Action No. 1001-02216

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

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

AND IN THE MATTER OF DARIAN RESOURCES LTD. and BOWVIEW PETROLEUM INC.

BENCH BRIEF OF ARGUMENT OF THE APPLICANTS, DARIAN RESOURCES LTD. and BOWVIEW PETROLEUM INC. RE: HEARING ON FEBRUARY 19, 2010 AT 9:00 A.M.

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I. INTRODUCTION

1. This Brief of Argument is submitted by Darian Resources Ltd. and Bowview Petroleum Inc. (collectively the "Applicants") in support of an application by the Applicants for an extension of the Stay Period in these proceedings to March 15, 2010 and in opposition to the lifting of the stay to allow applications made by the Shaw Family Group for orders compelling ATB to assign to the Shaw Family Group all indebtedness owed to it and security granted to it by the Applicants (the "ATB Position") and appointing a Receiver over the Applicants.

2. All capitalized terms not defined herein shall take the meaning ascribed to them in the First Bartlett Affidavit or the order granted by Madam Justice B.E.C. Romaine in these proceedings on February 12, 2010 (the "Initial Order").

II. FACTS

3. The facts are as set out in the Affidavits of Grant Aulden Bartlett sworn in these proceedings on February 11, 2010 (the "First Bartlett Affidavit"), February 12, 2010 (the "Second Bartlett Affidavit"), and February 18, 2010 (the "Third Bartlett Affidavit").

III. ISSUES

4. Is it appropriate for the Stay Period to be extended to March 17, 2010?

5. Is it appropriate to grant the related relief sought by the Applicants?

6. Is it appropriate for the stay of proceedings to be lifted in order that the ATB Position be assigned from ATB to the Shaw Family Group and a Receiver be appointed over the Applicants?

III. ARGUMENT

A. Stay Extension

7. Under section 11.02(2) of the *Companies' Creditors Arrangement Act*, a court may, on an application in respect of a debtor company other than an initial application, make an order, on

any terms that it may impose. This includes extending a stay of proceedings. The burden of proof on such an application lies with the applicant debtor company.

> *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. c-36 at sd. 11.02(2), 11.02(4), ("*CCAA*") **[TAB 1]**

8. Section 11.02(3) of the *CCAA* sets out the three part statutory test for granting an extension of a stay:

(a) circumstances exist that make the extension order appropriate;

(b) the applicant has acted and continues to act in good faith; and

(c) the applicant has acted and continues to act with due diligence.

> *CCAA*, *supra*, at s. 11.02(3) **[TAB 1]**

9. Courts have found the following circumstances as making a stay extension appropriate:

(a) where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the *CCAA*;

(b) where the continuation of the stay is supported by the overriding purpose of the *CCAA*, which is to allow an insolvent company a reasonable period of time to reorganize and propose a plan of arrangement to its creditors and the Court, and to prevent manoeuvres for positioning among creditors in the interim;

(c) where the *CCAA* is necessary to prevent any manoeuvres for positioning among creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed;

(d) where the benefit to all creditors and to the company of facilitating a reorganization offsets the possibility that one or more creditors may be prejudiced;

(e) where a number of employees would be affected by the shut down of a business and there would be sufficient impact on the community;

(f) whether the company's going concern value is greater than its value on liquidation;

(g) where the company's secured creditors' secured positions are not at risk;

(h) where there is sufficient reality of the potential for refinancing from a recognized institution; and

(i) where the imposition of a receiver would impair the ability of the *CCAA* eligible entities from restructuring.

Simpson's Island Salmon, 2006 NBQB 279 at para. 20 **[TAB 2]**

Federal Gypsum Co., Re, 2007 NSSC 347 at para. 7 (citing Justice Farley in *Lehndorff General Partners Ltd., Re.*, [1993] O.J. No. 14 at paras. 5-6) and at para. 16 **[TAB 3]**

Caterpillar Financial Services Inc. v. Hard-Rock Paving Co. (2008), 45 C.B.R. (5th) 87 at paras. 4-7 **[TAB 4]**

Forest & Marine Financial Corp. Re, 2009 BCSC 1234 at para. 22 **[TAB 5]**

10. We will deal with the related relief sought by the Applicants in oral argument.

B. Lifting of the Stay

11. The applications by the Shaw Family Group and ATB should be adjourned to March 17, 2010 and appropriate scheduling arrangements should be made allowing all parties a reasonable opportunity to deal with the voluminous affidavits filed. There is no urgency dictating the immediate hearing of these applications, and an adjournment will not prejudice the Shaw Family Group for reasons dealt with in more detail below.

12. Should the Court not grant an adjournment, the Applicants oppose the lifting of the stay.

13. There is no statutory test for lifting, varying or amending a stay. Therefore, in determining whether or not to lift or vary a stay, the courts will generally attempt to *balance the interests of all affected parties.* The courts generally will not lift a stay if such would prejudice the interests of the company or other creditors, and the debtor is burdened with the onus of demonstrating to the court that the stay should not be lifted or varied. More often than not, the courts have refused to lift or vary a stay, as maintaining the *status quo* is generally seen as being fair and the in line with the purpose of the *CCAA*.

