applied

Statutes considered:

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

Generally — considered

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

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

s. 50.4(11) [en. 1992, c. 27, s. 19] — referred to

s. 50.4(11)(c) [en. 1992, c. 27, s. 19] — considered

s. 69(2)(b) — considered

s. 69.4 [en. 1992, c. 27, s. 36] — pursuant to

s. 244(1) — referred to

Personal Property Security Act, R.S.O. 1990, c. P.10

Generally — referred to

MOTION by defendant for extension of time to file proposal; CROSS-MOTION by plaintiff for order lifting stay of action.

***Chadwick J.*:**

1 Paquette Fine Foods Inc. filed notice of its intention to file a proposal under the *Bankruptcy and Insolvency Act* on March 21, 1997 and bring this motion pursuant to s. 50.4(9) B.I.A. for a 45-day extension in order to able the proposing debtor to file its proposal.

2 St. Isidore Meats Inc. is both a secured and unsecured creditor of the debtor Paquette Fine Foods Inc.

3 St. Isidore Meats has brought a cross motion to terminate the proposal made by Paquette Fine Foods in accordance with the provisions of s. 50.4(11) of the B.I.A.

4 In addition, the creditor seeks an order lifting the stay pursuant to s. 69.4 of the B.I.A. act or a declaration in the alternative a declaration that the stay has no application to the creditor as a secured creditor.

5 Paquette Fine Foods Inc. carries on business in the preparation and distribution of prepackaged foods and related products such as packaged cooked meats.

6 The creditor St. Isidore Meets owned and operated a food processing plant in the Township of South Plantagenet. The plant was sold to Paquette Fine Foods on December 5, 1994. Paquette Fine Foods purchased the property for $800,000. and St. Isidore took back a first mortgage in the amount of $750,000. The mortgage was registered against the real property and the security agreement was registered under the *Personal Property Security Act*.

7 Payments were made by Paquette until December 1995 when Paquette experienced difficulty in meeting its obligations. As a result of a verbal agreement, St. Isidore agreed that Paquette would not have to make any payments during the year 1995. There were a number of conditions to the agreement.

8 One of the issues is whether St. Isidore had agreed to waive further payments under the mortgage in 1997. There is no written documentation of any such agreement and St. Isidore has taken action to enforce its security.

9 The negotiations between St. Isidore and Paquette broke down and on January 16, 1997 St. Isidore served a notice of intention to enforce security under the provisions of s. 244(1) of the *Bankruptcy and Insolvency Act*. As of January 1, 1997 the outstanding balance was $811,205.08 with a per diem rate of $222.25.

10 St. Isidore also issued notice pursuant to the provisions of the *Personal Property Security Act* on March 5, 1997. The security under the *Personal Property Security Act* held by St. Isidore is on the equipment contained in the food processing plant.

11 The Bank of Nova Scotia holds a general security agreement over inventory, equipment, accounts receivable and other.

12 On the facts contained in the affidavit materials filed on behalf of both the debtor and the creditor, I am satisfied that Paquette Fine Foods Inc. is an "insolvent" person within the meaning of s. 69(2)(b) of the B.I.A.

13 I am prepared to lift the stay of the creditor's action to enforce the security as I am satisfied on the material before me that the creditor would be materially prejudiced if the stay continued. The creditor's security presents close to 95 percent of the purchase price paid for the building and there has been no payments made in 1996 and only one payment of interest in 1997.

14 In the affidavit of Serge Bergeron filed on behalf of the creditors he indicates that the value of the security is now $450,000. and that the unsecured portion of their debt is $350,391.22. The unsecured debts as listed by the trustee amounts to $454,042. which $80,000. is owed to Ernest Paquette, one of the owners of the business. The debtors calculate that they represent 48 percent of the total unsecured debt.

15 It is clear from the affidavit material of the creditor that they will not vote for the proposal in relation to either their secured debt or their unsecured debt and as such the proposal would fail.

16 Since filing their proposal on March 21, 1997 the debtors have not been able to put forth any meaningful financial plan which would support a proposal. There is vague reference in the affidavit material that they have approached at least two prospective purchasers however there is no evidence that any of these parties are interested in assisting the debtor either now or in the near future.

17 Section 50.4(11)(c) reads:

> The court may, on application by ... a creditor, declare terminated, before its actual expiration, the 30-day period mentioned in s.s. 8 if the court is satisfied that ...
>
> (c) the insolvent person will not likely be able to make a proposal before the expiration of the period in question, that will be accepted by creditors, or ... and where the court declares the period in question terminated paragraphs 8(a) to (c) thereupon apply as if the period had expired.

18 Likewise on the application for an extension to a maximum of 45 days, s. 50.4(9)(b) of the B.I.A. requires the court to be satisfied that the debtor would likely be able to make a viable proposal if the extension being applied for were granted.

19 As the 30-day period has now expired, I am not required to deal with the application for the termination within the 30-day period.

20 The debtor has brought an application for extension within the 30-day period. The debtor has not satisfied the onus upon them to show that they are "likely to be able to make a viable proposal if the extension being applied for were granted". I have considered and followed *Re N.T.W. Management Group Ltd.* (1993), 19 C.B.R. (3d) 162 (Ont. Bktcy.); *Re Doaktown Lumber Ltd.* (1995), 36 C.B.R. (3d) 136 (N.B. Q.B.); *Re Cumberland Trading Inc.* (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div. [Commercial List]).

21 The debtor company has filed an affidavit of Daniel Paquette outlining what steps have been taken towards arranging financing or the sale of the business in order to support the proposal. It is noted that very little was done in the first few weeks of the proposal towards getting together a formal proposal. It appears that only in the last two weeks have they made any efforts to attempt to sell the business. Although negotiations are rather vague as described in the affidavit material and the supporting affidavit of Daniel Rozon, a chartered accountant and licensed trustee in bankruptcy with Raymond Chabot, he indicates that it will take a total period of 3 to 4 months to confirm financing.

22 On the basis that the debtor is unlikely to be able to file a viable proposal within the 45 days the application for extension is dismissed.

23 A. Farber & Partners Inc. are appointed Bankruptcy Trustees.

Order accordingly.

