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

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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I. INTRODUCTION

1. This Bench Brief is submitted by OAN Resources Ltd. ("**OAN**") in support of its Application for a second extension to the period for filing its proposal (the "**Proposal**"), filed on August 19, 2019 (the "**Application**").

2. OAN is a private company based in Calgary, Alberta, which carries on business as a producer of oil and gas.[1] On June 14, 2019, OAN filed a Notice of Intention to Make a Proposal (the "**NOI**") under Subsection 50.4(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("***BIA***"). OAN has engaged Hardie & Kelly Inc. as its trustee for the NOI proceedings (the "**Proposal Trustee**").[2]

3. Under Subsection 50.4(8) of the *BIA*, OAN must file its Proposal within a period of 30 days of the NOI, failing which it is deemed to have made an assignment to bankruptcy. However, under Subsection 50.4(9) of the *BIA*, this Court has discretion to extend that period, by up to 45 days for any individual extension and with a maximum total extension of five months.[3] On July 8, 2019, OAN was granted an initial 45 day extension to file its Proposal, from July 14, 2019 to August 28, 2019 (the "**Initial Extension**").[4]

4. In the present Application, OAN seeks a further 45 day extension to file its Proposal, from August 28, 2019 to October 12, 2019, since it requires additional time to continue formulating a viable Proposal.[5] Specifically, OAN is in the midst of consultations with its primary secured creditors (the "**Debentureholders**"),[6] regarding whether the Debentureholders will fund a Proposal.[7] If the Debentureholders agree to fund a Proposal, then OAN would likely be able to compromise lienholder claims and make a distribution to unsecured creditors.[8] Although OAN has diligently advanced negotiations with its Debentureholders, the Debentureholders require more time to assess whether they will fund a Proposal.[9] Accordingly, OAN seeks a further extension to file its Proposal.

5. In these circumstances, OAN has met the requirements of Subsection 50.4(9) of *BIA* and this Court should exercise its discretion to grant OAN an extension. In particular:

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[1] Affidavit of David Fricker, sworn and filed on June 28, 2019 ("**First Fricker Affidavit**"), paras. 2-3.
[2] First Fricker Affidavit, para. 9.
[3] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("***BIA***"), Subsections 50.4(8) and 50.4(9) **[TAB 1]**.
[4] Affidavit of David Fricker, sworn and filed on August 19, 2019 ("**Second Fricker Affidavit**"), para. 7; *see,* Order pronounced by the Honourable Madam Justice BEC Romaine on July 8, 2019 ("**Initial Extension Order**"), para. 2.
[5] Second Fricker Affidavit, para. 14.
[6] Second Fricker Affidavit, para. 4.
[7] Second Fricker Affidavit, para. 9; Second Report of the Proposal Trustee, Hardie & Kelly Inc., dated August 20, 2019 (filed August 20, 2019) (the "**Second Report**"), paras. 18-21.
[8] Second Fricker Affidavit, para. 9.
[9] Second Fricker Affidavit, para. 9; Second Report, para. 21.

(a) OAN has and is acting in good faith and with due diligence;[10]

(b) OAN is in consultation with the Debentureholders,[11] which are likely to result in a viable Proposal in the sense that a Proposal "might well happen,"[12] and/or has some "some degree of probability"[13] of being filed;

(c) no creditor would be materially prejudiced by an extension. Rather, creditors would be materially prejudiced *without* an extension, since without an extension OAN would be deemed bankrupt, the Debentureholders would likely pursue a receivership, and unsecured creditors would likely receive no recoveries;[14] and

(d) the Debentureholders support OAN's Application,[15] as does the Proposal Trustee,[16] the latter of which is a highly significant factor given the Proposal Trustee is the Court's officer.[17]

6. In addition, OAN seeks a sealing order regarding the Confidential Supplement (the "**Confidential Supplement**") to the Second Report of the Proposal Trustee dated August 20, 2019 (the "**Second Report**"). The Confidential Supplement contains commercially sensitive information regarding the value of OAN's assets, which, if widely disseminated, would prejudice OAN's ability to restructure, for the reasons set out in the Confidential Supplement.[18]

7. The facts in support of the relief sought by OAN are set out in the Affidavit of David Fricker sworn and filed on August 19, 2019, in the Proposal Trustee's Second Report, and in prior affidavits and reports filed in the within proceedings, which OAN adopts as if the same were reproduced herein.

II. LAW & ARGUMENT

A. EXTENSION OF TIME FOR OAN TO FILE A PROPOSAL

i. The Court has Discretion to Extend the Time for Filing a Proposal under Subsection 50.4(9) of the *BIA*

8. Subsection 50.4(8) of the *BIA* provides that a debtor who makes a notice of intention must file its proposal within 30 days thereof, failing which it will be deemed to have made an assignment into bankruptcy.[19]

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[10] Second Fricker Affidavit, para. 8.
[11] Second Fricker Affidavit, paras. 8-9; Second Report, paras. 18-21.
[12] *Enirgi Group Corp v Andover Mining Corp*, 2013 BCSC 1833 ("***Andover***"), para. 66 [**TAB 2**]; *In the Matter of the Bankruptcy of Schendel Mechanical Contracting Ltd*. ("***Schendel***"), Decision of the Honourable Mr. Justice D.R. Mah of the Court of Queen's Bench of Alberta, dated April 18, 2019 (unreported), p 7, lines 3-5 [**TAB 3**].
[13] *Schendel, supra*, p 7, lines 3-5 [**TAB 3**].
[14] Second Fricker Affidavit, paras. 10 and 15; Second Report, para. 23.
[15] Second Fricker Affidavit, para. 16; Second Report, paras. 17, 21.
[16] Second Fricker Affidavit, para. 15; Second Report, para. 23.
[17] *Castle Rock Research Corp v AGC Investments Ltd*, 2012 ABQB 208 ("***Castle Rock***"), para. 17 [**TAB 4**].
[18] Second Fricker Affidavit, para. 17; Second Report, paras. 19, 24.
[19] *BIA*, Subsection 50.4(8) **[TAB 1]**.

9. However, pursuant to Subsection 50.4(9) of the *BIA*, the Court has discretion to extend the period for the debtor to file its proposal provided it is satisfied three requirements are met. Specifically, Subsection 50.4(9) states:

> **Extension of time for filing proposal**
>
> (9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that
>
> (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
>
> (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
>
> (c) no creditor would be materially prejudiced if the extension being applied for were granted.[20] (underlining added)

10. Thus, the Court may extend the time for a debtor to file a proposal provided that (i) the debtor is acting in good faith and with due diligence; (ii) a "viable proposal" is "likely" to be filed by the debtor; and (iii) no creditor would be "materially prejudiced". The debtor/applicant must prove these criteria on the balance of probabilities.[21]

11. There are few decisions of this Court interpreting Subsection 50.4(9). However, Subsection 50.4(9) was considered in detail by the British Columbia Supreme Court in *Enirgi Group Corp v Andover Mining Corp* ("***Andover***").[22] In that case, and among other things, the Court indicated that the obligation on the debtor to show that it "would likely be able to make a viable proposal" under Subsection 50.4(9)(b) is a low threshold. Specifically, the Court stated:

> [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": … It follows that Enirgi's views about any proposal are not necessarily determinative. **The proposal need not be a certainty and "likely" means "such as might well happen."**…[23] (underlining and bold added)

12. In the recent decision *In the Matter of Schendel Mechanical Contracting Ltd*. ("***Schendel***"), Justice Mah of this Court also granted the debtor an extension to file its proposal,[24] and in so doing adopted

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[20] *BIA*, Section 50.4(9) **[TAB 1]**.
[21] Houlden & Morawetz, *Bankruptcy and Insolvency Law of Canada*, 4 ed (Retrieved electronically on WestlawNext Canada during August 2019) ("**Houlden & Morawetz**"), E4 [**TAB 5]**; *see also*, *Castle Rock*, *supra* at para. 9 [**TAB 4].**
[22] *Andover*, *supra* [**TAB 2**].
[23] *Ibid*, para. 66 [**TAB 2**].
[24] *Schendel*, *supra* at p 8, lines 18-22 [**TAB 3**].

much of the analysis in *Andover*.[25] In particular, Justice Mah suggested that Subsection 50.4(9)(b) is a low threshold; his Lordship held:

> The second factor is whether the debtor is likely to make a viable proposal and I note that the words 'likely to' denote **some degree of probability**. As *Andover Mining* instructs at paragraph 66, what that means is that the making of a viable proposal **might well happen**.[26] (underlining and bold added)

13. Further, in the recent decision of the Nova Scotia Supreme Court in *Kocken Energy Systems Inc, Re* ("***Kocken***"), the Court granted the debtor an extension to file its proposal and remarked that:

> The requirement is "would likely be able to make a viable proposal", not "has settled on terms likely to be accepted". I think that is the point made by Justice Goodfellow in *H & H Fisheries Ltd., Re*, 2005 NSSC 346 (N.S. S.C.), when he says that s. 50.4(9)(b) means "that a reasonable level of effort dictated by the circumstances must have been made that gives **some indication of the likelihood** a viable proposal will be advanced within the time frame of the extension applied for."[27] (underlining and bold added)

14. Thus, the requirement under Subsection 50.4(9)(b), that the debtor "would likely be able to make a viable proposal", is not an onerous test. Rather, Courts take a permissive or flexible approach to the analysis. This reflects the overall purpose of the notice of intention provisions of the *BIA*. According to Justice Mah "The purpose of the proposal process and antecedent filing of the NOI is to permit the debtor an opportunity to make a restructuring proposal to its creditors in furtherance of the rehabilitative objectives of the *BIA*" (underlining added).[28]

15. In *Andover*, the British Columbia Supreme Court also held, in respect of Subsection 50.4(9)(a), that it is only debtor's good faith and due diligence *after* the notice of intention is filed that is relevant,[29] and, in respect of Subsection 50.4(9)(c), that the Court is concerned with *material* prejudice and not prejudice to creditors.[30]

ii. OAN Has Met the Test for an Extension to File its Proposal

16. In the instant case, OAN seeks a second extension of the period to file its Proposal since its Debentureholders are considering whether to fund a Proposal and time is needed for the Debentureholders to complete their assessment and advise OAN accordingly.[31] In these

[25] *Ibid*, see for example p 5 lines 36-39, p 7 lines 4-5, p 7 lines 34-35 [**TAB 3**].
[26] *Ibid*, at p 7 lines 3-5 [**TAB 3**].
[27] *Kocken Energy Systems Inc, Re*, 2017 NSSC 80 ("***Kocken***"), para. 23 [**TAB 6].**
[28] *Schendel, supra* at p 5 lines 7-9 [**TAB 3**]; *see also, NTW Management Group Ltd, Re*, 1993 CarswellOnt 208 (Crt Just), where Justice Chadwick held that "The bankruptcy insolvency legislation and in particular the proposal sections are to give an insolvent company or person, an opportunity of putting forward a plan. The intent of the legislation is towards rehabilitation, not liquidation" (para. 22) **[TAB 7**]
[29] *Andover, supra* at para. 64 [**TAB 2**]; *see also, Schendel, supra* p 5 lines 37-39 [**TAB 3**].
[30] *Andover, supra* at para. 76 [**TAB 2**].
[31] Second Fricker Affidavit, para. 9; Second Report, paras. 21, 23.

circumstances, the Court should exercise its discretion under Subsection 50.4(9) of the *BIA* and grant OAN an extension to file its Proposal, and for several reasons.

17. First, OAN has, at all times, acted in good faith and with due diligence in pursuing activities aimed at presenting a viable Proposal to its creditors. For example, as set out in the Second Affidavit of David Fricker, since the Initial Extension OAN has (i) met with its professional advisors and the Proposal Trustee; (ii) conducted detailed financial and liquidity analysis; (iii) consulted with the Debentureholders; (iv) continuously updated its cash flow analysis; (v) advised other creditors and stakeholders regarding the impact of the NOI; and (iv) as, recently as Friday, August 16, 2019, obtained an independent valuation of its assets (through the Proposal Trustee).[32] Conversely, there is no evidence of any bad faith, improper conduct or lack of diligence by OAN, before the Court.