14. In *ICR Commercial Real Estate (Regina) Ltd.* 2007 SKCA 72, the Court of Appeal indicated that when determining whether or not to lift the stay, the court will consider whether there are sound reasons for lifting the stay, consistent with the objectives of the *CCAA*, including a consideration of the balance of convenience, the relative prejudice to parties, the merits of the proposed action, and the good faith and due diligence of the debtor company.

> *ICR Commercial Real Estate (Regina) Ltd.* 2007 SKCA 72 at para. 68
> **[TAB 6]**

C. Relevant Factors in the Case at Bar

15. Based on the foregoing caselaw, it is submitted that it is both appropriate to grant an extension of the Stay Period and deny the Shaw Family Group's application to lift the stay and appoint a receiver in light of the following factors:

(a) there is *prima facie* evidence that there is equity in the Applicants and the *CCAA* gives all of the Applicants' stakeholders the best chance of a recovery;

(b) the Applicants are going concerns with employees and valuable assets;

(c) only the Shaw Family Group wants receivership. The Applicants' other secured creditors either take no position (ATB) or actively oppose the Shaw Family Group (KYAL);

(d) the interests of the unsecured creditors will be better served and protected in *CCAA* and the major unsecured creditor (LXL) supports the Applicants' efforts to restructure under the *CCAA*;

(e) the interests of the shareholders will be better served and protected in *CCAA* and many of Darian's shareholders support the Applicants' efforts to restructure under the *CCAA*. The Shaw Family Group's opposition to the *CCAA* proceedings is tainted because they have been pursuing an agenda aimed at only advancing their own interests;

(f) *CCAA* proceedings are Court and Monitor supervised and the Shaw Family Group has full right of participation in the process;

(g) there is no prejudice to the Shaw Family Group which should outweigh the interests of all the other shareholders;

(h) the attempt to use the MCC Funds as a basis for receivership is fatally flawed. Those funds were advanced under existing demand facilities held with the Shaw Family Group, without any trust conditions, and were used with full knowledge and agreement of ATB;

(i) management is competent and continues to enjoy the confidence of the majority of the stakeholders;

(j) Darian has a strong board;

(k) the Shaw Family Group's security is not at risk: the Applicants' assets will be maintained during the *CCAA* proceedings and the Shaw Family Group's security remains in place;

(l) the Shaw Family Group continues to have their rights as shareholders in *CCAA*;

(m) the Shaw Family Group is free to participate in the efforts to restructure the Applicants;

(n) Many stakeholders oppose receivership as we believe will be apparent at the hearing of the various pending applications;

(o) this is a case where it is better to preserve the status quo and give the Applicants a fair opportunity to bring forward a plan of compromise or arrangement. The

Shaw Family Group loses none of its rights to bring a receivership application if unsatisfactory progress is made; and

(p) the Shaw Family Group has poor prospects succeeding with its applications aimed at appointing a Receiver.

D. Appointment of a Receiver by The Shaw Family Group Premature

16. It is respectfully submitted that the application by the Shaw Family Group to appoint a Receiver over the applicants is premature. At present the Shaw Family Group has not issued s.244 notices under the *Bankruptcy and Insolvency Act* and, accordingly, the Shaw Family Group cannot make an application for the appointment of a Receiver.

> *John Deere Credit Inc. v. Doyle Salewski Lemieux Inc.* (1997), 50 C.B.R.(3d) 286 at para 10 **[TAB 7]**
>
> *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended at s. 244 ("*BIA*") **[TAB 8]**

17. Moreover, under the Interlender Agreement, the Shaw Family Group cannot apply for the appointment of a Receiver because, as per Clause 4.5 of the Interlender Agreement, ATB has not given its consent for the Shaw Family Group to do so and the *CCAA* process has not yet run for 10 days. Clause 4.5 makes it clear that the issuance of s. 244 notices by ATB does not trigger any right on the Shaw Family Group's part to initiate enforcement proceedings, including the appointment of a Receiver.

18. Even if the Shaw Family Group's application to compel the assignment of the ATB Position to it is successful, the Shaw Family Group will be stayed from acting on the s.244 notices issued by ATB by virtue of the stay of proceedings granted by the Initial Order.

> *BIA, supra* **[TAB 8]**

19. The attempt by the Shaw Family Group to obtain assignment of the ATB security is a transparent attempt at improving the position of the Shaw Family Group after the commencement of CCAA proceedings. Such attempt is aimed at derailing the CCAA process, is

to the prejudice of the Applicants and others stakeholders, is disruptive, disturbs the status quo, and is not urgent in any way.

V. RELIEF SOUGHT

20. It is respectfully requested that this Honourable Court grant an order extending the Stay Period to March 15, 2010 and adjourn the Shaw Family Group's applications to compel the assignment of the ATB Position and for the appointment of a receiver over the Applicants, subject to appropriate scheduling arrangements; alternatively that the Court dismiss those applications.

All of which is respectfully submitted this 18th day of February, 2010.

BORDEN LADNER GERVAIS LLP

Josef G. Kruger, Q.C.
Counsel for Darian Resources Ltd. and Bowview Petroleum Inc.