TAB 15

2020 PESC 15
Prince Edward Island Supreme Court

Nautican v. Dumont

2020 CarswellPEI 30, 2020 PESC 15, 319 A.C.W.S. (3d) 18, 79 C.B.R. (6th) 243

IN THE MATTER OF: a Notice of Intention to Make a Proposal filed by NAUTICAN RESEARCH AND DEVELOPMENT LTD. Pursuant to Section 50.4 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

IN THE MATTER OF: a Notice of Intention to Make a Proposal filed by CARELI MARINE CORPORATION LIMITED pursuant to Section 50.4 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

IN THE MATTER OF: a Motion by NAUTICAN RESEARCH AND DEVELOPMENT LTD. and by CARELI MARINE CORPORATION LIMITED for Orders pursuant to Sections 50.4(9), 64.2(1), 64.2(2), 50.6(1) and 50.6(3) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

James W. Gormley J.

Heard: October 31, 2019
Judgment: May 8, 2020
Docket: S1-GS-28836

Counsel: Michael G. Drake, Sean Corcoran, for Nautican Research and Development Ltd. and Careli Marine Corporation Ltd.
David W. Hooley, Q.C., Melanie McKenna, for David Dumont and Outboard Engineering Group LLC

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.5 Practice and procedure
Bankruptcy and insolvency
VII Consolidation orders and orderly payment of debts
Headnote
Bankruptcy and insolvency --- Consolidation orders and orderly payment of debts
Creditor brought action against debtor corporations — Debtor corporations entered proceedings under Bankruptcy and Insolvency Act, and trustee was appointed — Debtors brought application for consolidation of bankruptcy proceedings and other relief — Application granted in part — Consolidation of bankruptcy proceedings ordered — Consolidation would avoid multiplicity of proceedings thereby providing most just, expeditious and least expensive determination of issues — Debtors were closely aligned, as one was holding company that held all issued shares in other and had no employees, no bank account, and no active business activities — Managing director for both debtors was same and both companies shared same major secured creditor — No prejudice in granting consolidation — Creditor agreed to consolidation.
Bankruptcy and insolvency --- Proposal — Time period to file — Extension of time
Creditor brought action against debtor corporations — Debtor corporations entered proceedings under Bankruptcy and Insolvency Act, and trustee was appointed — Debtors brought application for consolidation of bankruptcy proceedings and other relief — Application granted in part — Consolidation of bankruptcy proceedings ordered — Extension of time to file proposal granted — Not shown that debtors were acting in bad faith and it was not shown that funds were being diverted to other entity — There was evidence that viable proposal could be filed — No prejudice to creditor from extension — Tangible assets were subject to seizure order, and intangible assets would be diminished if bankruptcy declared — Administrative charge

approved — Debtor in possession loan not authorized — Loan was offered by sole shareholder of debtors and terms requested included super priority over interest of all creditors — Loan was not offered by creditor or non-arm's length party.

Table of Authorities

Cases considered by *James W. Gormley J.*:

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

Convergix Inc., Re (2006), 2006 NBQB 288, 2006 CarswellNB 460, 24 C.B.R. (5th) 289, 307 N.B.R. (2d) 259, 795 A.P.R. 259, 2006 NBBR 288, 2006 CarswellNB 863 (N.B. Q.B.) — considered

H & H Fisheries Ltd., Re (2005), 2005 NSSC 346, 2005 CarswellNS 541, 239 N.S.R. (2d) 229, 760 A.P.R. 229, 18 C.B.R. (5th) 293 (N.S. S.C.) — considered

Mustang GP Ltd., Re (2015), 2015 ONSC 6562, 2015 CarswellOnt 16398, 31 C.B.R. (6th) 130 (Ont. S.C.J.) — followed

Statutes considered:

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

Generally — referred to

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

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

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

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

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

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

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

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

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

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

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

Rules considered:

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

R. 3 — considered

Rules of Civil Procedure, P.E.I. Rules

Generally — referred to

R. 1.04 — considered

APPLICATION by debtors for relief in proceedings under *Bankruptcy and Insolvency Act*.

***James W. Gormley J.*:**

Introduction

1 Nautican Research and Development Ltd. (hereinafter "Nautican") and Careli Marine Corporation Limited (hereinafter "Careli") seek the following relief:

a. an order abridging the time for the notice and service of the motion and associated documentary evidence;

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

Factors to be considered

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

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

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

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

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

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

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

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

30 I have come to the conclusion that this is not an appropriate situation to order a DIP Loan for a number of reasons. First of all, the DIP Loan is being offered by the sole shareholder of the debtors and the terms requested include a super priority over the interest of all creditors. In other words, the management of the debtors is offering the loan. It is not being offered by a creditor or an arm's length party. This differentiates this situation from the decisions referred to by the debtors including *Colossus Minerals Inc., Re*, 2014 ONSC 514 (Ont. S.C.J.) (hereinafter "*Colossus*") decision. In *Colossus*, Wilton-Siegel J. found that a DIP Loan was appropriate in those circumstances. Another difference between *Colossus* and the present case is captured in the following statement:

> 5 Second, current management will continue to operate Colossus during the stay period to assist in the SISP. Because Sandstorm has significant rights under a product purchase agreement pertaining to the Project and the Notes represent the applicant's largest debt obligation, the DIP Loan reflects the confidence of significant creditors in the applicant and its management.

31 In *Colossus*, significant creditors had confidence in the senior management of the debtor. Nautican and Careli do not enjoy the confidence of the significant creditors, being Dumont and Outbound respectively. The major creditors in this case have expressed their lack of confidence in the management of Nautican and Careli. As a result, one of the key factors to be assessed, specifically s. 50.6(5)(c) is thoroughly lacking in these circumstances. The evidentiary record is clear that the creditors do not have confidence in the debtor's management. I find that this not an appropriate situation to order a DIP Loan. Section 50.6(5)(c) is a subjective test. It requests the court to look at the actual situation of the debtor's management and its relationship to its major creditors. This is unlike the prior objective tests referenced in the other relief sought by Nautican and Careli, and leads to a different result on the same factual context.

Costs

32 The parties indicated that neither would be seeking costs in this matter as the outcome was mixed, I would not be inclined to grant costs in any case. There will be no order with respect to costs in regards to this matter.

Application granted in part.