18. Second, OAN has taken sufficient steps such that a "viable proposal might well happen" and/or that there is "some probability" of a viable Proposal, which is all that is required.[33] As indicated above, the Debentureholders are presently assessing the value of OAN's assets, considering the claims of lienholders, evaluating OAN's tax pools, and on that basis, considering whether to fund a Proposal.[34] Therefore, a Proposal "might well happen".

19. Moreover, in *Andover*, the British Columbia Supreme Court granted the extension sought by the debtor since, among other things, the debtor was "in the process" of finalizing a new loan even though no firm commitment had been obtained by the debtor. For instance, the Court in *Andover* remarked that "…Andover remains asset rich and cash poor …the assets of Andover support the view that it is likely that it can present a viable proposal. As above, there is also the prospect of a $3,000,000 cash loan from Ophir [the lender] and that is some evidence of an imminent injection of cash into Andover. It has not materialized as yet but it is further evidence of the likelihood of a viable proposal. A certainty is not required and I conclude that a proposal is likely in the sense it might well happen" (underlining added).[35] Here, OAN similarly does not have a funding commitment from the Debentureholders, but there is some evidence that such funding may be provided.

20. Third, there is no evidence of "material prejudice" to creditors if the extension sought by OAN is granted. Rather, the evidence is that creditors are likely to suffer material prejudice if the extension is *refused*. Specifically, (i) the Debentureholders, OAN's primary secured creditors, support the extension,[36] and (ii) if the extension is denied, and OAN is deemed to have made an assignment into

[32] Second Fricker Affidavit, paras. 8 and 12; *see also*, the Second Report, paras. 18-21; *see also*, First Fricker Affidavit, para. 10.
[33] *Schendel, supra* p 7 lines 3-5 [**TAB 3**]; *Andover, supra* para. 66 [**TAB 2**].
[34] Second Fricker Affidavit, para. 9; Second Report, para. 21.
[35] *Andover, supra* paras. 65, 74 [**TAB 2**].
[36] Second Fricker Affidavit, para. 16; Second Report, paras. 17, 21.

bankruptcy, unsecured creditors are unlikely to receive any recoveries.[37] This Court should exercise its discretion so that OAN is provided a meaningful "opportunity"[38] to restructure, which would benefit creditors as a whole.

21. Fourth, in *Castle Rock v Research Corp v AGC Investments Ltd* ("***Castle Rock***"), Justice Belzil of this Court granted the debtor an extension to file its proposal noting that "It is highly significant that the Trustee supports this request for the extension. … as such is acting as an Officer of the Court."[39] Here, the Proposal Trustee similarly supports the extension sought by OAN.[40]

22. Finally, although OAN is seeking its second extension of time to file its Proposal, Justice Mah remarked in *Schendel* that "As I understand it, it is not uncommon, especially in complex situations involving large concerns … [for the debtor] to request one or more extensions" (underlining added).[41] Further, in *Castle Rock*, Justice Belzil granted the debtor an extension even though an earlier extension (albeit for one week) had already been granted.[42] It is therefore appropriate for OAN to require additional time.

23. In sum, the extension sought by OAN will enable its restructuring process to continue so that there is an opportunity for value to be maximized, in accordance with the purpose of the notice of intention provisions of the *BIA*.

B. SEALING ORDER FOR THE CONFIDENTIAL SUPPLEMENT TO THE SECOND REPORT

24. The test for granting a sealing order was set out by Justice Iacobucci in *Sierra Club of Canada v Canada (Minister of Finance*). Specifically, the applicant must demonstrate that:

> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.[43]

25. Here, the Confidential Supplement contains commercially sensitive information of OAN, namely valuations of its assets. If this information is immediately disseminated, the ability of OAN to effect

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[37] Second Fricker Affidavit, para. 10.
[38] *Schendel, supra* at p 5 lines 7-9 [**TAB 3**].
[39] *Castle Rock, supra* para. 17 [**TAB 4**].
[40] Second Report, para. 23.
[41] *Schendel, supra* at p 5 lines 10-11 [**TAB 3**].
[42] *Castle Rock, supra* paras. 4, 21 [**TAB 4**].
[43] *Sierra Club of Canada v Canada (Minister of Finance*), 2002 SCC 41 ("***Sierra Club***"), para. 53 [**TAB 8**].

a financial restructuring will be placed at serious risk, for the reasons more fully set out in the Confidential Supplement.[44]

26. The temporary sealing order (a duration of six months)[45] sought for the Confidential Supplement is the least restrictive and prejudicial alterative to preventing the dissemination of OAN's commercially sensitive information, and it is fair and just in the circumstances to restrict public access to the Confidential Supplement.

III. CONCLUSION

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 21st DAY OF AUGUST 2019

BORDEN LADNER GERVAIS LLP

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

FOR

[44] Second Fricker Affidavit, para. 17; Second Report, paras. 19, 24.
[45] *See*, Form of Order (para. 3) attached to the Application filed by OAN on August 19, 2019.

TABLE OF AUTHORITIES

TAB	DOCUMENT
1.	*Bankruptcy and Insolvency Act*, RSC 1985, c B-3, Section 50.4
2.	*Enirgi Group Corp v Andover Mining Corp*, 2013 BCSC 1833
3.	*In the Matter of the Bankruptcy of Schendel Mechanical Contracting Ltd*., Decision of the Honourable Mr. Justice D.R. Mah of the Court of Queen's Bench of Alberta, dated April 18, 2019 (unreported)
4.	*Castle Rock Research Corp v AGC Investments Ltd*, 2012 ABQB 208
5.	Houlden & Morawetz, *Bankruptcy and Insolvency Law of Canada*, 4 ed (Retrieved electronically on WestlawNext Canada during August 2019)
6.	*Kocken Energy Systems Inc, Re*, 2017 NSSC 80
7.	*NTW Management Group Ltd, Re*, 1993 CarswellOnt 208
8.	*Sierra Club of Canada v Canada (Minister of Finance*), 2002 SCC 41

TAB A

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

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

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

Current to June 20, 2019

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

NOTE

This consolidation is current to June 20, 2019. The last amendments came into force on May 23, 2018. Any amendments that were not in force as of June 20, 2019 are set out at the end of this document under the heading "Amendments Not in Force".

NOTE

Cette codification est à jour au 20 juin 2019. Les dernières modifications sont entrées en vigueur le 23 mai 2018. Toutes modifications qui n'étaient pas en vigueur au 20 juin 2019 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

Idem

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

Idem

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

Where no secured creditor in a class takes action

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

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

Excluded secured creditor

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

1992, c. 27, s. 19.

Rights in bankruptcy

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

1992, c. 27, s. 19.

Notice of intention

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

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

Idem

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

Idem

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

Rejet présumé de la proposition

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

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

Le cas des autres créanciers garantis

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

1992, ch. 27, art. 19.

Droits en cas de faillite

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

1992, ch. 27, art. 19.

Avis d'intention

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

a) son intention de faire une proposition;

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

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

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

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

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

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

Certain things to be filed

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

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

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

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

Documents à déposer

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

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

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

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

Creditors may obtain statement

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

Copies de l'état

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

Exception

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

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

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

Exception

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

Trustee protected

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

Immunité

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

Trustee to notify creditors

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

Trustee to monitor and report

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

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

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

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

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

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

Where assignment deemed to have been made

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

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

Notification

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

Obligation de surveillance

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

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

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

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

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

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

Cas de cession présumée

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

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

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

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

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

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

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

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

Extension of time for filing proposal

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

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

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

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

Prorogation de délai

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

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

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

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

Court may not extend time

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

Non-application du paragraphe 187(11)

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

Court may terminate period for making proposal

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

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

Interruption de délai

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

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

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

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

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

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

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

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

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

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

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

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

Trustee to help prepare proposal

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

1992, c. 27, s. 19.

Préparation de la proposition

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

1992, ch. 27, art. 19.

Order — interim financing

50.6 (1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

Financement temporaire

50.6 (1) Sur demande du débiteur à l'égard duquel a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1), le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens du débiteur sont grevés d'une charge ou sûreté — d'un montant qu'il estime indiqué — en faveur de la personne nommée dans l'ordonnance qui accepte de prêter au débiteur la somme qu'il approuve compte tenu de l'état — visé à l'alinéa 50(6)a) ou 50.4(2)a), selon le cas — portant sur l'évolution de l'encaisse et des besoins de celui-ci. La charge ou sûreté ne peut garantir qu'une obligation postérieure au prononcé de l'ordonnance.

Individuals

(2) In the case of an individual,

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

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

Personne physique

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

Priority

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

Priorité — créanciers garantis

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

TAB B

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.2 Time period to file
VI.2.a Extension of time

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.*:

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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

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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

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

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

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

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

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

Background

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

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

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

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

10 In September 2012 there were discussions between Andover, Enirgi and Chief in regards to a potential joint venture, with the possibility that Enirgi would take majority ownership of Andover. A memorandum of understanding was executed and Enirgi commenced a process of due diligence. According to Enirgi, the due diligence revealed a complex joint venture agreement between Chief and another company. Ultimately, in March 2013, the parties were not able to agree on terms that were commercially acceptable to Enirgi. On March 27, 2013 Sentient assigned the above three promissory notes to Enirgi including all of the rights and obligations of Sentient under the terms of the notes. These notes are the subject of the current applications. According to Enirgi, it made a reasonable business decision to cease discussions with Enirgi, it became the assignee of the three promissory notes and it then sought repayment of the first promissory note.

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

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

13 In a letter dated May 28, 2013 Andover advised Enirgi that it was making its best efforts to secure funding to repay the first promissory note. On May 30, 2013 Enirgi again demanded repayment of the first promissory note. In a letter of that date Enirgi advised Andover that failure to pay would be considered default and the second and third notes would become immediately due and payable. Enirgi takes the position that, by application of the wording of the other two notes, they are now due and owing. As above, the total for all three notes is $6.5 million and the due date for the second and third notes are May 1, 2014 and September 1, 2014, respectively. Whether Enirgi is correct in its interpretation of the notes and, therefore, all three notes are now due and owing is not an issue to be decided at this time.

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

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

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

. . .

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

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

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

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

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

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

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

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

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

Analysis

Review of the evidence

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

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

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

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

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

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

> (a) Mr. Blankstein, on behalf of Andover, deposes that in May 2013 Enirgi issued an Insider Report advising the public of its demand on the first promissory note. According to Mr. Blankstein there "was no apparent legal basis to do so" and the directors of Andover "considered this a move to deflate Andover's share value and curtail its ability to raise funds."
>
> In reply Mr. Scargill, with Enirgi, deposes that it "did not issue an insider report or otherwise advise the public that it had made demand on the first note at or about the time it made such demand on May 23, 2013." Further, "the first public announcement of the fact of the demand was made by Andover on June 5, 2013 only after Enirgi had commenced legal proceedings."
>
> The result is that I am asked to prefer one person's affidavit evidence over another: either Enirgi issued an insider's report with the information of its demand, as deposed by Mr. Blankstein, or it did not, as deposed to by Mr. Scargill. However, since there is no evidence of an insider report with the statement in question I am unable to agree with Andover that such a report exists.
>
> (b) There were negotiations between Andover and Enirgi (and Chief) in October 2012 about a potential joint venture. A memorandum of understanding was signed but, following due diligence by Enirgi, there was no agreement on the joint venture.
>
> According to Mr. Blankstein the prospect of these negotiations being successful (as well as previous negotiations to a similar end with Sentient) was the main reason that the first note was not paid. It was anticipated, by Andover at least, that any joint venture agreement would include purchase of stock in Andover and cancellation of the first note. There were "verbal assurances" from Sentient and Enirgi that there was no intention to make demand on the note and it was intended to convert the note as part of a venture agreement. Further, according to Andover, the demand on the first note was the beginning of a very aggressive campaign by Enirgi to ultimately get access to the assets of Andover, assets which were and are worth significantly more than the first note or all three notes.

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

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

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

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

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

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

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

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

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

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

Overall there was a private placement of about $1.7 million dollars that was received by Andover before its proposal was filed. It was used to pay for a shareholder loan and for operating expenses and some of these at least

were committed to as early as April 2012. Further, the wrongful dismissal payment was a matter involving Chief, rather than Andover, and only $50,000 has been paid by Chief. I conclude that Mr. Scargill did not have all of the pertinent information before him when he gave his affidavit evidence.