Estimated time for argument: 30 minutes

VI. LIST OF AUTHORITIES

1. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended
2. *Simpson's Island Salmon Ltd., Re*, 2006 NBQB 279
3. *Federal Gypsum Co., Re*, 2007 NSSC 347
4. *Caterpillar Financial Services Inc. v. Hard-Rock Paving Co.* (2008), 45 C.B.R. (5th) 87
5. *Forest & Marine Financial Corp. Re*, 2009 BCSC 1234
6. *ICR Commercial Real Estate (Regina) Ltd.*, 2007 SKCA 72
7. *John Deere Credit Inc. v. Doyle Salewski Lemieux Inc.* (1997), 50 C.B.R. (3d) 286
8. *Bankruptcy and Insolvency Act*, R.S.C. 1985., c. B-3, as amended

Companies' Creditors Arrangement Act

C-36

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

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,
(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

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

Burden of proof on application

(3) The court shall not make the order unless
(*a*) the applicant satisfies the court that circumstances exist that make the order appropriate; and
(*b*) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

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

2005, c. 47, s. 128, 2007, c. 36, s. 62(F).

2006 CarswellNB 453, 2006 NBQB 279, 24 C.B.R. (5th) 17, 302 N.B.R. (2d) 10, 784 A.P.R. 10

C
2006 CarswellNB 453

Simpson's Island Salmon Ltd., Re

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

And In the Matter of a plan of compromise or arrangement of the applicants, Simpson's Island Salmon Ltd., and Tidal Run Aqua Inc.

New Brunswick Court of Queen's Bench

P.S. Glennie J.

Heard: June 14, 2006
Judgment: June 16, 2006
Docket: S/M/69/05

Counsel: Rodney J. Gillis, Q.C., John C. Gillis for Applicants

Raymond P. Gorman, Q.C. for Monitor

R. Gary Faloon, Q.C. for Farm Credit Corporation, The Bank of Nova Scotia

Catherine A. Lahey, Stephen J. Hutchinson for Heritage Salmon Limited

Mel K. Norton for 047759 N.B. Ltd.

John B.D. Logan for Minister of Business New Brunswick

Subject: Insolvency

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous issues

Two companies had business of salmon farming and harvesting, and brought application seeking extension of stay termination date pursuant to Companies' Creditors Arrangement Act ("CCAA") — Major creditor which was feed supplier opposed application — Application granted — Extension of stay termination date was ordered and date for filing plan of arrangement ("plan") was set since CCAA proceeding constituted viable restructuring of companies' business — Evidence showed that companies acted in good faith and with due diligence in putting forth plan — Circumstances existed that made extension of stay of termination appropriate since plan with plausible financing could be finalized and filed for review by creditors in near future if extension was granted —

C.C.A.A., the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.

Does this CCAA proceeding constitute a viable restructuring, and if so, should it be permitted to proceed.

18 Heritage takes the position that the Applicants are improperly utilizing the protections afforded by the *CCAA*. In my opinion, the Applicants are properly within the purview of the *CCAA* and are taking all actions solely with a view of restructuring and proposing a Plan of Arrangement to their creditors in a timely way once it is possible to do so. In the particular circumstances of this industry and this case, the assets are needed to be valued by harvesting. In this case, the value of the salmon increases the longer the delay period to market since the salmon grow in size and in all likelihood will be worth more when brought to market. This is not the normal case of raw inventory such as motor vehicles or appliances which would in all likelihood decrease in value and are usually sold at distressed prices in an insolvency situation.

19 The need for flexibility in *CCAA* proceedings was referred to by Justice Topolniski in *843504 Alberta Ltd., Re*, [2003] A.J. No. 1549 (Alta. Q.B.) wherein he stated:

> *I accept that the need for flexibility in CCAA proceedings may, in the appropriate circumstances, warrant a sale of a significant portion of a debtors assets or undertaking before a plan of arrangement is put to the creditors. (*Re PSI Net Ltd. *(2001), 28 C.B.R. (4th) 95, [2001] O.J. No. 3829 (Ont. S.C.)*, Canadian Red Cross and Consumer's Packaging*).*

20 Similar statements were made in *Lehndorff General Partner Ltd., Re*, [1993] O.J. No. 14 (Ont. Gen. Div. [Commercial List]) at page 4:

> The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. [The] purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their business in the ordinary course or otherwise deal with their assets so as to enable a plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has great discretion under the CCAA to make orders so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors.
>
> The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA. It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed. The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and all of the creditors: *Chef Ready Foods Ltd. v. Hongkong*

Bank of Canada (1990), 4 C.B.R. (3d) 311 at pp 315-318.

21 In my opinion, upon reviewing the submissions of counsel and all of the circumstances in this case, I conclude that this *CCAA* proceeding constitutes a viable restructuring and should be permitted to proceed.

Is the purpose of the within CCAA proceeding simply to fund litigation and, if so, should it be permitted to proceed?

22 Heritage Salmon has expressed concern as to whether the purpose of the *CCAA* in this matter is to fund litigation against it. At the April 26th hearing, this Court was assured by counsel for Simpson's Island and Tidal Run that outstanding litigation by the Companies against Heritage Salmon Ltd. was being billed separately by their legal counsel.

23 On direction of this Court, the Monitor has extensively reviewed the accounts of counsel for Simpson's Island and Tidal Run and has concluded that time billings have been tracked separately.

24 Initially, it was believed that it would not be possible to put together a Plan of Arrangement until the litigation was concluded. However, based on recent affidavits and discussions with the Companies, the Monitor has now confined that the resolution of the litigation is not a condition precedent to a plan of arrangement.