TAB 16

2012 ONSC 6087
Ontario Superior Court of Justice [Commercial List]

Dondeb Inc., Re

2012 CarswellOnt 15528, 2012 ONSC 6087, [2012] O.J. No. 5853, 223 A.C.W.S. (3d) 772, 97 C.B.R. (5th) 264

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

In the Matter of a Proposed Plan of Compromise or Arrangement with Respect to Dondeb Inc. and the Additional Applicants Listed on Schedule "A" Hereto (collectively, the "Applicants"), Applicants

C. Campbell J.

Heard: October 11, 15, 17, 18 2012
Judgment: November 22, 2012
Docket: CV-12-00009865-00CL

Counsel: David P. Preger, Lisa S. Corne, Michael Weinczok for Applicants
Jeffrey J. Simpson, A. Ronson for Pace Savings & Credit Union Limited
Gary Sugar for David Sugar, et al
D.R. Rothwell for RMG Mortgage/MCAP Financial Corporation
Harry Fogul for Regional Financial
Robin Dodokin for Empire Life Insurance Co.
Beverly Jusko, M.R. Kestenberg for TD Bank Canada Trust
Roger Jaipargas for Faithlife Financial
R.B. Bissell for Vector Financial Services Limited
Jeffrey Larry for First Source Mortgage Corporation
Douglas Langley for Virgin Venture Capital Corporation
David Mende for Addenda Capital Inc.
J. Dietrich, W. Rabinovitch for A. Farber & Partners Inc.
M. Church for SEIU (Union)

Subject: Insolvency; Property
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.d Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Dismissal of application
Debtors were group of companies which owned and managed properties — Debtors brought application for initial order under Companies' Creditors Arrangement Act — Application dismissed — Unlikely that plan could be developed that sufficient number of creditors would agree to — Application was opposed by approximately 75 per cent of creditors, who had concerns about principal of group of companies' plan to transfer certain properties to secure additional funding, and did not wish debtor-in-possession financing to occur — Principal had not engaged with creditors from early date and was to some extent author of own misfortune — Goal of protection under Act was liquidation, which could be achieved by appointing receiver.
Table of Authorities
Cases considered by *C. Campbell J.*:

Azure Dynamics Corp., Re (2012), 91 C.B.R. (5th) 310, 2012 CarswellBC 1545, 2012 BCSC 781 (B.C. S.C. [In Chambers]) — referred to

Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp. (2008), 2008 BCCA 327, 2008 CarswellBC 1758, 83 B.C.L.R. (4th) 214, 296 D.L.R. (4th) 577, 434 W.A.C. 187, 258 B.C.A.C. 187, 46 C.B.R. (5th) 7, [2008] 10 W.W.R. 575 (B.C. C.A.) — considered

First Leaside Wealth Management Inc., Re (2012), 2012 CarswellOnt 2559, 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]) — referred to

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 4467, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) — referred to

Octagon Properties Group Ltd., Re (2009), 58 C.B.R. (5th) 276, 2009 CarswellAlta 1325, 2009 ABQB 500, 486 A.R. 296 (Alta. Q.B.) — considered

Shire International Real Estate Investments Ltd., Re (2010), 64 C.B.R. (5th) 92, 2010 CarswellAlta 234, 2010 ABQB 84 (Alta. Q.B.) — considered

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

Timminco Ltd., Re (2012), 2012 ONSC 506, 95 C.C.P.B. 48, 2012 CarswellOnt 1263, 85 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]) — referred to

Timminco Ltd., Re (2012), 2012 CarswellOnt 9633, 2012 ONCA 552 (Ont. C.A.) — referred to

Statutes considered:

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

Generally — referred to

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

Generally — referred to

s. 11.02 [en. 2005, c. 47, s. 128] — referred to

APPLICATION by debtors for protection under *Companies Creditors Arrangement Act*.

***C. Campbell J.*:**

1 The applicants seeking an Initial Order under the *Companies Creditors Arrangement Act* are a group of companies owned and controlled by or through the main holding company Dondeb Inc. The proposed relief would include a stay of proceedings in respect of the various companies which own and or operate businesses and real property in Ontario.

2 The application is vigorously opposed by numerous secured creditors which have mortgage or other security on property beneficially owned by one or more of the companies in the Dondeb "group".

3 The applicants seek the protection of the *CCAA* to enable an orderly liquidation of the assets and property of the various companies to enable what is asserted to be the remaining equity after sale and expenses to accrue to the benefit of the Dondeb Group.

4 It is urged that the flexible mechanism of the *CCAA* is appropriate as there are common expenses across some of the companies', common security across others and that any order in liquidation would prevent the incurrence of added cost should individual properties and companies placed in liquidation with the loss of remaining equity.

5 The applications propose a Debtor in Possession (DIP) financing and administrative charge to secure the fees of professionals and expenses associated with *CCAA* administration. The application is opposed by approximately 75% in value of the secured creditors.

6 The basis of the opposition can be summarized as follows:

> i) That in many instances the properties over which security is held is sufficiently discrete with specific remedies including sale being more appropriate than the "enterprise" approach posed by the applicants.
>
> ii) That the proposed DIP/financial and administration changes are an unwarranted burden to the equity of specific properties are evidence of the inappropriate application of the *CCAA*.
>
> iii) That in the circumstances individual receivership orders for many of the properties is a more appropriate remedy where the creditors and not the debtor would have control of the process.
>
> iv) That the creditors have lost confidence in the Dondeb family owners of the Dondeb group for a variety of reasons including for breach of promise and representation.
>
> v) That it is now evident that the applicants will be unable to propose a realistic plan that is capable of being accepted by creditors given a difference in position with respect to value of various properties.

7 Those who support the applicants in the main wish to see those businesses that are operating on some of the properties such as in one instance, a school, and others like retirement homes continue in a way that may not be possible in a bankruptcy.

8 During the course of the submissions on the first return date an alternative was proposed by a number of secured creditors, namely a joint or consolidated receivership of the various entities to maximizing creditor control of the process and ensure that costs of administration be allocated to each individual property and company.

9 The application was adjourned to be returnable October 15, 2012 to allow both the applicants and the opposing creditors to consider their positions hopefully achieve some compromise. In the meantime 4 notices of intention under the BIA were stayed.

10 The return of the application on October 15, 2012 did produce some modification of position on both sides but not sufficient to permit a *CCAA* order to be agreed to.

11 The applicants revised the proposed form of Initial Order to allow for segregation of accounts on the individual properties an entitlement.

12 The rationale of the applicants for the original Initial Order sought was that if liquidated or otherwise operated in an orderly way by the debtor and a "super" monitor, greater value could be achieved than the secured debt owing in respect to at least a number of the properties which could be available (a) to other creditors in respect of which guarantees or multiple property security could enhance recovery and or (b) the equity holders.