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

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

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

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

From this I take it that Enirgi did contact Chief to say any mortgage by Chief would violate agreements between Andover and Enirgi. This took place before the date of the Consent Order. On its face it supports the contention by Andover that Enirgi has obstructed its efforts to obtain funding although there is no evidence or argument before me to decide whether Enirgi was correct in taking the view it did with Chief.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The applications

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

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

Extension of time for filing proposal

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

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

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

granted; and

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

. . .

Court may terminate period for making proposal

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

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

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

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

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

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

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

The approaches in Cumberland and in Baldwin

35 In a decision relied on by Enirgi, Mr. Justice Farley of the Ontario Court of Justice denied the appeal of a registrar's decision that had dismissed an application for an extension of time by debtors under s. 50.4(9): *Baldwin Valley Investors Inc., Re*, [1994] O.J. No. 271 (Ont. Gen. Div. [Commercial List])). The court noted that the test under 50.4(9)(b) was whether the debtors "would likely be able to make a viable proposal if the extension being applied for was granted." "Likely" did not mean a certainty and, using the Oxford Dictionary, it was defined as "such as might well happen, or turn out to be the thing specified, probable ... to be reasonably expected." Applied to the facts, the conclusion was that it was not likely the debtors would be able to make such a proposal since they had only submitted a cash flow statement. At para. 4, Mr. Justice Farley concluded "I do not see the conjecture of the debtor companies' rough submission as being 'likely'". Further, the court noted at para. 6 that the debtors did not even attempt to meet the condition of material prejudice under s. 50.4(9)(c) and the debtor was changing inventory into cash.

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

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

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

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

39 The result in *Baldwin* was that the debtor's application under s. 50.4(9) was denied. There does not appear to have been an application for termination under 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

47 A quite different view is set out in a more recent British Columbia case, *Cantrail Coach Lines Ltd., Re*, 2005 BCSC 351 (B.C. Master) [*Cantrail*] a decision relied on by Andover. Master Groves, as he then was, was presented with a submission by the creditor in that case that it intended to vote against any proposal from the debtor because it had lost faith in the debtor. The creditor was one of 91 creditors and its share of the total debt was not explained. This is essentially the position of Enirgi.

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

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

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

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

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

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

53 Another decision relied on by Andover as being similar to *Cantrail* is *Plancher Heritage Ltée / Heritage Flooring Ltd., Re*, [2004] N.B.J. No. 286 (N.B. Q.B.) where a debtor filed an application under s. 50.4(9) for an extension and the creditor filed an application for termination under s. 50.4(11). The court allowed the application for an extension. The *Cumberland* and *Baldwin* decisions were noted but in *Plancher Heritage Ltée / Heritage Flooring Ltd.* the evidence was that the creditor

would be paid out and, in any event, the creditor was not in a position to veto any proposal. *Cantrail* was also followed in *Entegrity Wind Systems Inc., Re*, 2009 PESC 25 (P.E.I. S.C.) although the facts in *Entegrity Wind Systems Inc.* did not include an application by the creditor under s. 50.4(11). The objective standard discussed in *Cantrail* was also adopted in *Convergix Inc., Re*, 2006 NBQB 288 (N.B. Q.B.).

Cumberland or Cantrail?

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

55 The comments from *Cumberland* discussed above suggest that an application by a creditor under s. 50.4(11) can "cut short" an application under 50.4(9) and there is no absolute requirement that a creditor has to wait to see a proposal before voting it down. And in *Baldwin* there is a comment, in *obiter*, that any successful application under s. 50.4(9) would be a Pyrrhic victory because the creditor could "come right back" with an application under s. 50.4(11).

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

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

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

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

60 Other cases relied on by Enirgi are of a similar kind. In *Baldwin* the proposal was conjecture and rough (and the debtor had not even considered the issue of any material prejudice to the creditor from the proposal). Similarly, in *St. Isidore Meats Inc. / Viandes St. Isidore Inc. v. Paquette Fine Foods Inc.*, [1997] O.J. No. 1863 (Ont. Bktcy.)) and *1252206 Alberta Ltd. v. Bank of Montreal*, [2009] A.J. No. 648 (Alta. Q.B.) the courts proceeded to a determination of the s. 50.4(11) application after finding there was no viable proposal. In *Triangle Drugs Inc., Re*, [1993] O.J. No. 40 (Ont. Bktcy.)) the creditors had a veto and they had actually seen the proposal. The court imported principles from the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36, concluded that it was fruitless to proceed with a plan that is doomed to failure and allowed the creditor's application under s. 50.4(11). In *Com/Mit Hitech Services Inc., Re*, [1997] O.J. No. 3360 (Ont. Bktcy.)) there was no good faith or due diligence on the part of the debtor and the court proceeded to consider and allow the creditor's application under s. 50.4(11).

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

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

The application by Andover under s. 50.4(9)

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

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

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

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

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

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

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

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

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

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

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

74 Enirgi generally minimizes the asset value of Andover but it does not dispute the specific numbers above. In my view these are impressive numbers and they reflect a strong asset base for Andover. I accept that they do not demonstrate the cash at hand to pay the first promissory note and at this time Andover remains asset rich and cash poor. But it is not "trying to box with a ghost" (as in *Cumberland*) to conclude that the assets of Andover support the view that it is likely that it can present a viable proposal. As above, there is also the prospect of a $3,000,000 cash loan from Ophir and that is some evidence of an imminent injection of cash into Andover. It has not materialized as yet but it is further evidence of the likelihood of a viable proposal. A certainty is not required and I conclude that a proposal is likely in the sense it might well happen.

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

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

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

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

Summary and conclusion

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

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

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

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

83 I considered the alternate application of Enirgi to appoint a receiver under section 47.1 of the *BIA*. I note that there is a trustee appointed as part of the notice of intention. He apparently disagreed with Enirgi about what should be in a proof of

claim document but for defensible reasons. There is otherwise no evidence that something more than a trustee is warranted at this time.

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

Application by debtor allowed; application by creditor dismissed with leave to reapply.

TAB C

Action No. B203-489860
E-File Name: EVQ19SCHENDEL
Appeal No.: _____

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

IN THE MATTER OF THE BRANKRUPTCY OF
SCHENDEL MECHANICAL CONTRACTING LTD.

P R O C E E D I N G S

Edmonton, Alberta
April 18, 2019

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K. Fisher	For Schendel Mechanical Contracting Ltd.
D. Nowak	For Grant Thornton Limited
P. Kyriakakis (by telephone)	For ATB
K. Pryor	Court Clerk
T. Steinhauer	Court Clerk

THE COURT: Mr. Kyriakakis, we have you on the telephone?

MR. KYRIAKAKIS: Yes, My Lord, and Alex Corbett from ATB is also here as well.

THE COURT: All right, thank you. I'll begin by saying that if anyone requests a transcript of these reasons, I reserve the right to edit that transcript for spelling, grammatical, typographical, and other non-substantive errors. I will otherwise not change the substance of the decision.

MR. KYRIAKAKIS: Apologies, My Lord, I don't mean to interrupt you, but we seem to not be able to hear what the -- what is being said.

THE COURT: Okay, is that any better? We -- we're trying --

MR. KYRIAKAKIS: My Lord.

THE COURT: -- to make some adjustments right now. How's that Mr. Kyriakakis?

MR. KYRIAKAKIS: Hello.

MS. NOWAK: Pantelis, are you able to hear me?

MR. KYRIAKAKIS: Yeah, it appears to be coming out very intermittently, so I can catch almost every third word.

THE COURT: Okay, well --

MR. KYRIAKAKIS: I can try to dial in again, but (INDISCERNIBLE).

THE COURT CLERK: Perhaps I could try dialling out, if that would be --

THE COURT: Okay, we're going to try dialling out. If you want to just hang up for a moment.

MR. KYRIAKAKIS: Of -- of course, yeah.

THE COURT: Okay, thank you. Sorry, everyone.

THE COURT CLERK: -- all right, if you'll stand by, I'll try giving you a call.

MR. KYRIAKAKIS: Hello?

THE COURT CLERK: Clerk of the court, 313.

MR. KYRIAKAKIS: Hi, it -- it's Pantelis and Alex again. Thank you very much.

THE COURT: All right, can you hear us now?

MR. KYRIAKAKIS: Yes, this is fantastic. Thank you, My Lord.

Decision

THE COURT: All right. I'll just start over again.

This is my decision from yesterday's application. I'm reserving the right to edit the transcript of these reasons if anyone requests transcripts. I will edit only for spelling, typographical, grammatical, and other non-substantive errors. I otherwise will not change the substance of these reasons.

There were two applications before me yesterday. The first, an application by the debtor, Schendel Mechanical Contractor Ltd., who applied for a 45 day extension of the period

within which to file a notice of intention under the *BIA*. The lender, ATB, opposes the extension and by cross-application seeks instead the termination of the current NOI period as well as the appointment of a receiver or alternatively the appointment of an interim receiver. These applications were heard by me concurrently yesterday.

The background to this matter is well canvassed in the affidavits filed on behalf of Schendel, ATB, and the proposal trustee, Grant Thornton. I will limit myself to a brief recitation of the facts to set the context for this decision.

While I refer to Schendel Mechanical as the debtor, there are actually three related entities in a debtor-creditor relationship with ATB. They are Schendel Mechanical, Schendel Management, and 687 Alberta. Only Schendel Mechanical is an operating entity and its operations consist of being a mechanical contractor on large scale construction projects including water treatment plants, hospitals, and the Edmonton Valley Line LRT. The other two entities are holding companies, those holdings primarily being real estate, which is leased to Schendel Mechanical. All three of the entities under separate commitment letters with ATB have borrowings from ATB. They are cumulatively indebted to ATB in the sum of $21.6 million, give or take. I am going to henceforth refer to all three debtors collectively as Schendel. They are under common management, all three have filed NOIs and I will deal with all three collectively and refer to the total cumulative indebtedness. I note that Mechanical and Management are, in any event, jointly and severally liable and they were dealt with collectively during the application.

Ms. Reese is the principal of Schendel and she indicates that ATB became Schendel's main banker in 2016 after a 30 year relationship with another bank.

The parties differ as to the length of time the relationship between Schendel and ATB carried on satisfactorily, but agree that Schendel's involvement in the Grande Prairie Regional Hospital project triggered difficulties in the banking relationship.

Schendel had been hired by Graham Construction, who was the general contractor on the project as the prime mechanical contractor. It has been well documented elsewhere and generally known that the Grande Prairie hospital project was fraught with delay, cost overrun, and other problems during construction.

Eventually in September of 2018 Alberta Infrastructure, which I'll refer to as AI, terminated Graham as the prime contractor and all work and payments that would have flowed through Graham stopped with the exception of basic maintenance work. Schendel had been advised to submit a claim to AI for its unpaid work under the *Public Works Act* and it did so. Schendel says that the total owed by Graham or AI on the project is 26.2 million, which includes the claims of Schendel's subcontractors. Schendel says that it

expected to be paid in September of 2018, but that never happened. AI instead interplead some $30 million into court in separate proceedings and litigation in respect of payment out continues.

Complications from the Grande Prairie Hospital project resulted in Schendel experiencing cash flow problems which prompted discussions and meetings between Schendel's representatives and ATB's representatives concerning ATB's exposure and these occurred as early as the fall of 2017.

Here, while two versions of what happened proffered by the respective parties don't necessarily diverge, at least not materially, it is clear that each side has a perspective regarding the conduct of the other, which has led to a mutual mistrust. I do not need for the purposes of this application to determine which perspective is correct. I have concluded that such a determination is not really legally relevant for the question I need to decide under section 50.4(9) of the *BIA*. However, the impressions formed by each side, in particular a sense of betrayal engendered by the perceptions of conduct by each side, I think contribute to the positions and actions taken by the respective parties.

In particular, as Ms. Reese deposes, she believed that Schendel had engaged in good faith discussions preceding and during March 2019 regarding a plan for the continuation of the banking relationship only to be taken aghast by ATB's issuance of demands on the loans on March 13th, 2019, and then by onerous unreasonable forbearance terms requested by ATB. Moreover, Ms. Reese believes that Schendel had been lulled into not considering restructuring as early as 2018 because of what was interpreted as passive conduct on ATB's part.

ATB in turn is deeply disturbed by the following. Schendel, unbeknownst to ATB had opened and was operating a separate bank account at another financial institution with some $200,000 on deposit, which by itself is a default event under the commitment letter, all the while negotiating further credit from ATB. Schendel's seeming inability to provide meaningful financial information at critical points in the lending relationship in late 2018 was also a cause for ATB's concern.