25 The Monitor has not found any evidence that the purpose of the *CCAA* in this case was to fund litigation. This is further reinforced by the fact that a plan of arrangement is being prepared without resolution of the outstanding dispute between Heritage Salmon Ltd. and Simpson's Island and Tidal Run.

26 I find on the evidence that the purpose of the *CCAA* proceedings is not to fund the litigation against Heritage Salmon Ltd. and 1311735 Ontario Limited.

Does the CCAA proceeding in this case constitute a liquidation and, if so, should it be permitted to pro- ceed?

27 In assessing the applicability of the *CCAA* in this case, it is important to examine the nature of the assets at issue. The major assets of Simpson's Island and Tidal Run are the aquaculture site licenses; the boats and equipment; and the fish inventory. This matter is unique because the major asset of the companies being sold is the inventory of Atlantic salmon which need to be harvested on a two year cycle.

28 It is important to note that just because an asset is being sold does not mean that a liquidation is taking place. It should not be forgotten that the sale of the fish inventory is what the companies in this case do in the normal course of their business operations. It is their product and, in effect, their business.

29 The value of Simpson's Island and Tidal Run as a whole, as operating entities under a restructuring, have significantly more value for the stakeholders involved than in a liquidation scenario. As stated by Farley J. in *Lehndorff General Partner Ltd., supra*, the *CCAA* seeks to facilitate ongoing operations where the assets have greater value as part of an integrated system than individually.

30 As pointed out by counsel for the Monitor, if the companies can sell their fish inventory then they have a good chance of obtaining additional investment and/or financing as the foundation for putting together a viable proposal which will benefit all stakeholders.

2007 CarswellNS 629, 2007 NSSC 347, 40 C.B.R. (5th) 80, 835 A.P.R. 299, 261 N.S.R. (2d) 299

C
2007 CarswellNS 629

Federal Gypsum Co., Re

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

And IN THE MATTER OF A Plan of Compromise or Arrangement of the Applicant, Federal Gypsum Company

Nova Scotia Supreme Court

A.D. MacAdam J.

Heard: November 5, 2007
Oral reasons: November 5, 2007
Written reasons: January 29, 2008
Docket: S.H. 285667

Counsel: Maurice P. Chaisson, Graham Lindfield for Federal Gypsum Company

Carl Holm, Q.C. for BDO Dunwoody Goodman Rosen Inc.

Thomas Boyne, Q.C. for Royal Bank of Canada

Robert Sampson, Robert Risk for Enterprise Cape Breton Corporation, Cape Breton Growth Fund Corporation

Michael Pugsley for Her Majesty in Right of the Province of Nova Scotia (Nova Scotia Economic Development), Nova Scotia Business Incorporated

Michael Ryan, Q.C., Michael Schweiger for Black & McDonald Limited

Subject: Insolvency; Civil Practice and Procedure

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

Debtor was granted stay of proceedings for 30 days pursuant to s. 11 of Companies' Creditors Arrangement Act ("CCAA") — Debtor wished to arrange debtor in possession ("DIP") financing, which was essentially new financing that required existing secured creditors to subordinate their interests — Bank was sole secured creditor that objected to DIP financing — Debtor was granted approval to arrange DIP financing to extent of $350,000 — Debtor was subsequently granted extension of time for filing plan of arrangement along with extension of stay termination date — Debtor wished to increase DIP financing with view to paying off bank — Debtor brought application for permission to increase DIP financing to $1,500,000 and for further extension of stay ter-

The Law

6 The purpose of the CCAA was commented on by Justice Turnbull of the New Brunswick Court of Appeal in *Juniper Lumber Co., Re*, [2000] N.B.J. No. 144 (N.B. C.A.), at para. 1:

> The principal purpose of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the 'CCAA'), 'is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business ... When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.' See Arrangements Under the Companies' Creditors Arrangement Act by Goldman, Baird and Weinszok (1991), 1 C.B.R. (3d) 135 at p. 201 where the authors cite Thackray; J. approvingly quoting Gibbs, J.A. from the cases cited on that page. In New Brunswick, the Court of Queen's Bench is defined by the CCAA as the Court to play the 'kind of supervisory role.' The CCAA has a remedial purpose and, therefore, must be interpreted in a broad and liberal fashion. See pages 137-138 in the article previously cited. More often than not time is critical. And, in order to maintain a status quo while attempts are made to determine if a successful compromise or arrangement can be reached, the courts are granted certain powers in s. 11 to hold creditors at bay.

7 Justice Glennie of the New Brunswick Court of Queen's Bench in *Simpson's Island Salmon Ltd., Re*, 2006 NBQB 279 (N.B. Q.B.), at para. 20, after referencing *Juniper Lumber Co.*, referred to *Lehndorff General Partner Ltd., Re*, [1993] O.J. No. 14 (Ont. Gen. Div. [Commercial List]), at paras. 5 and 6, where Farley, J. said:

> The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable a plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has a great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. ...
>
> The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA. ...

Background

(A) The Initial Application

8 On the initial application, the Court having been satisfied the company met the requirements for the filing under the *CCAA*, in that it was, on the evidence tendered, "insolvent" and had total claims exceeding $5,000,000.00, and being further satisfied that the burden stipulated in s. 11(6) had been met, an Order providing for a Stay of Proceedings was issued.