13 The second major reason advanced by a significant number of creditors appearing through counsel was that they no longer had any confidence in Mr. Dandy, the principal of Dondeb Inc. Significant examples of alleged misleading supported the positions taken.

14 I accept the general propositions of law advanced on behalf of the applicants that pursuant to s.11.02 of the *CCAA* the court has wide discretion "on any terms it may impose" to make an Initial Order provided the stay does not exceed 30 days [see *Nortel Networks Corp., Re* [2009 CarswellOnt 4467 (Ont. S.C.J. [Commercial List])], 2009, CanLII 39492 at para 35 and *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) CF 33.

15 The more recent decision of the Supreme Court of Canada in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) at para 15 confirms the breadth and flexibility of the CCAA to not only preserve and allow for restructuring of the business as a going

concern but also to permit a sale process or orderly liquidation to achieve maximum value and achieve the highest price for the benefit of all stakeholders. See also *Timminco Ltd., Re*, 2012 ONSC 506 (Ont. S.C.J. [Commercial List]) at para 49-50 (leave to appeal denied 2012 ONCA 552 (Ont. C.A.)).

16 I also accept the general proposition that given the flexibility inherent in the *CCAA* process and the discretion available that that an Initial Order may be made in the situation of "enterprise" insolvency where as a result of a liquidation crisis not all of the individual entities comprising the "enterprise" may be themselves insolvent but a number are and to propose of the restructuring is to restore financial health or maximize benefit to all stakeholders by permitting further financing. Such process can include liquidation. See *First Leaside Wealth Management Inc., Re*, 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]) and also *Edgeworth Properties Inc. (Re)* CV-11-9409-CL [Commercial List].

17 I also accept that while each situation must be looked at on its individual facts the court should not easily conclude that a plan is likely to fail. See *Azure Dynamics Corp., Re*, 2012 BCSC 781 (B.C. S.C. [In Chambers]) at paras 7-10.

18 In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 CarswellBC 1758 (B.C. C.A.), the British Columbia Court of Appeal overturned the decision of the chambers' judge extending a stay of proceedings and authorizing DIP financing under the *CCAA* in the case of a debtor company in the business of land development because:

> Although the *CCAA* can apply to companies whose sole business is a single land development as long as the requirements set out in the *CCAA* are met, it may be that, in view of the nature of its business and financing arrangements, such companies would have difficulty proposing an arrangement or compromise that was more advantageous than the remedies available to its creditors. The priorities of the security against the land development are often straightforward, and there may be little incentive for the creditors having senior priority to agree to an arrangement or compromise that involves money being paid to more junior creditors before the senior creditors are paid in full. If the developer is insolvent and not able to complete the development without further funding, the secured creditors may feel that they will be in a better position by exerting their remedies rather than by letting the developer remain in control of the failed development while attempting to rescue it by means of obtaining refinancing, capital injection by a new partner or DIP financing.

19 Similarly, in *Octagon Properties Group Ltd., Re*, 2009 CarswellAlta 1325 (Alta. Q.B.) paragraph 17, Kent, J. made the following comments:

> This is not a case where it is appropriate to grant relief under the CCAA. First, I accept the position of the majority of first mortgagees who say that it is highly unlikely that any compromise or arrangement proposed by Octagon would be acceptable to them. That position makes sense given the fact that if they are permitted to proceed with foreclosure procedures and taking into account the current estimates of value, for most mortgagees on most of their properties they will emerge reasonably unscathed. There is no incentive for them to agree to a compromise. On the other hand if I granted CCAA relief, it would be these same mortgagees who would be paying the cost to permit Octagon to buy some time. Second, there is no other reason for CCAA relief such as the existence of a large number of employees or significant unsecured debt in relation to the secured debt. I balance those reasons against the fact that even if the first mortgagees commence or continue in their foreclosure proceedings that process is also supervised by the court and to the extent that Octagon has reasonable arguments to obtain relief under the foreclosure process, it will likely obtain that relief.

20 A similar result occurred in *Shire International Real Estate Investments Ltd., Re*, 2010 CarswellAlta 234 (Alta. Q.B.) even after an initial order had been granted.

21 In Edgeworth, dealing with the specifics of that case I noted:

> Were it not for the numerous individual investors (UDIs, MICs) and others who claim to have any interest in various of the lands as opposed to being general creditors of the Edgeworth companies, I doubt I could have been persuaded to grant the Initial CCAA Order.

22 At the conclusion of oral submissions which followed on a hearing of the application which commenced on Friday October 11, 2012 continued on October 15 with additional written material and concluded on Wednesday October 17, 2012 again with additional written material and oral submissions the following conclusions were reached.

(i) The application for an Initial Order under the CCAA based on the material filed be dismissed.

(ii) The issue of costs incurred by the proposed Monitor Farber and of counsel to the debtor be reserved for further consideration (if not resolved) basis on material to be provided to counsel for the creditors and their submissions.

(iii) The request for a more limited *CCAA* Initial Order which like the Original Application is opposed by a significant body of creditors is also rejected.

(iv) A Global Receivership Order which is supported by most of the creditors appearing to oppose the application and which has the support of Farber which will become Receiver of those companies and properties covered by the application will issue in a format to be approved by counsel and the court.

23 For ease of administration the Global Receivership Order will issue in Court File No. CV-12-9794-CL and make reference to the various companies and properties to be covered by the Order.

24 In order to further facilitate administration the following proceedings, each being Notices of Intention to make a proposal

Dondeb Inc.	31-1664344
Ace Sel/Storage & Business Centre	31-1664774
1711060 Ontario Ltd.	31-1664775
2338067 Ontario Ltd.	31-1664772
King City Holdings Ltd.	31-1671612
1182689 Ontario Inc.	31-1671611
2198392 Ontario Inc.	31-1673260

hereby stayed and suspended pending further order of the court.

25 The request for an Initial Order under the *CCAA* was dismissed for the simple reason that I was not satisfied that a successful plan could be developed that would receive approval in any meaningful fashion from the creditors. To a large extent, Mr. Dandy is the author of his own misfortune not just for the liquidity crisis in the first place but also for a failure to engage with creditors as a whole at an early date.

26 In his last affidavit filed Mr. Dandy explained why certain properties were transferred into individual corporations to allow additional financing that would permit the new creditors access to those properties in the event of default. To a certain extent this was perceived by creditors as "robbing Peter to pay Paul" and led to the distrust and lack of confidence the vast majority of creditors exhibit. Had there been full and timely communication both the creditors and the court may have concluded that a *CCAA* plan could be developed.