Schendel then defaulted on facilities number 1 and 2 on their maturity dates and there are other events more particularly described in paragraphs 42 to 56 of Mr. Corbett's first affidavit.

The upshot of all of this was ATB's crisis of confidence in Schendel's management team, ultimately leading to the issuance of the demands.

Schendel's response to the demands was to file the NOIs. I think it fair to say that both

sides have well-entrenched views regarding who is at fault, as it were, for the current situation.

So, that is the pre-NOI history. I'm going to discuss the post-NOI history in the analysis of the factors under section 50.4(9) to which I now turn.

The purpose of the proposal process and the antecedent filing of the NOI is to permit the debtor an opportunity to make a restructuring proposal to its creditors in furtherance of the rehabilitative objectives of the *BIA.* The initial filing of the NOI triggers a 30 day period to make a proposal. As I understand it, it is not uncommon, especially in complex situations involving large concerns, such as we have here, to request one or more extensions. The BIA allows extensions in aggregate up to a duration of five months following the initial 30 day period and whether an extension should be granted in any case, depends on the three factors to be considered in section 50.4(9). These factors are,

> 1) Whether the debtor has acted and acts in good faith and with due diligence;
>
> 2) Whether the debtor is likely able to make a viable proposal if the extension is granted; and
>
> 3) That there is no material prejudice to the creditors if the extension is granted.

Mr. Kyriakakis also made an application to terminate the current period for the NOI, which would involve a fourth factor. So, if I deny the extension, then I will need to consider this fourth factor in order to terminate the NOI period today and that factor is whether the debtor is unlikely to make an acceptable proposal before expiry of the period.

I then turn to the first factor and that is whether the debtor acted and acts in good faith and with due diligence.

The first question that I address is with regard to what? Within context, this acting in good faith and with due diligence must be with regard to putting together a proposal for presentation to creditors within the time allotted. It cannot be acting in good faith and with due diligence generally. That, in my view, is not supported by the statutory context. Therefore, I accept the statement of law in *Andover Mining,* which is a 2012 BC Supreme Court case, at paragraph 64 where it says that the conduct to be considered must be post-NOI conduct.

There is no dispute that Schendel is in default under the commitment letters and that the

total indebtedness is now due and payable. That was the very reason for filing the NOIs. If a creditor were allowed to rely on the very same acts of default as a basis for denial of an extension, an extension could never be granted. The main complaint of ATB under this heading is the preferential payment it says that Schendel made to a single contractor, A.J. Brayer (phonetic), in the sum of $105,000 for pre-NOI arrears. I agree with Mr. Kyriakakis that the spirit and scheme of the *Bankruptcy and Insolvency Act* applies once the NOI is filed and also agree that consultation regarding the payment with ATB would have been preferable, but I assess good faith in light of Schendel's explanation, which was to avoid a lien on the property and thereby ensure continued payments from the general contractor on the Valley Line LRT project and Schendel's continued work on that project. Therefore, the purpose was to maintain Schendel's cash flow so as to be in a position to make a proposal and I accept the explanation that the decision to pay was not to prefer a creditor per se, but to maintain cash flow so that a proposal could be made.

In discussion during the application yesterday, it was pointed out to me that all other payments that were alleged to have been preferential were not related to pre-NOI due accounts.

Other complaints of ATB under this account are as follows. There was the undisclosed bank account, which I previously indicated was a pre-NOI event and I also have regard to the fact that Schendel's accounts had been frozen by ATB including that of a non-debtor affiliate where funds were on deposit and Schendel needed some method to deal with its payables. ATB also complains about the lack of transparency and inaccuracy in financial reporting and providing restructuring information generally. I do note that the proposal trustee identified an information gap in its first report and I will speak more about that later. I also note efforts to upgrade compliance with reporting requirements as described in paragraphs 3 to 6 of Ms. Reese's April 12th affidavit. These efforts to comply included a comprehensive reply to the April 7th demand letter for information between counsel. There is, as I understand it, regular daily reporting with the proposal trustee, who is in turn reporting to the Court.

So, I find overall that Schendel acted and acts in good faith and I do not find a violation of honesty per the *San Francisco Gifts* or the *Canada North Group* cases, which are cases from this Court. Although I do say that the execution of some of these decisions could have been better.

Now, the second part of this question relates to due diligence and I can only describe the efforts catalogued in Ms. Reese's confidential affidavit relating to Schendel's efforts to secure restructuring and/or refinancing as a frenzy of activity, all of which was compacted into under 30 days. Some of these efforts seem more promising than others and I will comment more fully in the discussion of the next factor, but I think it can fairly be said that

Schendel is working diligently to make a proposal.

The second factor is whether the debtor is likely to make a viable proposal and I note that the words "likely to" denote some degree of probability. As *Andover Mining* instructs at paragraph 66, what that means is that the making of a viable proposal might well happen. The factor is not satisfied, as Mr. Kyriakakis says, by writing down one's hopes and aspirations. Something must be more concrete and indicative of a realistic, viable proposal.

So, I'll summarize some of the efforts that have been made. First of all, there is an ongoing, strategic review involving the employment of an outside consultant. Schendel has also made accommodations with its major subcontractors and letters of support, for what they are worth, are in evidence. There was discussion of conventional refinancing with major banks, but in two cases those discussions carried a caveat that overt conflict or active conflict with ATB has to be over before this conventional refinancing would be discussed seriously. I am not sure what "overt conflict" or "active conflict" means, but what I take from the affidavit is that these two major banks would prefer relative tranquility as opposed to pitched warfare and that is in the litigation sense, of course, and one road or the other might be determined today. The other forms of refinancing include asset back lending, possible M & A and equity investment, and mezzanine financing. Some of these ideas are at the nascent stage and at least one is more developed and that is the discussion with CTSL whose letter of intention was shown as Exhibit J to Ms. Reese's confidential affidavit. In that LOI the structure of the takeout of ATB's involvement as described, at least conceptually in the letter of intent from CTSL, appears serious. Schendel has also sought support, as Ms. Reese deposes, to securing surety bond and provider support and has also developed an interest in commercial litigation lending in respect of the claims against Graham and AI should that become necessary.

With all of this, I'm of the view that there is a much more than a germ. The most promising areas, as far as I can tell, is the conventional refinancing and the equity investment proposal put forward by CTSL. I find that a viable proposal will likely emerge in the sense that it might well happen given time. Now, ATB as the major creditor or the fulcrum creditor, as Mr. Kyriakakis described it, indicated that any proposal was bound to fail because it would approve no proposal or because it would approve no proposal that doesn't involve a total takeout of ATB's position. The first statement that there would simply be a veto is, in my view, idiosyncratic in the sense used in *Andover Mining* at paragraph 66. As to the second statement, I would only respond that one can never say never and one does not know until one sees the proposal and the creditor might well conclude that the proposal is a better alternative than a liquidation.

I then turn to the third factor, which is material prejudice and what ATB says through counsel is basically that every dollar spent by Schendel is a dollar lost to ATB. That would

include what it has characterized as a preferential payment to A.J. Brayer, along with any funds for pursuing this multiplicity of refinancing avenues including the administration charge which is being sought as well. All of that, says ATB, goes to its prejudice. In response, Schendel says that it has prepared updated cash flow statements and anticipates a modest profit through the contemplated period and at worst a break even position.

Second, I note what the proposal trustee says regarding ATB's security in its first report. The proposal trustee is basically saying that ATB should not look to the receivables and rather that it is secured by the claim against Graham and Public Works, the real properties and the equipment and chattels. The proposal trustee also adverts to personal guarantees and I acknowledge that the guarantees merely create joint and several liability and without collateral security, it's not true security. I also acknowledge that ATB says that Schendel's claim against the Grande Prairie Regional Hospital project is contested and, yes, it may well be contested, but Schendel has a different view of its value and what it might take to ultimately realize those funds. In the meantime Schendel continues to operate, is bidding on new work, and is continuing to do its current work.

In my view, having regard to all of the foregoing, I find that ATB is not materially prejudiced by a 45 day extension. I, therefore, grant the extension and it follows from this that I deny applications for cancellation of the current NOI period and for the appointment of a receiver or an interim receiver at this time. I take some comfort from the fact that the proposal trustee remains in place to do daily monitoring and is a neutral party.

Now, Mr. Schmidt, I want to communicate through you what the Court's expectations are with regard to what happens next, although this is not part of any order that I'm making. This is something that I would typically do in a family law case, but I'm going to do it here because I granted your client a big indulgence today. So, with respect to the communication lacuna identified in the public trustee's first report, I think that both parties would admit that such communication deficiency exists. The continuation of this lack of information flow is unproductive and may well lead to ATB renewing its applications because of something else that happens or didn't happen. Page 7 of the proposal trustee's report contains a series of recommendations and when I read them it might just be one recommendation and it is to implement better and more avenues of communication regarding subjects such as cash flow projection, payments, restructuring efforts, and any other pertinent information that might be important for ATB to know as the major creditor. So, the Court's expectation is that despite the mistrust one hopes that the parties can put aside that for the sake of a viable restructuring at least for the remainder of the period. So, the hope is that Schendel will comply with those recommendations and allow the proposal trustee to facilitate the communication. Failing which, we'll just be back here in a few weeks because something else happened.

It follows that I will grant the $200,000 administration charge as I feel there's no alternative in light of the extension just granted.

Is there anything counsel?

MR. SCHMIDT: No, M'Lord.

THE COURT: Mr. Kyriakakis?

MR. KYRIAKAKIS: Nothing further, M'Lord, thank you.

THE COURT: Counsel?

MS. NOWAK: No, Sir.

THE COURT: All right, Mr. Schmidt, you'll prepare the order.

MR. SCHMIDT: I will do, M'Lord.

MR. KYRIAKAKIS: Oh, ap -- apologies, My Lord, I did forget one thing. Master Schlosser on the Grande Prairie Hospital claim had asked what ATB's position will be. Would it be acceptable to the Court for ATB to involve itself in that Grande Prairie Hospital claim to the extent of its position?

THE COURT: I'll ask Mr. Schmidt for a reaction to that.

MR. SCHMIDT: I -- I'm not coun -- counsel on that matter. There is separate counsel on behalf of the company, so -- so I can't give a position on that today unfortunately, M'Lord, I'm sorry.

THE COURT: All right. Well, you've heard my admonition --

MR. SCHMIDT: Yes, indeed.

THE COURT: -- so I think that there ought to at least be a discussion that takes place regarding whether ATB can be involved to the extent Mr. Kyriakakis says.

MR. SCHMIDT: Understood, M'Lord.

THE COURT: All right. Thank you, counsel, we're adjourned.

PROCEEDINGS CONCLUDED

Certificate of Record

I, Kyla Pryor, certify that this record is a record of evidence in the proceedings in Court of Queen's Bench held in courtroom 313, at Edmonton, Alberta, on the 18th day of April, 2019, and I, Kyla Pryor, was the court official in charge of the sound-recording machine during the proceedings.

Certificate of Transcript

I, Deborah Bell, certify that

(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record, and

(b) the Certificate of Record for these proceedings was included orally on the record and is transcribed in this transcript.

Deborah Bell, Transcriber
Order Number: AL-JO-1003-0281
Date: May 1, 2019

TAB D

2012 ABQB 208
Alberta Court of Queen's Bench

Castle Rock Research Corp. v. A.G.C. Investments Ltd.