2008 CarswellOnt 4046, 45 C.B.R. (5th) 87

C
2008 CarswellOnt 4046

Caterpillar Financial Services Ltd. v. Hard-Rock Paving Co.

Caterpillar Financial Services Limited v. Hard-Rock Paving Company Limited, Diamond Stonebridge Contracting Inc., Hard-Rock Construction Inc., 942355 Ontario Limited and 942356 Ontario Limited

Ontario Superior Court of Justice

H.J. Wilton-Siegel J.

Heard: June 10, 2008
Judgment: June 10, 2008
Docket: CV-08-00007504-00CL

Counsel: Steven T. Weisz, Katherine McEachern, Michael McGraw for Applicant, Caterpillar Financial Services Limited

Gary H. Luftspring for GCNA as D & O Insurer

Raymond M. Slattery, David T. Ullmann for Hard-Rock Paving Company Limited

Craig J. Hill for Gaurantee Company of North America

Tim Hogan for BDO Dunwoody

Andrew Hatnay, Demetrios Yiokaris for Labourers International Local 837

Subject: Insolvency; Civil Practice and Procedure

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

Substantially all of proceeds of sale of debtors' assets and business would be for benefit of creditor — Debtors brought application for extension of stay of proceedings under Companies' Creditors Arrangement Act and approval of $1 million of additional DIP financing to allow it to complete sales process currently underway — Creditor sought to terminate proceedings under Act with assignment of debtor into bankruptcy — Debtors' application granted — Quantum of probable decline in creditor's security position was neither large amount nor material in context of creditor's overall exposure — Substitution of trustee in bankruptcy or interim receiver to take carriage of sale process would entail considerable additional costs and time that had to be weighed against estimated decline in security that would result if DIP financing was approved — Sale on going-concern basis would yield sales proceeds that were no lower than, and quite possibly higher than, sales proceeds likely to res-

ult from sale on liquidation basis — Monitor's opinion was that it would expect current sales process to yield amount in excess of amount likely realizable from sales process conducted by trustee in bankruptcy or interim receiver — Monitor was of opinion that such difference would be at least equal to creditor's security deficiency — Evidence suggested that approval of DIP financing would not adversely affect creditor's security position any more than assignment into bankruptcy, and may well have more positive financial result to creditor.

Statutes considered:

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

Generally — referred to

APPLICATION by debtors for extension of stay of proceedings under *Companies' Creditors Arrangement Act* and approval of $1 million of additional DIP financing to allow it to complete sales process currently underway.

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

1 The applicants seek an extension of the stay of proceedings under the CCAA and approval of $1 million of additional DIP financing to be disbursed during June to allow it to complete the sales process currently under- way.

2 Caterpillar Financial Services Limited ("CFSL") seeks to terminate the CCAA proceedings with an assignment of the debtor into bankruptcy. As I understand the security held by the secured creditors of the debtors, substantially all of the proceeds of sale of the debtors' assets and business will be for the benefit of CFSL. CFSL envisages continuation of the sales process by the trustee in bankruptcy or an interim receiver appointed by the Court. It has filed a report of KPMG Inc. ("KPMG") that quantifies the net decline in its security position in June if the DIP financing is extended. The amount should be reduced by the amount of interest accruing on the stayed loans and leases, which would be incurred irrespective of whether DIP financing is approved. The net amount is herein referred to as the "CFSL Security Deficiency".

3 I would note that, while CFSL also suggests that the actual decline in its security position could be higher as a result of lower accounts receivable related to possible unidentified trust claims not included in the MOT deduction in the KPMG calculation, this is entirely speculative. There is no evidence of any such claims despite KPMG's involvement.

4 In considering the applicants' requested relief, the Court should have regard to the number of employees who would be affected if the business were shut down and the nature of that impact on the particular community involved. However, by itself, that consideration would not be sufficient to decide the issue if CFSL were able to demonstrate a significant adverse impact on its security position likely to result if the DIP financing were approved.

5 Accordingly, the Court must assess whether, on the evidence before it, it is probable that the current sales process would net higher proceeds than a sale after an assignment into bankruptcy.

6 The quantum of the probable decline in the CFSL security position, as calculated by KPMG, is neither a large amount nor material in the context of CFSL's overall exposure. The substitution of a trustee in bankruptcy or interim receiver to take carriage of the sales process would entail considerable additional costs and time which must be weighed against the estimated decline in security that will result if the DIP financing is approved.

7 In addition, a sale on a going-concern basis will yield sales proceeds that are no lower than, and quite possibly higher than, the sales proceeds likely to result from a sale on a liquidation basis. The Monitor has given its opinion to the Court at the hearing that it would expect the current sales process to yield an amount in excess of the amount likely realizable from a sales process conducted by a trustee in bankruptcy or an interim receiver. The Monitor is of the opinion that such difference would be at least equal to the CFSL Security Deficiency. The Monitor has indicated that it is prepared to put this opinion in writing in a supplemental report to be filed with the Court.

8 Based on the foregoing, while nothing is certain these circumstances, the evidence before the Court suggests that approval of the additional DIP financing will not adversely affect CFSL's security position any more than an assignment into bankruptcy of the applicants, and may well have a more positive financial result to CFSL.