27 Under the proposed Initial Order the fees of the proposed monitor and of counsel to the debtor were an issue as well as leaving the debtor in possession with the cost that would entail.

28 Counsel for each of the various creditors represented urged that their client's individual property should not be burdened with administrative expenses and professional fees not associated with that property.

29 Counsel for the debtor advised that to the extent possible his client and the monitor would keep individual accounts. This proposal did not appease the opposing creditors who did agree that their clients could accept what was described as a "global" receiver and that the Farber firm would be acceptable as long as the receiver's charge was allocated on an individual

property basis. In other words, the opposing creditors are prepared to accept the work of the professionals of the receiver but not fund the debtor or its counsel.

30 The issue of the fees of Farber incurred todate in respect of preparation of the *CCAA* application was agreed between the opposing creditors, Farber and its counsel and are not an issue. Counsel for the debtor requested that the court consider a request for fees and costs on the part of the debtor. In order to give an opportunity for the parties to consider the details of such request and possible resolution the issue was deferred to a later date.

31 Following further submissions on behalf of the debtor I advised the parties that in my view the conditions necessary for approval of an Initial *CCAA* Order were not met but that a comprehensive Receivership Order should achieve an orderly liquidation of most of the properties and protect the revenue from the operating properties with the hope of potential of some recovery of the debtor's equity.

32 Counsel are to be commended for the effort and success in reaching agreement on the form of order acceptable to the court.

33 The *CCAA* is a flexible instrument, which with judicial discretion, is capable of permitting restructuring, including in appropriate situations, liquidation.

34 In my view the use of the *CCAA* for the purpose of liquidation must be used with caution when liquidation is the end goal, particularly when there are alternatives such as an overall less costly receivership that can accomplish the same overall goal.

Schedule "A"

1. Dondeb Inc.

2. Ace Self Storage and Business Centre Inc.

3. 1182689 Ontario Inc.

4. King City Holdings Inc.

5. 1267818 Ontario Ltd.

6. 1281515 Ontario Inc.

7. 1711060 Ontario Ltd.

8. 2009031 Ontario Inc.

9. 2198392 Ontario Ltd.

10. 2338067 Ontario Inc.

11. Briarbrook Apartments Inc.

12. Guelph Financial Corporation

Application dismissed.

End of Document

TAB 17

2020 MBQB 58
Manitoba Court of Queen's Bench

White Oak Commercial Finance, LLC v. Nygård Holdings (USA) Limited et al.

2020 CarswellMan 174, 2020 MBQB 58, 317 A.C.W.S. (3d) 238, 79 C.B.R. (6th) 44

IN THE MATTER OF: THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. C. B-3, AS AMENDED, AND SECTION 55 OF THE COURT OF QUEEN'S BENCH ACT, C.C.S.M., C. C280, AS AMENDED

WHITE OAK COMMERCIAL FINANCE, LLC (Applicant) and NYGÅRD HOLDINGS (USA) LIMITED, NYGÅRD INC., FASHION VENTURES, INC., NYGÅRD NY RETAIL, LLC, 4093879 CANADA LTD., 4093887 CANADA LTD., NYGÅRD INTERNATIONAL PARTNERSHIP, NYGÅRD PROPERTIES LTD., AND NYGÅRD ENTERPRISES LTD. (Respondents)

Edmond J.

Judgment: March 26, 2020
Docket: Winnipeg Centre CI 20-01-26627

Counsel: Marc Wasserman, Jeremy Dacks, Catherine Howden, Eric Blouw, for Applicant
Wayne Onchulenko, for Respondents
Bruce Taylor, Ross McFadyen, Melanie LaBossiere (articling student), for Richter Advisory Group Inc.
David Jackson, Shayne Kukulowicz, Hylton Levy, for proposal trustee, A. Farber & Partners Inc.

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.1 Appointment
Headnote
Bankruptcy and insolvency --- Receivers — Appointment
WC LLC, lender, advanced funds to N Group to fund their payroll — Funding was advanced by WC LLC because N Group had not confirmed that sufficient funds were deposited in corporate account — N Group did not deposit necessary payroll funds, and WC LLC funded payroll to ensure that employee payroll was not interrupted during crucial time frame — New evidence was received, which included that N Group provided no indication of how they intended to fund payroll, that WC LLC had responded to N Groups funding request, but that N Group did not respond to WWC LLC's proposal — WC LLC brought application for R LLP to be appointed as receiver — Application granted — Further evidence satisfactorily showed that N Group had not been acting in good faith and with due diligence — As result of N Group failing to provide accurate and timely information to proposal trustee and WC LLC, proposal proceedings were untenable — Further, N Group had no plan to continue to fund its operations and no other lender had stepped up to provide necessary financing to pay out WC LLC — It was fundamental, for purpose of proposal process to continue, that N Group cooperate with proposal trustee and this had not occurred — Unilateral closing of its retail stores, distribution centres and website, without consulting with WC LLC or proposal trustee, was in breach of Credit Agreement and court order.
Table of Authorities
Cases considered by *Edmond J.*:
Bank of Nova Scotia v. Freure Village on Clair Creek (1996), 40 C.B.R. (3d) 274, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List]) — referred to

Callidus Capital Corp. v. Carcap Inc. (2012), 2012 ONSC 163, 2012 CarswellOnt 480, 84 C.B.R. (5th) 300 (Ont. S.C.J. [Commercial List]) — referred to

Dondeb Inc., Re (2012), 2012 ONSC 6087, 2012 CarswellOnt 15528, 97 C.B.R. (5th) 264 (Ont. S.C.J. [Commercial List]) — followed

Romspen Investment Corp. v. 6711162 Canada Inc. (2014), 2014 ONSC 2781, 2014 CarswellOnt 5836, 13 C.B.R. (6th) 136, 35 C.L.R. (4th) 167, 2 P.P.S.A.C. (4th) 332 (Ont. S.C.J. [Commercial List]) — referred to

Textron Financial Canada Ltd. v. Chetwynd Motels Ltd. (2010), 2010 BCSC 477, 2010 CarswellBC 855, 67 C.B.R. (5th) 97, 91 C.P.C. (6th) 171 (B.C. S.C. [In Chambers]) — referred to

7451190 Manitoba Ltd v. CWB Maxium Financial Inc et al (2019), 2019 MBCA 95, 2019 CarswellMan 772 (Man. C.A.) — referred to

Statutes considered:

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

Generally — referred to

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

s. 50.4(11) [en. 1992, c. 27, s. 19] — referred to

s. 69(1) — considered

s. 69.4 [en. 1992, c. 27, s. 36(1)] — considered

s. 243 — pursuant to

s. 243(1) — considered

s. 244(1) — referred to

Court of Queen's Bench Act, S.M. 1988-89, c. 4

s. 55(1) — considered

APPLICATION by WC LLC for R LLP to be appointed as receiver.