2012 CarswellAlta 576, 2012 ABQB 208, [2012] A.W.L.D. 2139, 217 A.C.W.S. (3d) 17, 94 C.B.R. (5th) 34

In the Matter of the Notice of Intention to make a proposal filed by Castle Rock Research Corporation Under the provisions of the Bankruptcy and Insolvency Act, R.S.C. 1985 c. B-3 as amended

Castle Rock Research Corporation, Applicant and A.G.C. Investments Ltd. And Osman Auction Inc., Respondents

A.G.C. Investments Ltd., Applicants (Cross-Application) and Castle Rock Research Corporations and BDO Canada Limited in its capacity as Trustee under the Notice of Intention to make a proposal, Respondents (Cross-Application)

R. Paul Belzil J.

Heard: March 22, 2012
Judgment: March 28, 2012
Docket: Edmonton BK03 115587

Counsel: Michael McCabe, Q.C. for Applicant
Darren Bieganek, Q.C. for Respondent
Rick Reeson, Q.C. for BDO

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
VI Proposal
VI.2 Time period to file
VI.2.a Extension of time

Headnote

Bankruptcy and insolvency --- Proposal — Time period to file — Extension of time
Debtor filed Notice of Intention to make proposal to creditors pursuant to s. 50.4(1) of Bankruptcy and Insolvency Act — Debtor obtained one week extension — Trustee filed second report, which stated that debtor was cooperative, had provided business plan, and was acting in good faith and with due diligence — Debtor brought application for extension of time to file proposal to creditors — Creditor brought cross-application for declaration that time to file proposal had expired — Application granted — Cross-application dismissed — Extension was granted — Three requirements in s. 50.4(9) of Act were satisfied — Debtor was likely to make viable proposal if extension were granted — Debtor was continuing to operate in ordinary course of business and had license agreements that provided for payments to debtor — Trustee supported debtor's request — Trustee had no concern that debtor was acting in bad faith or without due diligence — Creditor did not suffer material prejudice because it knew that debtor transferred funds to related company before creditor invested in debtor.

Table of Authorities

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 50.4(1) [en. 1992, c. 27, s. 19] — considered

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

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

APPLICATION by debtor for extension of time to file proposal to creditors; CROSS-APPLICATION by creditor for declaration that time to file proposal had expired.

***R. Paul Belzil J.*:**

The Applications

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

Factual Background

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

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

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

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

> 6. That since filing the Trustee's Report of March 9, 2012, the Trustee has been provided weekly Monitoring Reports in adherence with the Monitoring Program initiated by the Trustee;
>
> 7. That the Debtor and management have been co-operative in addressing queries in relation to the Monitoring Reports which have satisfied the Trustee;
>
> 8. That while the Trustee has expressed to the Debtor concerns over the financial reporting system utilized by the Debtor, management indicates that they are prepared to take the necessary steps to implement a suitable financial reporting system;
>
> 9. That since filing of the Trustee's Report on March 9, 2012, the Trustee is in receipt of a Business Plan dated March 6, 2012 which provides detailed information about the Company Plan including Profile, Products and Services, Marketing Plan and the Future Direction of the Company. The Trustee has not had an opportunity to review and assess that Business Plan; and
>
> 10. That it is the Trustee's opinion that the Debtor is acting in good faith and with due diligence and that the Debtor will be able to make a viable Proposal if an additional extension were granted.

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

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

Discussion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

Application granted; cross-application dismissed.

TAB E

HMANALY E§4
Houlden & Morawetz Analysis E§4

Bankruptcy and Insolvency Law of Canada, 4th Edition

THE BANKRUPTCY AND INSOLVENCY ACT

Proposals (ss. 50-66)
L.W. Houlden and Geoffrey B. Morawetz

E§4 — Extension of Time to Make a Proposal

E§4 — Extension of Time to Make a Proposal

See ss. 50, 50.1, 50.2, 50.3, 50.4, 50.5, 50.6, 51, 52, 53, 54, 54.1, 55, 56, 57, 57.1, 58, 59, 60, 61, 62, 62.1, 63, 64, 64.1, 64.2, 65, 65.1, 65.11, 65.12, 65.13, 65.2, 65.21, 65.22, 65.3, 66

A proposal must be filed within 30 days after filing the notice of intention: s. 50.4(8). The court can extend the period for 45 days at a time, but the total period of the extension cannot exceed five months after the expiration of the 30-day period: s. 50.4(9). Section 187(11), which gives the court power to extend time limits prescribed by the Act, does not apply to the time limits in s. 50.4(9): s. 50.4(10). Under s. 50.4(9), the burden of proof is on the debtor to show that it complied with all the three tests set out in that subsection. The debtor must prove on the balance of probabilities than an extension is justified, that it has acted in good faith and with due diligence, would likely be able to make a viable proposal, and that no creditor will be materially prejudiced by the extension: *Re Air Atlantic Ltd.* (1994), 27 C.B.R. (3d) 225, 1994 CarswellNfld 21 (Nfld. T.D.); *Benfor Inc. c. Restaurants Mikes* (1996), 44 C.B.R. (3d) 149, 1996 CarswellQue 831 (Nfld. T.D.); *St. Isidore Meats Inc. / Viandes St. Isidore Inc. v. Paquette Fine Foods Inc.* (1997), 46 C.B.R. (3d) 280, 1997 CarswellOnt 1524 (Ont. Gen. Div.); *Re Heritage Flooring Ltd.* (2004), 2004 CarswellNB 358, 3 C.B.R. (5th) 60, 2004 NBQB 168 (N.B. Q.B.), the failure of one of the tests in s. 50.4(9) is sufficient to disqualify the debtor company from being able to ask for an extension. Where the debtor company, apart from the cash-flow statement, did not provide any further information as to why an extension should be granted, the application of the debtor for an extension was refused: *Re Baldwin Valley Investors Inc.* (1994), 23 C.B.R. (3d) 219, 1994 CarswellOnt 253 (Ont. Gen. [Commercial List]).

An extension of time for filing a proposal under s. 50.4(9) of the *BIA* should be granted, despite the opposition of the debtor's primary secured creditor that intended to vote against any proposal, where: (a) the proposal has not yet been formulated such that the secured creditor's opposition is premature and not determinative of whether a viable proposal could be generated; (b) there is no evidence of bad faith; and (c) there is no evidence that any creditor of the debtor would be materially prejudiced if the extension is granted. In considering applications under s. 50.4(9) of the *BIA,* an objective standard must be applied and matters considered under such provisions should be judged on a rehabilitation basis rather than on a liquidation basis: *Re Cantrail Coach Lines Ltd.* (2005), 2005 CarswellBC 581, 2005 BCSC 351, 10 C.B.R. (5th) 164 (B.C. Master).

A motion to extend time to develop a proposal was dismissed and an order for the receiver to enter into a liquidation agreement was granted where the court found that the receiver had acted properly and responsibly, followed the court-sanctioned marketing process and acted in good faith and with fairness and where the passage of time had eroded the bank's realization on its security: *Bank of Montreal v. Trent Rubber Corp.* (2005), 13 C.B.R. (5th) 31, 2005 CarswellOnt 3126 (Ont. S.C.J. [Commercial List]).

Where a creditor opposes an extension of time under s. 50.4(9) for filing a proposal on the ground that it will be materially prejudiced by the extension and will suffer losses as a result of granting it, it should quantify its losses and give particulars of prospective purchasers for its equipment, and if it fails to do so, the court will reject the submission that there is material prejudice: *Re Nortec Colour Graphics Inc., supra.* Where a bank holding security over the debtor's property unilaterally swept

the debtor's operating account and capped its revolving line of credit, it was held that the bank had acted contrary to the stay provisions under s. 69. Given that debtor had satisfied the court that it had acted in good faith and with due diligence, would likely be able to make a viable proposal, and that no creditor would be materially prejudiced, the extension was granted: *Heritage Flooring Ltd., supra.* (See also E§43 "Stay of Proceedings" and E§66 "Provision for Termination Because of Proposal".)

Where two large creditors, holding decisive voting powers, stated that they would not accept a proposal and, in addition, the debtor lacked the financial resources to make a viable proposal, the court refused an extension of time under s. 50.4(9); *Benfor Inc. c. Restaurants Mikes* (1996), 44 C.B.R. (3d) 149, 1996 CarswellQue 831 (Nfld. T.D.).

The Supreme Court of Nova Scotia, in allowing a motion for an extension of time for the filing of a proposal, emphasized that the onus was on the debtor to satisfy the court on a balance of probabilities that each of the three prerequisites of s. 50.4(9) of the *BIA* had been established, namely: (a) the debtor is acting in good faith and with due diligence; (b) the debtor is likely to make a viable proposal if the extension is granted; and (c) none of the creditors would be materially prejudiced if the extension is granted: *Re H & H Fisheries Ltd.* (2005), 2005 CarswellNS 541, 18 C.B.R. (5th) 293, 2005 NSSC 346 (N.S.S.C.).

If an extension is granted under s. 50.4(9), an order for a further extension must be made before the prior extension expires, and if it is not, the debtor will be automatically in bankruptcy: *Re Air Atlantic Ltd., supra.*

In granting an extension under s. 50.4(9), the court may impose terms: *Re Air Atlantic Ltd., supra.* In *Scotia Rainbow Inc. v. Bank of Montreal* (2000), 18 C.B.R. (4th) 114, 2000 CarswellNS 216 (N.S. S.C.), the Court, on the request of a secured creditor and as a term of granting an extension, ordered that an interim receiver should be permitted to market and seek purchasers for the assets covered by the security of the secured creditor.

If a proposal is not filed, then the debtor is deemed to have made an assignment: s. 50.4(8)(a).

The 30-day period or any extension of it can be shortened by the court and the time period for filing a proposal terminated. An application for this purpose may be made by the trustee, the interim receiver, if any, or a creditor: s. 50.4(11). The court will make such a declaration if it is satisfied that:

• the debtor has not acted or is not acting in good faith and with due diligence;

• the debtor will likely be unable before the expiration of the time period to make a viable proposal;

• the debtor will likely be unable before the expiration of the time period to make a proposal acceptable to creditors; or

• the creditors as a whole would be materially prejudiced if the application to terminate the time period was refused.

If a declaration is made under s. 50.4(11), the court may, if it is satisfied that it would be in the best interests of creditors to do so, appoint a trustee in lieu of the trustee named in the notice of intention: s. 57.1.

In order to have the 30-day period terminated, an applicant must satisfy the court that one of the four paragraphs in s. 50.4(11) applies: *Re Magasin Coop Dégelis* (1993), 24 C.B.R. (3d) 49, 1993 CarswellQue 42 (Que. S.C.); *Benfor Inc. c. Restaurants Mikes* (1996), 44 C.B.R. (3d) 149, 1996 CarswellQue 831 (Nfld. T.D.). The word "likely" in para, (c) requires proof on the balance of probabilities that the debtor will not be likely to make a viable proposal that will be accepted by creditors, but it does not require proof beyond a reasonable doubt: *Re Magasin Coop Dégelis, supra.* An application for termination of the original 30-day period should only be granted in exceptional cases; if the 30-day period has been extended, the court may be more receptive to an application for termination: *Re Magasin Coop Dégelis, supra.*

In *National Bank of Canada v. Dutch Industries Ltd.* (1996), 45 C.B.R. (3d) 103, 1996 CarswellSask 631, 149 Sask. R. 317, Kyle J. of the Saskatchewan Court of Queen's Bench was the opinion that there is a strong preference on the part of courts to permit at least the initial 30-day period to expire before depriving an insolvent company of the protection of the Act. See case comment on this case 45 C.B.R. (3d) 108.

If the time period is terminated, the debtor is deemed to have made an assignment: s. 50.4(11), and the provisions of s. 50.4(8) apply.

An application under s. 50.4(8) of the *BIA* to extend the time for the filing of a proposal must be heard within 30 days after the notice of intention (NOI) was filed and the registrar held that it was not sufficient to make the application within the 30 days after the NOI was filed. The registrar contrasted the wording of s. 50.4(8) with s. 135(4) of the *BIA* and concluded that s. 135(4) contemplates the extension being granted after the expiry of the 30 days, provided that the application for the extension was made within the 30 days whereas s. 50.4(8) does not have the same saving language. Thus, the registrar was not empowered to extend the time past 30 days to allow for the filing of the proposal or the obtaining of an extension of that 30 days. In the absence of an extension, the applicant was deemed to have made an assignment in bankruptcy: *Re Royalton Banquet & Convention Centre Ltd.* (2007), 2007 CarswellOnt 3796, 33 C.B.R. (5th) 278 (Ont. S.C.J.).