9 Accordingly, the stay of proceedings under the CCAA is extended and DIP financing in an amount not exceeding $1 million is approved, subject to the approval of the Court of a term sheet implementing such DIP financing.

Application granted.

END OF DOCUMENT

2009 CarswellBC 2361, 2009 BCSC 1234

H
2009 CarswellBC 2361

Forest & Marine Financial Corp., Re

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

And In the Matter of the Business Corporations Act, S.B.C. 2002, c. 57

And In the Matter of Forest & Marine Financial Corporation(in its own capacity, in its capacity as general partner of Forest & Marine Financial Limited Partnership and in its capacity as manager of Forest & Marine Investment Trust), Forest & Marine Investments Ltd., Forest & Marine Capital Ltd., Forest & Marine Insurance Services Ltd. and Treesea Holdings Inc. (Petitioners)

Asset Engineering LP (Plaintiff) and Forest & Marine Financial Limited Partnership, Forest & Marine Financial Corporation, Forest & Marine Investments Ltd., Forest & Marine Capital Ltd., Forest & Marine Insurance Services Ltd., and Treesea Holdings Inc. (Defendants)

British Columbia Supreme Court [In Chambers]

D.M. Masuhara J.

Heard: May 1, 2009
Judgment: May 1, 2009
Docket: Vancouver S092244, S092160

Proceedings: affirmed *Forest & Marine Financial Corp., Re* (2009), 2009 CarswellBC 1738, 54 C.B.R. (5th) 201, [2009] 9 W.W.R. 567, [2009] B.C.W.L.D. 5281, [2009] B.C.W.L.D. 5284 ((B.C. S.C. [In Chambers]))

Counsel: A. Brown, M.C. Sennott for Petitioners

R.A. Millar for Asset Engineering LP

A. Welch for Province of British Columbia

S. Wilkinson for Financial Institutions Commission

J. McLean for Ad hoc Committee of Investment Receipt Holders, Barry Kenna

H. Ferris for Monitor, Wolrige Mahon Limited

Subject: Insolvency; Corporate and Commercial

22 Given that there is a broad constituency of interest at play; that at this point the financial analysis supports the view that Asset Engineering's position is secured; that further payments to reduce the outstanding indebtedness to Asset Engineering are projected — and in this regard I would note that there appears to be government interest in FM's continued operation; that continued payments to Asset Engineering's significant monthly fees are projected to continue; that though Asset Engineering has forcefully argued its right for the appointment of a receiver based on contractual and equitable considerations, there has been some indications of some flexibility, but not much, with respect to timing; that this would also equally be contained within the comments of the investment receipt holders; that there is also sufficient reality of the potential for refinancing from a recognized institution; that refinancing is a primary focus for the FM group; and that the imposition of a receiver would impair the ability of the *CCAA* eligible entities from restructuring; in assessing the competing interests relative to the prejudice to each, I conclude that an extension of the stay of proceedings is in order.

23 However, given the uncertainty in the economic climate, there is a need for continued vigilance in the finances of the FM group. The monitor will be directed to provide regular updates regarding cash flow, loan portfolio performance, the state of the value of the entities' assets and any disposition thereof, and the progress or lack thereof in obtaining refinancing; and to report, on a timely basis, any change that would serve to materially impair or prejudice the position of Asset Engineering from the position as indicated in the monitor's report including the assessment of whether a timely refinancing is likely or not. Such a change would form the basis for an early review of the stay.

24 Insofar as the suggestion of the investment receipt holder's position that the monitor lead the refinancing initiative, while I have not reviewed this extensively, I have concerns regarding the potential for conflict between the role of the monitor in accepting a leading role with respect to refinancing, and I would see concluding this reason, further submissions on this point, as well as to any other details regarding the order arising from this ruling. That concludes my ruling, and I will now receive submissions relating thereto.

25 COUNSEL: I just want to know, how long is the extension?

26 *THE COURT:* The extension is for the sought after period.

(SUBMISSIONS BY COUNSEL)

27 COUNSEL: Maybe Mr. Millar can clarify this, but I take it from what he was saying is that paragraph 39(f) should be deleted.

28 *THE COURT:* That is the way I took it. It has essentially been done.

(SUBMISSIONS BY COUNSEL)

29 *THE COURT:* The monitor will have the role of assisting in regards to sourcing financing.

END OF DOCUMENT

2007 CarswellSask 324, 2007 SKCA 72, 33 C.B.R. (5th) 50, [2007] 9 W.W.R. 79, 299 Sask. R. 194, 408 W.A.C. 194

H
2007 CarswellSask 324

ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.

ICR Commercial Real Estate (Regina) Ltd. (Appellant) and Bricore Land Group Ltd., Bricore Investment Group Ltd., 624796 Saskatchewan Ltd. 603767 Saskatchewan Ltd.,(Respondents)

Saskatchewan Court of Appeal

Klebuc C.J.S., Jackson, Smith JJ.A.

Heard: June 7, 2007
Judgment: June 13, 2007
Docket: 1443, 1452

Proceedings: affirming *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 2007 SKQB 121, 2007 CarswellSask 157 (Sask. Q.B.); additional reasons at *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 2007 SKQB 144, 2007 CarswellSask 264 (Sask. Q.B.); and reversing *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 2007 SKQB 144, 2007 CarswellSask 264 (Sask. Q.B.)