***Edmond J.*:**

Introduction

1 The applicant, White Oak Commercial Finance, LLC applies pursuant to s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, as amended ("*BIA*") and s. 55(1) of *The Court of Queen's Bench Act*, C.C.S.M. c. C280, as amended ("*QB Act*") for the appointment of Richter Advisory Group LLP ("Richter") as receiver without security, of all assets, undertakings and properties of the respondents. On March 18, 2020, the court granted a receivership order and advised the parties that brief reasons for decision would be delivered following the hearing. These are those reasons.

2 By way of background, this matter proceeded in court on Tuesday, March 10, 2020 and was adjourned to Thursday, March 12, 2020, to permit the respondents to file responding affidavit material. Interim orders were made to preserve the status quo pending the hearing on the merits.

3 The respondents are identified in the affidavit material as the corporate entities operating retail, wholesale and business operations of the Nygård clothing and fashion business in Canada and the USA ("Nygård Group"). As at March 12, 2020, the Nygård Group operated 169 retail stores in Canada and the USA, operated a wholesale business and employed approximately 1450 employees.

4 The respondents filed an affidavit of Greg Fenske, affirmed March 11, 2020 and a supplemental brief for the hearing that proceeded on March 12, 2020. After hearing submissions from all parties, the court reserved its decision on whether

(b) that it is equitable on other grounds to make such a declaration.

31 In my view, both of these requirements have been satisfied in this case. I agree that the Lenders will suffer a material prejudice if the receivership is not granted. While I accept that the shutdown of the retail operations may have been appropriate and necessitated by the COVID-19 virus, the closure of the business, distribution centres and website, without any consultation with the Lenders and the proposal trustee is prejudicial. The proposal trustee and the Lenders require the ability to oversee the preservation of the Collateral including the inventory and to maintain continuity with employees. The notice sent out by the Nygård Group was inappropriate, referring to unrelated matters and alleging misrepresentations regarding the actions of the Lenders. Regrettably, the notice sent to employees and customers did not achieve certainty regarding the Nygård Group business operations at this difficult time during the COVID-19 pandemic. Instead, it blamed others for the financial difficulties and caused greater uncertainty and instability in the Nygård Group business operations.

32 Acting in good faith and with due diligence is required for a debtor to remain in possession and to seek the protection of the *BIA* under the proposal process. The lack of good faith by the Nygård Group together with its failure to comply with the previous court orders, satisfies me that the stay must be lifted and the receiver must be appointed to take control of the respondents' business and provide experienced and effective oversight. This is not only in the interests of the Lenders, but it is in the interests of all stakeholders.

33 While the court has the authority pursuant to s. 50.4(11) of the *BIA* to terminate the 30-day period on the basis that the criteria set forth in that sub-section has been met, I agree that terminating the 30-day period is not what is required at this time.

34 Once Richter takes control of the assets and the business, Richter will be able to assess the respondents' business and make a recommendation to the court and the other stakeholders. The applicant requested that the court order the proposal proceedings commenced by the NOIs be stayed until further order of the court. That order was granted on March 18, 2020.

35 A similar approach was taken by the Ontario Superior court in *Dondeb Inc., Re*, 2012 ONSC 6087, [2012] O.J. No. 5853 (Ont. S.C.J. [Commercial List]) and, in my view, that approach is equally applicable in this case.

Conclusion

36 The court grants a stay of the proposal proceedings commenced by the NOIs until further order of the court. The court also grants a receivership order appointing Richter as the receiver in accordance with a draft order that was reviewed in court on March 18, 2020.

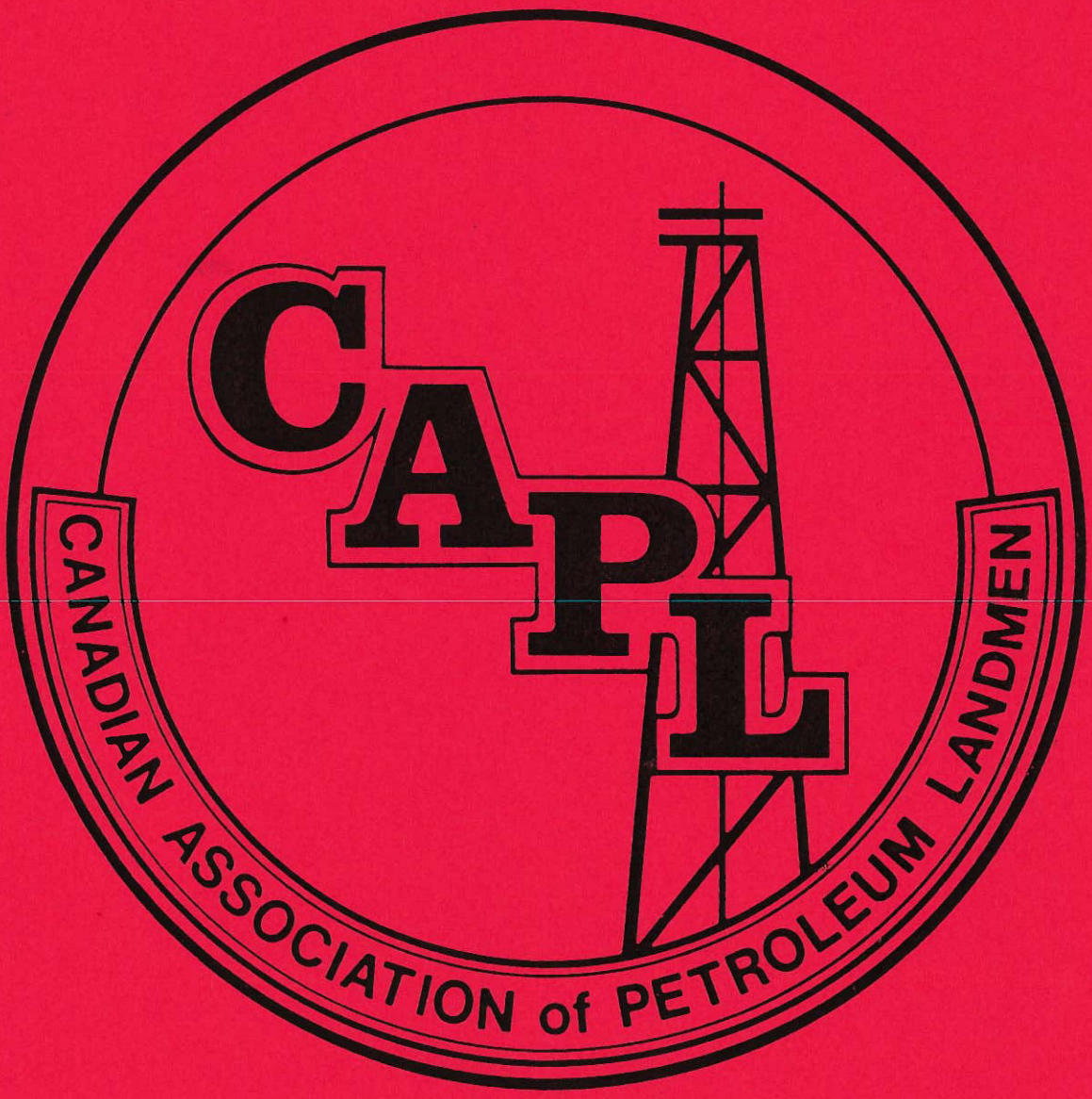
37 Richter will be funded by the Lenders in accordance with the term sheet attached as Schedule B to the receivership order and will be subject to the oversight and jurisdiction of this court.