The Québec Court of Appeal allowed an appeal by debtors for an extension of time to file a proposal. The first instance judge had previously granted a seven-day extension of the time limit to file a proposal, conditional on rent and electricity fees being paid. They were not paid and the judge held that since the debtors had failed to satisfy the requirements of the earlier order, there should be no extension of time, refusing to hear new evidence. On appeal, the debtors submitted that subject to agreements in principle with investors, the secured lender and landlord, they were in a position to submit a proposal to creditors. The issue before the Court of Appeal concerned the status of the companies. If the effect of the impugned judgment was suspended by the appeal, should the companies' proposal be considered to have been made following a notice of intention by debtors still in possession of the property, or, since the time period in which to present a proposal had expired, should the proposal be considered as emanating from bankrupt debtors? Justice Dalphond noted that there was no existing bankruptcy order, nor any declaration that the companies were bankrupt. The court held that pending appeal, the companies were not bankrupt, remained in possession of their property and continued to exercise their commercial and financial activities, all under the supervision of the designated trustee. The court held that the judge should have permitted the companies to submit evidence regarding their efforts and recent developments, because in refusing, the criteria for extension of the time period referenced at s. 50.4(9) were not considered, contrary to the objective of the *BIA* to favour proposals instead of assignments of property. In the result, the Court of Appeal permitted the submission of evidence regarding the latest developments, allowed the appeal, and granted the companies an extension of time to place a proposal before a meeting of creditors: *Re Raymor Industries inc.* (2009), 2009 CarswellQue 3207, 2009 CarswellQue 3787, 2009 QCCA 677, 2009 QCCA 678, 2009 QCCA 679, 2009 QCCA 680 (Que. C.A.).

The debtor brought a motion for an order pursuant to s. 50.4(9) of the *BIA* for an extension of 45 days to file a proposal, which was opposed by the single largest creditor. The Prince Edward Island Supreme Court held that it must be satisfied that: the insolvent person has acted, and is acting, in good faith and with due diligence; the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and no creditor would be materially prejudiced if the extension were granted. The court held that the debtor was attempting to address the creditor's demand, using funds from projects as well as its own funds to maintain the company while it moved on an overall plan to extricate itself from its difficulties; that the debtor was trying to act with due diligence during this time to develop a detailed proposal, even though, at the same time, it was distracted by the actions of the creditor. The court was satisfied that the debtor would likely be able to make a viable proposal if the extension were granted. The prejudice to the creditor was not material prejudice. In the result, a 45-day extension was granted: *Re Entegrity Wind Systems Inc.* (2009), 2009 CarswellPEI 47, 56 C.B.R. (5th) 1 (P.E.I. S.C.).

The Prince Edward Island Supreme Court declined to exercise its discretion to grant the debtor a second extension under s. 50.4(9) of the *BIA*. The court held that the debtor had not acted in good faith and with due diligence and on that basis alone, its motion for an extension of time ought to be dismissed. The court also observed that the debtor did not have a draft proposal to consider; it had drastically reduced its workforce making it impossible to meet its cash flow projections; there were no new investors prepared to commit any infusion of capital; the debtor was continuing to suffer substantial financial losses; there was no evidence that its key suppliers and customers were prepared to support its efforts during the restructuring; and thus, it was unlikely that the debtor would be able to advance a viable proposal. The court also held that a further extension of the stay period would materially prejudice a significant creditor: *Re Entegrity Wind Systems Inc.* (2009), 2009 CarswellPEI 63, 2009 PESC 33 (P.E.I. S.C.).

The registrar of the New Brunswick Court of Queen's Bench held that the time limitations imposed on a debtor by s. 50.4(9) of the *BIA* in relation to an extension to file a proposal did not require the extension to be granted within the time limitation. It only required the debtor to apply for such an extension within the time limitation. A debtor farming enterprise applied for a 45-day extension to file a proposal pursuant to s. 50.4(9). Evidence was filed by a representative of the trustee who attested that the bank and other creditors had security over sufficient real property and chattels to avoid their being prejudiced by an extension. A representative of the receiver deposed that the bank was not fully secured and to his belief there was no certainty of the date of completion of the proposed plant. Registrar Bray held that the considerations set out in s. 50.4(9) in paragraphs (a), (b) and (c) are conjunctive so that the applicant must prove all three. Although the evidence was not fulsome, the registrar was satisfied the applicant was acting in good faith and with sufficient diligence; however, the application for a 45-day extension was denied as the registrar was not persuaded of the debtor's ability to devise a proposal. The registrar did, however, grant a three-week extension to file a proposal, observing that no request for any further extension would be considered unless the applicant filed a draft proposal, a clear cash-flow projection, a complete appraisal of its assets, a business plan, a detailed indication of funding available and the sources thereof, and the contingency arrangements should the bank not release its security on the land: *Re Kids' Farm Inc.*, 2011 CarswellNB 441, 84 C.B.R. (5th) 91, 2011 NBQB 240 (N.B. Q.B.).

The New Brunswick Court of Queen's Bench considered the provisions of s. 50.4(9) of the *BIA* on a motion to extend the stay period for a proposal. McLellan J. granted a limited stay for three days to allow the principals a short period of time to contribute $150,000, which the court would take as an indication of good faith and the likelihood that the debtor would be able to make a viable proposal. Justice McLellan issued a second endorsement three days later. The court noted that s. 50.4 (9) of the *BIA* was prospective in nature; s. 50.4(9)(c) speaks of, "no creditor would be materially prejudiced with the extension being applied for or granted." The two principals failed to arrange for the additional $150,000. In the circumstances, McLellan J. was not persuaded that the bank would not be materially prejudiced. The court concluded that because of the legal requirements of the *BIA* and the equitable considerations that applied, it was necessary and appropriate to dismiss the debtor's application for an extension of time to make or file a proposal pursuant to the *BIA*: *Re SWP Industries Inc.*, 2012 CarswellNB 769, 5 C.B.R. (6th) 160, 2012 NBQB 397, additional reasons 2012 CarswellNB 770, 5 C.B.R. (6th) 165, 2012 NBQB 400 (N.B. Q.B.).

A creditor held three promissory notes against a debtor with a total value of $6.5 million; one note $2.5 million not been paid ten months after due. The debtor filed a notice of intention to file a proposal, and then brought an application for extension of the time for filing a proposal for 45 days. The creditor brought an application to terminate the proposal proceeding and a declaration that the debtor was bankrupt, or in the alternative, the appointment of a receiver. The creditor argued that it had a veto over any proposal by the debtor because it was the largest creditor and had lost faith in the debtor's ability to manage its assets and it was concerned that the debtor was restructuring to dissipate its assets. The parties disputed which application should prevail. The application by the debtor was allowed, the court finding that the debtor had significant assets; it was likely that it would be able to present a viable proposal; the debtor had acted in good faith in attempting to construct a proposal; and there was no material prejudice to the creditor if the extension was granted. If the debtor presented a proposal, the creditor would have the opportunity to decide its position as a business decision: *Enirgi Group Corp. v. Andover Mining Corp.*, 2013 CarswellBC 3026, 6 C.B.R. (6th) 32, 2013 BCSC 1833 (B.C. S.C.).

The Ontario Superior Court of Justice dismissed the motion of the debtor to extend the 30-day stay under s. 50.4(9) of the *BIA* and allowed the motion of the judgment creditor for an order terminating the 30-day stay under s. 50.4(11) of the *BIA*. The debtor had filed a notice of intention ("NOI") to make a proposal under the *BIA*; and applied for an extension of the 30-day stay. The debtor had a woodchip business that had a five-year shipping contract with the creditor; there was a dispute that resulted in an arbitral award against the debtor for $15.3 million, which award was confirmed by the District Court for the Southern District of New York. The day after the release of the confirming judgment, the debtor filed its NOI, on the basis of its belief that the judgment creditor would "expeditiously seek to record the judgment and proceed with collection actions." Justice Penny stated that s. 50.4(9) of the *BIA* sets out a three-part, conjunctive test for the grant of an extension of the 30-day stay: (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. Justice Penny was not satisfied that the debtor had acted and was acting in good

faith and with due diligence; and was not satisfied that the debtor would be able to make a viable proposal if the extension being applied for were granted. There was no active business, no complex financial arrangements and no assets. It was this failure to give the court even a hint of what a proposal might look like, or to provide any content for the bald and conclusory statement that more time was needed, which led Penny J. to the conclusion that the debtor had not met its onus of proving, on a balance of probabilities, that it had acted in good faith and with due diligence and it was likely to be able to make a viable proposal if given more time. Penny J. found proven on a balance of probabilities that it was not likely that the debtor would be able to make a viable proposal and, even if that were likely, the proposal would not likely be accepted by the requisite level of creditor support. The judgment creditor's motion to terminate the 30-day stay was granted: *NS United Kaiun Kaisha, Ltd. v. Cogent Fibre Inc.*, 2015 CarswellOnt 12962, 30 C.B.R. (6th) 315, 2015 ONSC 5139 (Ont. S.C.J.).

The New Brunswick Court of Appeal dismissed a debtor's appeal from the application judge's decision to refuse an extension of time to file a proposal. The Court of Appeal held that in order for the appellate court to interfere with decisions where the alleged errors are of mixed fact and law, the court must determine that the judge made a palpable and overriding error. Absent express statutory instruction, adjudicative facts presented only in affidavit form are owed the same deference as other kinds of evidence. Where the impugned order is the product of an exercise of judicial discretion, it may be interfered with on appeal only if it is founded upon an error of law, an error in the application of the governing principles, or palpable and overriding error in the assessment of the evidence. Here, the judge took into consideration all of the evidence available by affidavit before applying it to the legal test prescribed by s. 50.4(9) of the *BIA*. The judge made findings of fact from which the judge concluded the appellants did not meet the three statutory criteria. As the motion judge had made no palpable and overriding error, and had applied the correct legal principles, the Court of Appeal saw no basis for intervention: *Re Dynamic Transport Inc.*, 2016 CarswellNB 595, 2016 CarswellNB 596, 45 C.B.R. (6th) 45, 2016 NBCA 70 (N.B. C.A.).

The Nova Scotia Supreme Court extended the deadline for filing a proposal under the *BIA*. The extension request had been opposed by the major secured creditor. Section 50.4(9) provides that the insolvent person must prove (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. Moir J. held that statements by a secured creditor with a veto are not determinative; they are forecasts rather than evidence of present fact. Justice Moir held that the statutory requirement is "would likely be able to make a viable proposal", not "has settled on terms likely to be accepted". Justice Moir found that terms for a proposal were being discussed and needed more development, and was satisfied that there was a better than even chance of a viable proposal being developed. Terms were imposed to limit prejudice to the secured creditor: *Re Kocken Energy Systems Inc.*, 2017 CarswellNS 187, 50 C.B.R. (6th) 168, 2017 NSSC 80 (N.S. S.C.). In the same proceeding, the Nova Scotia Supreme Court granted a motion to approve a proposal, and took the opportunity to issue additional reasons to address a misinterpretation of reasons issued previously concerning a motion to extend the time to file a proposal. The misinterpretation had cast doubt on the debtor's business efficacy. Justice Moir stated that this case was an example of something seldom written about, but relevant in early challenges to a reorganization effort. A secured creditor who is able to veto a proposal or plan of arrangement vehemently opposes the effort from the beginning and says it is doomed because the creditor will exercise its veto when the time comes. Moir J. observed that such forecast does not always come true. In Moir J.'s earlier decision, published as 2017 CarswellNS 187, 50 C.B.R. (6th) 168, 2017 NSSC 80 (N.S. S.C.), the court summarized the bank's concerns and its expressed intention to veto, and expressed a reservation. The court did not make any findings in this respect. At an earlier hearing, Moir J. had found that the debtor had acted in good faith and that there was a good chance a viable proposal would be developed. Ultimately, when the proposal was considered by the creditors, the creditors voted unanimously to accept the proposal, including the bank. Justice Moir observed that the outcome bore out the debtor's submission that a threat to veto a developing proposal is always subject to assessment. Moir J. regretted that the earlier decision was misinterpreted by some to cast doubt on the debtor's business efficacy. He granted the requested order: *Re Kocken Energy Systems Inc.*, 2017 CarswellNS 598, 51 C.B.R. (6th) 339, 2017 NSSC 215 (N.S. S.C.).