Counsel: Fred C. Zinkhan for Appellant

Jeffrey M. Lee for Respondents

Kim Anderson for Monitor, Ernst & Young

Subject: Civil Practice and Procedure; Insolvency; Corporate and Commercial

Bankruptcy and insolvency --- Practice and procedure in courts — Stay of proceedings

Application to lift stay — B Ltd. owned building and other properties — B Ltd. filed under Companies Creditors' Arrangement Act ("CCAA") and stay of proceedings was imposed — Supervising judge appointed exclusive selling officer for B Ltd. properties, and appointed chief restructuring officer ("CRO") to assist with sale — CRO accepted purchaser's offer on B Ltd. properties ("offer") — CRO submitted report to supervising judge recommending sale of building and advising that offer represented greatest value obtainable — CRO signed agreement with realtor ("disputed agreement") — Disputed agreement provided that realtor would be protected as agent of record if B Ltd. properties were sold to other potential buyers, including City of Regina ("city") — B Ltd. properties were ultimately sold pursuant to offer, and purchaser later resold building to city — Realtor took position that it had introduced city to opportunity to purchase building, and was therefore entitled to commission — Realtor's application for leave to commence action against B Ltd. was dismissed — Supervising judge held

68 In determining what constitutes "sound reasons," much is left to the discretion of the judge. However, previous decisions on this point provide some guidance as to factors that may be considered:

(a) the balance of convenience;

(b) the relative prejudice to the parties;

(c) the merits of the proposed action, where they are relevant to the issue of whether there are "sound reasons" for lifting the stay (i.e., as was said in *Ma, Re*, if the action has little chance of success, it may be harder to establish "sound reasons" for allowing it to proceed).

The supervising *CCAA* judge should also consider the good faith and due diligence of the debtor company as referenced in s. 11(6). Ultimately, it is in the discretion of the supervising *CCAA* judge as to whether the proposed action ought to be allowed to proceed in the face of the stay.

69 While Koch J. did not state the test as broadly as I have, I agree that ICR does not reach the necessary threshold. ICR did not structure its affairs or establish a claim with the specificity that justifies the development of a remedy to allow it to participate in the liquidation of the Bricore assets. There is also no aspect of the liquidation that requires the Court in this case to be concerned. In particular, the stay need not be lifted, and no other step need be taken in the context of the *CCAA* proceedings in light of these facts:

1. as of January 30, 2006, the Building was subject to an exclusive Selling Officer Agreement that provided CMN Calgary with the exclusive right to sell the property and to earn a commission of 1.25% of the purchase price,[FN61] which is significantly less than that being claimed by ICR at a 5% commission;

2. the sale to the Proposed Purchaser was a sale of six of the seven Bricore properties;

3. the trial judge received a report dated September 25, 2006 from the CRO recommending approval of the sale, which is two days before the alleged contract with ICR was proposed;[FN62]

4. in the September 25 report, the CRO advised the Court that "the total aggregate purchase price for the Bricore Properties obtained by Bricore in the Accepted Offer to Purchase represented the greatest value which it would be possible to obtain for all of the Bricore Properties;"[FN63]

5. the September 27, 2006 letter from ICR to Bricore, states "we are aware that the properties are under contract to sell ..."; and,

6. there was no sale from Bricore to the City of Regina.

70 While ICR denies knowledge of the sale, it is important to come back to the September 27th letter from ICR to Mr. Ruf. It states:

We are aware that the properties are under contract to sell and request that ICR be protected in the specific situations as outlined.[FN64] [Emphasis added]

The addition by the CRO of these words, "Date of closing of *a sale* or December 31, 2006 whichever is earlier," to that letter adds further support to the veracity of the CRO's report to the effect that the CRO entered into discussions with ICR to provide for the eventuality of a failed sale to the purchaser with whom Bricore already had

1997 CarswellOnt 4431, 153 D.L.R. (4th) 572, 36 O.R. (3d) 259, 50 C.B.R. (3d) 286, (sub nom. Deere (John) Credit Inc. v. Doyle Salewski Lemieux Inc.) 105 O.A.C. 156

C
1997 CarswellOnt 4431

John Deere Credit Inc. v. Doyle Salewski Lemieux Inc.

In The Matter of the Proposal of Ready Rental and Supply Limited of the City of Sudbury, in the Province of Ontario

John Deere Credit Inc., Creditor (Appellant) and Doyle Salewski Lemieux Inc., Trustee (Respondent)

Ontario Court of Appeal

Osborne, Laskin, Goudge JJ.A.

Heard: September 23, 1997
Judgment: November 20, 1997
Docket: CA C27577

Counsel: *David G. Timms* and *Elizabeth Capitano*, for the appellant.

Justin R. Fogarty, for the respondent.