Application granted.

End of Document

TAB 18

OPERATING PROCEDURE
ANNOTATED



CANADIAN ASSOCIATION OF PETROLEUM LANDMEN
1990

306 PROTECTION FROM LIENS -- The Operator shall pay, or cause to be paid, as and when they become due and payable all accounts of contractors and claims for wages and salaries for services rendered or performed and for materials supplied with respect to the joint lands, any joint operations and any production facilities. The Operator shall keep the joint lands and any production facilities free from liens and encumbrances resulting therefrom, unless there be a bona fide dispute with respect thereto.

307 JOINT-OPERATOR'S RIGHTS OF ACCESS -- Except as otherwise provided herein, the Operator shall permit each Joint-Operator or its duly authorized representative, at that Joint-Operator's sole risk, cost and expense, full and free access at all reasonable times to inspect and observe all production facilities and all joint operations being conducted upon the joint lands and to the records on location of current operations being conducted thereon.

308 SURFACE RIGHTS -- The Operator shall acquire and maintain for the joint account all necessary surface rights respecting joint operations.

309 MAINTENANCE OF TITLE DOCUMENTS --

(a) Except as otherwise provided herein or in the Agreement, the Operator shall, on behalf of the parties and for the joint account, comply with all the terms and conditions of the title documents including: (i) the payment of rentals; (ii) the payment of any encumbrances agreed to be borne for the joint account; and (iii) the performance of all things necessary to maintain the title documents in good standing and in full force and effect. However, nothing in this Clause shall be construed to require or permit the Operator to drill a well or conduct any joint operation without the approval of the Joint-Operators, if their approval of an Authority of Expenditure with respect thereto is required pursuant to Clause 301.

(b) The Operator shall consult with the parties in a timely manner with respect to any applications it proposes to make under the Regulations to maintain any of the title documents in good standing, including, without restricting the generality of the foregoing, continuation and grouping applications and any other material decisions which are required to be made to maintain any of the title documents in good standing. The Operator shall provide the parties in a timely manner with copies of material correspondence pertaining to the maintenance of the title documents.

(c) If the joint lands are subject to a particular title document whereby the parties may select some (but not all) of such joint lands for the joint account in a successor title document as a result of work or operations which have been conducted (in this Clause called a "lease selection"), the following shall apply to the lease selection:

(i) the parties having a working interest in such title document shall consult, at least ten (10) days prior to the date upon which the lease selection is required, to attempt to agree on the lease selection; and

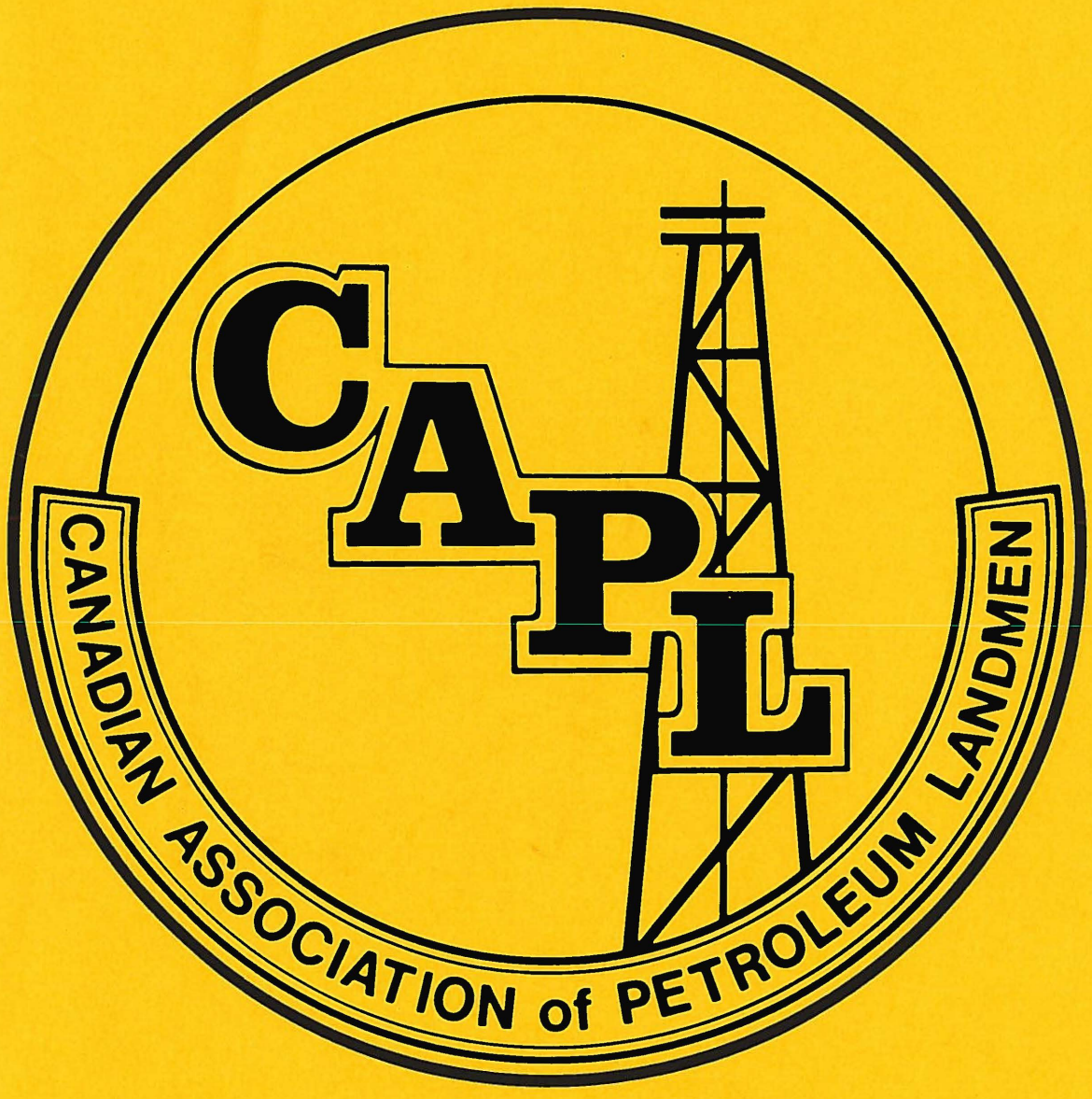
(ii) insofar as the parties are unable to agree on the joint lands to be included in the lease selection, the Operator shall determine the required number of minimum size geographic units prescribed by the Regulations with respect to a lease selection ("selection units") to complete the lease selection. This number shall be multiplied by each party's working interest, to determine the number of selection units which each party may select to complete the lease selection, with rounding of such number up or down to the nearest whole integer in the event such calculation would entitle a party to a selection of a partial selection unit. Each party shall be entitled to select for inclusion in leases, on a selection unit by selection unit basis, that number of selection units determined by such calculation, with the order of such selections to be determined by lot.