The Ontario Superior Court of Justice held that it has jurisdiction to stay bankruptcy proceedings in respect of a debtor notwithstanding s. 50.4(8)(a) of the *BIA*, which provides that if no proposal is filed by the insolvent person by the end of the last *BIA* stay period, the insolvent person is deemed to have made an assignment. Section 187(11) of the *BIA* permits the court to extend the time for doing anything on such terms as the court thinks fit to impose. Dunphy J. held that this language was

sufficiently broad to provide the court with authority to extend the time being deemed to make an assignment in bankruptcy pursuant to s. 50.4(8)(a) of the *BIA*. The Court further held that s. 11 of the *CCAA* provides the court with broad authority to make any order it thinks fit in connection with a *CCAA* application, and that jurisdiction under the *CCAA* can be exercised harmoniously with s. 187(11) of the *BIA*, having regard to the objects of the *CCAA* and *BIA*. He concluded that there was sufficient jurisdiction to be found in the combination of s. 187(11) of the *BIA*, s. 11 and s. 11.6 of the *CCAA* to enable the court to harmonize the operation of these two statutes to better achieve the common objectives of both: *Re Dundee Oil and Gas Limited*, 2018 CarswellOnt 2174, 2018 ONSC 1070 (Ont. S.C.J.).

End of Document

TAB F

2017 NSSC 80
Nova Scotia Supreme Court

Kocken Energy Systems Inc., Re

2017 CarswellNS 187, 2017 NSSC 80, 277 A.C.W.S. (3d) 21, 50 C.B.R. (6th) 168

In the Matter of the Proposal of Kocken Energy Systems Inc.

Gerald R.P. Moir J.

Heard: January 5, 2017
Judgment: January 10, 2017
Written reasons: March 22, 2017
Docket: Hfx. 458774, 40675, Estate No. 51-2097016

Counsel: Tim Hill, Q.C., for Kocken Energy Systems Incorporated
Gavin MacDonald, for Bank of Montreal

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
VI Proposal
VI.2 Time period to file
VI.2.a Extension of time

Headnote

Bankruptcy and insolvency --- Proposal — Time period to file — Extension of time
Applicant company manufactured process equipment for oil and gas industry — In 2011, two shareholders of company moved manufacturing from Alberta to Nova Scotia and company acquired plant in New Brunswick in 2015 and incorporated in Barbados — Company's main secured creditor bank had 3 million dollars in venture — Company brought motion for 45 day extension to file proposal for bankruptcy pursuant to Bankruptcy and Insolvency Act — Motion granted with conditions — Since cross-examinations had not been heard, there was no resolve to conflicting evidence on company's side and generalized opinions without raw facts on bank's side — However, judge was satisfied on three points that absence of information left bank and insolvency practitioners with serious questions relevant to bank's interest in company's inventory and receivables and they had rationally founded suspicion that equipment could be transferred to Barbados company without payment, compromising bank's interest in inventory and receivables — On conditional approval, reservation stemmed from strange purchase orders from Barbados company to Canadian company with large prices — It was ordered that company give four business days' notice of bank before shipping anything out of Canada and advise bank of amount to be paid and arrangements for payment.

Table of Authorities

Cases considered by *Gerald R.P. Moir J.*:

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

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.) — considered

Statutes considered:

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

s. 178 — considered

MOTION for 45 day extension to file proposal pursuant to *Bankruptcy and Insolvency Act*.

Gerald R.P. Moir J. **(orally):**

Introduction

1 Kocken Energy Systems Incorporated filed a notice of intention to make a proposal on December 7, 2016. It moves to extend the deadline for filing the proposal by the maximum allowed under the *Bankruptcy and Insolvency Act*, forty five days. Its major secured creditor, the Bank of Montreal, opposes the extension. It says that the stay should end and Kocken should be bankrupt. Alternatively, the extension should be no more than thirty days.

Facts

2 Kocken manufacturers specialized process equipment for the oil and gas industry. The company's predecessor did business in Alberta since about 2005. By 2007, it had just two shareholders, William Famulak and Arthur Sager. In 2011, they decided to move manufacturing to Eastern Canada. In 2015, Kocken acquired a plant at St. Antoine, New Brunswick.

3 The Bank of Montreal provided financing to purchase the plant as well as current financing. Kocken also had a relationship with the Royal Bank of Canada.

4 On Tuesday, November 8, 2016 the Bank of Montreal stopped extending current credit. Kocken reverted to the Royal Bank. The Bank of Montreal invited PricewaterhouseCoopers to review Kocken's performance and make recommendations. PricewaterhouseCoopers prepared, and Bank of Montreal and Kocken endorsed, an engagement letter dated November 14. Mr. David Boyd took charge of the assignment. (I have an affidavit from him.)

5 PricewaterhouseCoopers studied the St. Antoine plant, read accounting records, and interviewed Kocken operatives until about November 21, 2015. After that, it reported to the Bank of Montreal. The bank issued a notice of intention to enforce security on November 25.

Kocken and Bank of Montreal Breakdown

6 I have the affidavit of Ms. Anna Graham for the bank. She swears to a debt well over $3 million dollars and security in the St. Antoine plant, personal property, accounts receivable, and inventory. She also swears to these defaults at para. 9 of her affidavit:

Based on the information available to BMO, the Borrower has breached its obligations to BMO including the following:

> insufficient working capital to meet financial covenants, inability to fund current operations, entering into the Reorganization, as defined in the Boyd Affidavit, failing to provide financial statements and information, ceasing to conduct its banking with BMO and disposing of assets subject to the Security.

7 In para. 10, Ms. Graham swears that these defaults continue. She adds that Kocken failed to respond to requests for basic information. She offers her opinion that Kocken is deliberately hiding information.

8 At the heart of Ms. Graham's concerns is the belief that Kocken underwent some kind of reorganization and Kocken assets are being transferred to a related company recently incorporated in Barbados. That company is Kocken Energy Systems International Incorporated.

9 That this is the fundamental concern underlying the bank's decisions to suspend current financing, to enforce security, and to oppose the proposal is apparent from para. 16 of Mr. Boyd's affidavit as well as Ms. Graham's affidavit as a whole.

10 According to Mr. Sager, Kocken was simply a manufacturer. Most contracts for the sale of manufactured equipment and the intellectual property behind the equipment were with Mr. Famulak independently. Mr. Sager retained Mr. Rick Ormston, an accountant and consultant of Halifax about establishing a company that would be the design and engineering base for Mr. Famulak. That consultation lead to the Barbados company I mentioned, which I shall refer to as Kocken Barbados.

11 Mr. Ormston developed a plan, the details of which were unknown to the Bank of Montreal or PricewaterhouseCoopers. There are numerous contradictions between Mr. Boyd's affidavit and Mr. Sager's second affidavit, which responded to Mr. Boyd's. The contradictions concern what one said to the other, what Mr. Sager informed Mr. Boyd, and the subjects on which information was withheld or unavailable.

12 No one was cross-examined and I am in no position to resolve the evidentiary contradictions. The conflicting evidence is therefore unhelpful for making findings. Similarly, Ms. Graham's affidavit contains many generalized opinions without the raw facts required for findings on her subjects. I am, however, satisfied on three points.

13 Firstly, neither the Bank of Montreal nor PricewaterhouseCoopers knew the details of the Ormston plan. The absence of information left the bank and the insolvency practitioners with serious questions, itemized at para. 18 of Mr. Boyd's affidavit. Secondly, these questions were relevant to the bank's interest in Kocken inventory and receivables. Thirdly, the bank and the insolvency practitioners had a rationally founded suspicion that equipment may be transferred to Kocken Barbados without payment, compromising the bank's interest in inventory and receivables.

Recent Developments

14 In the last three working days, Kocken made some disclosure to the bank and PricewaterhouseCoopers. Most importantly, Kocken delivered a copy of the Ormston plan. It referred to draft documents that had not been disclosed yet, but the bank and the trustee must now know what the plan was really about.

Disposition

15 Subsection 50.4(9) provides three thresholds that the insolvent must prove before the court has any discretion to grant an extension:

> (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.

16 I am not prepared to embrace the generalized allegations made in Ms. Graham's affidavit because this court makes findings on evidence of raw fact. Nor can I resolve the evidentiary contradictions between Mr. Sager and Mr. Boyd. What is left suggests good faith and due diligence.

17 I reject the submission that Kocken's initial evidence failed to disclose material facts. This submission is premised on the PricewaterhouseCoopers characterization of the relationship between Kocken and Kocken Barbados. As I said, the contradictions between the evidence of Mr. Boyd and Mr. Sager are irresolvable at present. The rest of the evidence supports good faith and due diligence.

18 I am satisfied on the first threshold.

19 Next is the requirement that a viable proposal is likely to be made.

20 Ms. Graham swears that the Bank of Montreal "has lost all confidence and trust in current management and ownership". "BMO will not engage in negotiations." She is of the view "that any proposal is doomed to fail". The Bank of Montreal is the primary secured creditor and its support will be necessary when the time comes for a vote.

21 Such statements by a secured creditor with a veto are not determinative. They are forecasts rather than evidence of present fact. We must not assume intransigence in a world in which misunderstandings occur, they are sometimes corrected, and trust is sometimes restored in whole or in part. Nor may we, in this case, assume that the proposed terms will require a restoration of confidence or trust or a continuing relationship with the Bank of Montreal.

22 I have some difficulty with the decision of Justice Penny in *NS United Kaiun Kaisha, Ltd. v. Cogent Fibre Inc.*, 2015 ONSC 5139 (Ont. S.C.J.), which suggests that s. 50.4(9)(b) requires at least a hint of what the insolvent will offer to the secured creditor and what the proposal will contain. It is in the nature of proposals that they are developed and, if an extension is needed, the proposal is developing.

23 The requirement is "would likely be able to make a viable proposal", not "has settled on terms likely to be accepted". I think that is the point made by Justice Goodfellow in *H & H Fisheries Ltd., Re*, 2005 NSSC 346 (N.S. S.C.), when he says that s. 50.4(9)(b) means "that a reasonable level of effort dictated by the circumstances must have been made that gives some indication of the likelihood a viable proposal will be advanced within the time frame of the extension applied for."

24 The affidavits prove the cash flow projections, the preparation of other documents or reports, arrangements for appraisals, the trustee's investigation of accounts receivable, and the trustee's opinion that time is required for analysis of revenue and expense. Further, terms for a proposal are being discussed and need more development. In the meantime, Kocken has remained in operation. I am told that one appraisal has been delivered and another is close. All of this has been done over the holiday season. This evidence satisfies me that there is a better than even chance of a viable proposal being developed.

25 Finally, I have only one reservation about "no creditor would be materially prejudiced". The reservation stems from very strange purchase orders from Kocken Barbados to Kocken with very large prices. They purport to be conditional on resolving issues between Kocken and the Bank of Montreal.

26 By virtue of its s. 178 security, the bank owns the inventory. The extension would prejudice the bank if it was used to deliver inventory off shore without getting paid first.

27 I can diminish my concern by exercising my inherent jurisdiction to control this proceeding and the parties to it. I will order that Kocken give four business days' notice to the bank before it ships anything out of Canada and, along with the notice, advise the bank of the amount to be paid and the arrangements for payment. In view of my willingness to make such an order, I find that no creditor will be prejudiced by the order extending time.

28 I am prepared to extend the period for filing a proposal by the full 45 days, counting from last Thursday.

Motion granted with conditions.

End of Document

TAB G

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

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

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

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

Chadwick J.

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

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

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

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

Headnote

Bankruptcy --- Proposal — Annulment of approved proposal

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

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

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

Held:

The application was dismissed.

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

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

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

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

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

Table of Authorities

Cases considered:

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

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

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

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

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

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

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

Statutes considered:

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

s. 47(2)

s. 47.1

s. 50(8)

s. 50.4

s. 50.4(2)

s. 50.4(11)

s. 50.4(11)(a)

s. 50.4(11)(b)

s. 50.4(11)(c)

s. 50.4(11)(d)

s. 50.9

s. 224(1)

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

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

***Chadwick J.*:**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> 594-595. I would not, however, impose a heavy burden on the debtor company to establish the likelihood of ultimate success from the outset. As the Act will often be the last refuge for failing companies, it is to be expected that many of the proposed plans of reorganization will involve variables and contingencies which will make the plan's ultimate acceptability to the creditors and the Court very uncertain at the time the initial application is made.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Application dismissed.