Subject: Insolvency

Bankruptcy --- Priorities of claims — Secured claims — Dealings with security after bankruptcy — By secured creditor — Realization of security

Secured creditor delivered notice to debtor of intention to realize on security — Debtor filed proposal with Official Receiver on Sunday, being tenth day after creditor served its notice — Creditor was denied access to secured property on grounds that debtor's proposal had been filed and stay of proceedings in effect under Bankruptcy and Insolvency Act — Trustee in bankruptcy was granted order restraining creditor from realizing on security — Creditor's appeal of order dismissed — Having sent notice prescribed under s. 244 of Act, creditor was required to wait 10 days before realizing on security — Debtor was then entitled to file proposal at any time within 10-day period to prevent creditor from enforcing security — Where 10-day period expired on Sunday, debtor was entitled to file notice of intention to make proposal next day, Monday — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 50.4(1), 69(1)(a), (2)(b), 244 — Bankruptcy and Insolvency Rules, C.R.C. 1978, c. 368, R. 112.

On May 29, a secured creditor hand-delivered a notice of intention to enforce security pursuant to s. 244(1) of the *Bankruptcy and Insolvency Act* for a number of conditional sales contracts it had with the debtor. On Sunday, June 8, the debtor transmitted a notice of intention to make a proposal with the Official Receiver pursu-

8 Section 69 entitles the insolvent person to file a proposal and thereby prevent a secured creditor from enforcing the security unless that creditor had sent the prescribed notice more than ten days earlier.

9 While these are separate legislative provisions, in my view they cover the same time period. Until a secured creditor, having sent the prescribed notice, has waited the time necessary before being able to enforce the security, the insolvent person can file a proposal staying that creditor's right to proceed to enforce the security.

10 Hence, for the purposes of the issue on appeal, the effect of sections 244 and 69 taken together is that a secured creditor must send a notice of intention to enforce his security and then wait for the expiry of ten days. Only thereafter can the security interest be enforced without the consent of the insolvent person. The latter has the same ten days following the day on which the notice was sent to file a notice of intention to make a proposal and gain the protection of the stay provisions. In effect, the two sections are designed so that the insolvent person has these ten days to determine whether to give up the security provided or to continue with the proposal proceedings.

11 Where the ten-day period available to the insolvent person to file and thereby gain the protection of a stay expires on a Sunday, it is my view that the insolvent person may file a notice of intention to make a proposal on Monday, the next day, so as to trigger the stay provided by s. 69. While Rule 112 is not felicitously worded, when s. 26 of the *Interpretation Act* is used to inform its meaning, this result is clearly prescribed. In *Ohayon Jewelry Inc. v. Libarian Jewels & Setting Ltd. (Trustee of)* (1987), 63 O.R. (2d) 157 (Ont. S.C.), the court adopted this interpretation of the statutory scheme. Indeed, without this interpretation the insolvent person would have to file his notice on the preceding Friday (since filing is impossible on either Saturday or Sunday) and would therefore have only eight days to decide which way to proceed rather than the ten days prescribed by s. 69(2)(b).

12 I therefore conclude that on the central issue the appellant fails. Its notice of intention to enforce security was sent on May 29, 1997. The ten-day period that followed ended on Sunday, June 8. This permitted RRSL to file its notice of intention to make a proposal on Monday, June 9, so as to raise the stay provided for in s. 69(2)(b).

13 The appellant also argued that it ought to be relieved from the effect of the stay for equitable reasons, as is permitted by s. 69.4 of the *Bankruptcy and Insolvency Act*. Given that the material filed by the appellant on this issue was no more than a bare assertion of the possibility of the value of its security declining over time if it could not repossess that security, I am unprepared to allow the appeal on this basis.

14 For these reasons I would dismiss the appeal with costs.

Appeal dismissed.

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Bankruptcy and Insolvency Act

B-3

An Act respecting bankruptcy and insolvency

Appointment of interim receiver

47. (1) If the court is satisfied that a notice is about to be sent or was sent under subsection 244(1), it may, subject to subsection (3), appoint a trustee as interim receiver of all or any part of the debtor's property that is subject to the security to which the notice relates until the earliest of
(*a*) the taking of possession by a receiver, within the meaning of subsection 243(2), of the debtor's property over which the interim receiver was appointed,
(*b*) the taking of possession by a trustee of the debtor's property over which the interim receiver was appointed, and
(*c*) the expiry of 30 days after the day on which the interim receiver was appointed or of any period specified by the court.

Directions to interim receiver

(2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:
(*a*) take possession of all or part of the debtor's property mentioned in the appointment;
(*b*) exercise such control over that property, and over the debtor's business, as the court considers advisable;
(*c*) take conservatory measures; and
(*d*) summarily dispose of property that is perishable or likely to depreciate rapidly in value.

When appointment may be made

(3) An appointment of an interim receiver may be made under subsection (1) only if it is shown to the court to be necessary for the protection of
(*a*) the debtor's estate; or
(*b*) the interests of the creditor who sent the notice under subsection 244(1).

Place of filing

(4) An application under subsection (1) is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

R.S., 1985, c. B-3, s. 47; 1992, c. 27, s. 16; 2005, c. 47, s. 30; 2007, c. 36, s. 14.

Advance notice

244. (1) A secured creditor who intends to enforce a security on all or substantially all of
(*a*) the inventory,
(*b*) the accounts receivable, or
(*c*) the other property
of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Period of notice

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

No advance consent

(2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

Exception

(3) This section does not apply, or ceases to apply, in respect of a secured creditor
(*a*) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or
(*b*) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

Idem

(4) This section does not apply where there is a receiver in respect of the insolvent person.

1992, c. 27, s. 89; 1994, c. 26, s. 9(E).