Following the conclusion of the lease selection process, the Operator shall submit the application for leases on behalf of the parties in such manner and at such time as are prescribed by the Regulations.

(d) If the joint lands are subject to a particular title document pursuant to which the parties may make a lease selection, a party may, at any time not earlier than one (1) year before the latest date such lease selection may be made pursuant to that title document, require the parties to select, for the purposes of Clause 1010 only, the lands which will be retained for the joint account in the manner prescribed in the Agreement or Subclause (c) of this Clause, as the case may be. The parties thereupon shall make such lease selection within ten (10) days of the receipt of such notice, as if such lease selection was required at such time. Unless otherwise agreed by the parties, such lease selection shall be binding on the parties for the purposes of determining whether a well is a title preserving well or portions of the lands are preserved lands, as those terms are defined in Clause 1010.

310 PRODUCTION STATEMENTS AND REPORTS -- The Operator shall provide each Joint-Operator, before the twenty-fifth (25th) day of each month, with a statement showing production, inventories, sales and deliveries in kind to the parties of petroleum substances during the preceding month. The Operator shall also make all reports relating to joint operations

OPERATING PROCEDURE



CANADIAN ASSOCIATION OF PETROLEUM LANDMEN

1981

308 SURFACE RIGHTS — The Operator shall acquire for the joint account all necessary surface rights for purposes of joint operations hereunder.

309 MAINTENANCE OF LEASES — Except as otherwise provided herein or in the Agreement, the Operator shall on behalf of the parties and for the joint account comply with all the terms and conditions of the title documents including: (i) the payment of rentals, and (ii) the payment of other encumbrances agreed to be borne for the joint account; and (iii) all things necessary to maintain the title documents in good standing and in full force and effect, provided that nothing in this Clause shall be construed to require or permit the Operator to drill a well or conduct any operation for the joint account which operation otherwise would be preceded by an approved Authority for Expenditure.

310 PRODUCTION STATEMENTS AND REPORTS — The Operator shall furnish each Joint-Operator before the twenty-fifth (25th) day of each month with a statement showing production, inventories, sales and deliveries in kind to the parties of petroleum substances during the preceding month.

The Operator shall also make all necessary reports relating to operations for the joint account on the joint lands as required by the Regulations and shall upon request of a Joint-Operator provide it with a copy of each such report filed by Operator with any governmental agency.

311 INSURANCE — In respect of operations conducted for the joint account, the Operator shall prior to the commencement of such operations, comply with the provisions of ALTERNATE __A__ below (Specify A or B):

ALTERNATE - A:

(a) In respect of operations hereunder for the joint account, the Operator shall comply with the requirements of all Unemployment Insurance and Workers' Compensation legislation and all other similar Regulations and legislation applicable to workers employed for the joint account and shall not suffer any bona fide claims of, or dues to or on behalf of any such Regulations or legislation to become in arrears. The Operator shall, prior to the commencement of operations hereunder, hold or cause to be held with a reputable insurance company or companies, and thereafter maintain or cause to be maintained for the joint account and benefit of the parties hereto, the insurance hereinafter set forth. The insurance required pursuant to this Subclause shall apply to each separate claim and shall be as follows:

(i) Employer's Liability Insurance covering each employee engaged in the operations hereunder to the extent of two hundred and fifty thousand ($250,000.00) dollars where such employee is not covered by Workers' Compensation.

(ii) Automobile Liability Insurance covering all motor vehicles, owned or non-owned, operated and/or licensed by the Operator and used in the joint operation hereunder (but only insofar as any such motor vehicles are used in the joint operation) with a bodily injury, death and property damage limit of one million ($1,000,000.00) dollars inclusive.

(iii) Comprehensive General Liability Insurance with a bodily injury, death, and property damage limit of one million ($1,000,000.00) dollars inclusive; and, without restricting the generality of the foregoing provisions of this Subclause, such coverage shall include Contractual Liability, Tortious Liability, Contractor's Protective Liability, Products and Completed Operations Liability.

(iv) Aircraft Liability Insurance covering all aircraft, owned or non-owned, operated and/or licensed by the Operator and used in the joint operation hereunder (but only insofar as any such aircraft are used in the joint operation), with a bodily injury, death and property damage limit of two million ($2,000,000.00) dollars inclusive.

With respect to any insurance carried for the joint account, the amount of the deductible specified therein for each separate claim shall not exceed the amount set forth in Clause 301 without the prior approval of the Joint-Operators.