TAB H

Most Negative Treatment: Distinguished
Most Recent Distinguished: Canada (Procureur général) c. Contrevenant No. 10 | 2015 CAF 155, 2015 FCA 155, 2015 CarswellNat 2920, 2015 CarswellNat 4847, 476 N.R. 142, 123 W.C.B. (2d) 413, 256 A.C.W.S. (3d) 759, [2015] A.C.F. No. 873 | (F.C.A., Jun 30, 2015)

2002 SCC 41, 2002 CSC 41
Supreme Court of Canada

Sierra Club of Canada v. Canada (Minister of Finance)

2002 CarswellNat 822, 2002 CarswellNat 823, 2002 SCC 41, 2002 CSC 41, [2002] 2 S.C.R. 522, [2002] S.C.J. No. 42, 113 A.C.W.S. (3d) 36, 18 C.P.R. (4th) 1, 20 C.P.C. (5th) 1, 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 287 N.R. 203, 40 Admin. L.R. (3d) 1, 44 C.E.L.R. (N.S.) 161, 93 C.R.R. (2d) 219, J.E. 2002-803, REJB 2002-30902

Atomic Energy of Canada Limited, Appellant v. Sierra Club of Canada, Respondent and The Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada, Respondents

McLachlin C.J.C., Gonthier, Iacobucci, Bastarache, Binnie, Arbour, LeBel JJ.

Heard: November 6, 2001
Judgment: April 26, 2002
Docket: 28020

Proceedings: reversing (2000), 2000 CarswellNat 970, (sub nom. Atomic Energy of Canada Ltd. v. Sierra Club of Canada) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note), 2000 CarswellNat 3271, [2000] F.C.J. No. 732 (Fed. C.A.); affirming (1999), 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283, [1999] F.C.J. No. 1633 (Fed. T.D.)

Counsel: *J. Brett Ledger* and *Peter Chapin*, for appellant
Timothy J. Howard and *Franklin S. Gertler*, for respondent Sierra Club of Canada
Graham Garton, Q.C., and *J. Sanderson Graham*, for respondents Minister of Finance of Canada, Minister of Foreign Affairs of Canada, Minister of International Trade of Canada, and Attorney General of Canada

Subject: Intellectual Property; Property; Civil Practice and Procedure; Evidence; Environmental

Related Abridgment Classifications

Civil practice and procedure
XII Discovery
XII.2 Discovery of documents
XII.2.h Privileged document
XII.2.h.xiii Miscellaneous

Civil practice and procedure
XII Discovery
XII.4 Examination for discovery
XII.4.h Range of examination
XII.4.h.ix Privilege
XII.4.h.ix.F Miscellaneous

Evidence
XIV Privilege
XIV.8 Public interest immunity
XIV.8.a Crown privilege

Headnote

Evidence --- Documentary evidence — Privilege as to documents — Miscellaneous documents
Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Practice --- Discovery — Discovery of documents — Privileged document — Miscellaneous privileges
Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

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Preuve --- Preuve documentaire — Confidentialité en ce qui concerne les documents — Documents divers
Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Communication des documents — Documents confidentiels — Divers types de confidentialité
Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Interrogatoire préalable — Étendue de l'interrogatoire — Confidentialité — Divers types de confidentialité
Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle

d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

The federal government provided a Crown corporation with a $1.5 billion loan for the construction and sale of two CANDU nuclear reactors to China. An environmental organization sought judicial review of that decision, maintaining that the authorization of financial assistance triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*. The Crown corporation was an intervenor with the rights of a party in the application for judicial review. The Crown corporation filed an affidavit by a senior manager referring to and summarizing confidential documents. Before cross-examining the senior manager, the environmental organization applied for production of the documents. After receiving authorization from the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the Crown corporation sought to introduce the documents under R. 312 of the *Federal Court Rules, 1998* and requested a confidentiality order. The confidentiality order would make the documents available only to the parties and the court but would not restrict public access to the proceedings.

The trial judge refused to grant the order and ordered the Crown corporation to file the documents in their current form, or in an edited version if it chose to do so. The Crown corporation appealed under R. 151 of the *Federal Court Rules, 1998* and the environmental organization cross-appealed under R. 312. The majority of the Federal Court of Appeal dismissed the appeal and the cross-appeal. The confidentiality order would have been granted by the dissenting judge. The Crown corporation appealed.

Held: The appeal was allowed.

Publication bans and confidentiality orders, in the context of judicial proceedings, are similar. The analytical approach to the exercise of discretion under R. 151 should echo the underlying principles set out in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). A confidentiality order under R. 151 should be granted in only two circumstances, when an order is needed to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk, and when the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

The alternatives to the confidentiality order suggested by the Trial Division and Court of Appeal were problematic. Expunging the documents would be a virtually unworkable and ineffective solution. Providing summaries was not a reasonable alternative measure to having the underlying documents available to the parties. The confidentiality order was necessary in that disclosure of the documents would impose a serious risk on an important commercial interest of the Crown corporation, and there were no reasonable alternative measures to granting the order.

The confidentiality order would have substantial salutary effects on the Crown corporation's right to a fair trial and on freedom of expression. The deleterious effects of the confidentiality order on the open court principle and freedom of expression would be minimal. If the order was not granted and in the course of the judicial review application the Crown corporation was not required to mount a defence under the *Canadian Environmental Assessment Act*, it was possible that the Crown corporation would suffer the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. The salutary effects of the order outweighed the deleterious effects.

Le gouvernement fédéral a fait un prêt de l'ordre de 1,5 milliards de dollar en rapport avec la construction et la vente par une société d'État de deux réacteurs nucléaires CANDU à la Chine. Un organisme environnemental a sollicité le contrôle judiciaire de cette décision, soutenant que cette autorisation d'aide financière avait déclenché l'application de l'art. 5(1)b) de la *Loi canadienne sur l'évaluation environnementale*. La société d'État était intervenante au débat et elle avait reçu les droits de partie dans la demande de contrôle judiciaire. Elle a déposé l'affidavit d'un cadre supérieur dans lequel ce dernier faisait référence à certains documents confidentiels et en faisait le résumé. L'organisme environnemental a demandé la production des documents avant de procéder au contre-interrogatoire du cadre supérieur. Après avoir obtenu l'autorisation des autorités chinoises de communiquer les documents à la condition qu'ils soient protégés par une ordonnance de confidentialité, la

société d'État a cherché à les introduire en invoquant la r. 312 des *Règles de la Cour fédérale, 1998*, et elle a aussi demandé une ordonnance de confidentialité. Selon les termes de l'ordonnance de confidentialité, les documents seraient uniquement mis à la disposition des parties et du tribunal, mais l'accès du public aux débats ne serait pas interdit.

Le juge de première instance a refusé l'ordonnance de confidentialité et a ordonné à la société d'État de déposer les documents sous leur forme actuelle ou sous une forme révisée, à son gré. La société d'État a interjeté appel en vertu de la r. 151 des *Règles de la Cour fédérale, 1998*, et l'organisme environnemental a formé un appel incident en vertu de la r. 312. Les juges majoritaires de la Cour d'appel ont rejeté le pourvoi et le pourvoi incident. Le juge dissident aurait accordé l'ordonnance de confidentialité. La société d'État a interjeté appel.

Arrêt: Le pourvoi a été accueilli.

Il y a de grandes ressemblances entre l'ordonnance de non-publication et l'ordonnance de confidentialité dans le contexte des procédures judiciaires. L'analyse de l'exercice du pouvoir discrétionnaire sous le régime de la r. 151 devrait refléter les principes sous-jacents énoncés dans l'arrêt *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835. Une ordonnance de confidentialité rendue en vertu de la r. 151 ne devrait l'être que lorsque: 1) une telle ordonnance est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le cadre d'un litige, en l'absence d'autres solutions raisonnables pour écarter ce risque; et 2) les effets bénéfiques de l'ordonnance de confidentialité, y compris les effets sur les droits des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris les effets sur le droit à la liberté d'expression, lequel droit comprend l'intérêt du public à l'accès aux débats judiciaires.

Les solutions proposées par la Division de première instance et par la Cour d'appel comportaient toutes deux des problèmes. Épurer les documents serait virtuellement impraticable et inefficace. Fournir des résumés des documents ne constituait pas une « autre option raisonnable » à la communication aux parties des documents de base. L'ordonnance de confidentialité était nécessaire parce que la communication des documents menacerait gravement un intérêt commercial important de la société d'État et parce qu'il n'existait aucune autre option raisonnable que celle d'accorder l'ordonnance.

L'ordonnance de confidentialité aurait d'importants effets bénéfiques sur le droit de la société d'État à un procès équitable et à la liberté d'expression. Elle n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression. Advenant que l'ordonnance ne soit pas accordée et que, dans le cadre de la demande de contrôle judiciaire, la société d'État n'ait pas l'obligation de présenter une défense en vertu de la *Loi canadienne sur l'évaluation environnementale*, il se pouvait que la société d'État subisse un préjudice du fait d'avoir communiqué cette information confidentielle en violation de ses obligations, sans avoir pu profiter d'un avantage similaire à celui du droit du public à la liberté d'expression. Les effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables.

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AB Hassle v. Canada (Minister of National Health & Welfare), 2000 CarswellNat 356, 5 C.P.R. (4th) 149, 253 N.R. 284, [2000] 3 F.C. 360, 2000 CarswellNat 3254 (Fed. C.A.) — considered

Canadian Broadcasting Corp. v. New Brunswick (Attorney General), 2 C.R. (5th) 1, 110 C.C.C. (3d) 193, [1996] 3 S.C.R. 480, 139 D.L.R. (4th) 385, 182 N.B.R. (2d) 81, 463 A.P.R. 81, 39 C.R.R. (2d) 189, 203 N.R. 169, 1996 CarswellNB 462, 1996 CarswellNB 463, 2 B.H.R.C. 210 (S.C.C.) — followed

Dagenais v. Canadian Broadcasting Corp., 34 C.R. (4th) 269, 20 O.R. (3d) 816 (note), [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12, 175 N.R. 1, 94 C.C.C. (3d) 289, 76 O.A.C. 81, 25 C.R.R. (2d) 1, 1994 CarswellOnt 112, 1994 CarswellOnt 1168 (S.C.C.) — followed

Edmonton Journal v. Alberta (Attorney General) (1989), [1990] 1 W.W.R. 577, [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577, 102 N.R. 321, 71 Alta. L.R. (2d) 273, 103 A.R. 321, 41 C.P.C. (2d) 109, 45 C.R.R. 1, 1989 CarswellAlta 198, 1989

CarswellAlta 623 (S.C.C.) — followed

Eli Lilly & Co. v. Novopharm Ltd., 56 C.P.R. (3d) 437, 82 F.T.R. 147, 1994 CarswellNat 537 (Fed. T.D.) — referred to

Ethyl Canada Inc. v. Canada (Attorney General), 1998 CarswellOnt 380, 17 C.P.C. (4th) 278 (Ont. Gen. Div.) — considered

Irwin Toy Ltd. c. Québec (Procureur général), 94 N.R. 167, (sub nom. *Irwin Toy Ltd. v. Quebec (Attorney General)*) [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, 24 Q.A.C. 2, 25 C.P.R. (3d) 417, 39 C.R.R. 193, 1989 CarswellQue 115F, 1989 CarswellQue 115 (S.C.C.) — followed

M. (A.) v. Ryan, 143 D.L.R. (4th) 1, 207 N.R. 81, 4 C.R. (5th) 220, 29 B.C.L.R. (3d) 133, [1997] 4 W.W.R. 1, 85 B.C.A.C. 81, 138 W.A.C. 81, 34 C.C.L.T. (2d) 1, [1997] 1 S.C.R. 157, 42 C.R.R. (2d) 37, 8 C.P.C. (4th) 1, 1997 CarswellBC 99, 1997 CarswellBC 100 (S.C.C.) — considered

N. (F.), Re, 2000 SCC 35, 2000 CarswellNfld 213, 2000 CarswellNfld 214, 146 C.C.C. (3d) 1, 188 D.L.R. (4th) 1, 35 C.R. (5th) 1, [2000] 1 S.C.R. 880, 191 Nfld. & P.E.I.R. 181, 577 A.P.R. 181 (S.C.C.) — considered

R. v. E. (O.N.), 2001 SCC 77, 2001 CarswellBC 2479, 2001 CarswellBC 2480, 158 C.C.C. (3d) 478, 205 D.L.R. (4th) 542, 47 C.R. (5th) 89, 279 N.R. 187, 97 B.C.L.R. (3d) 1, [2002] 3 W.W.R. 205, 160 B.C.A.C. 161, 261 W.A.C. 161 (S.C.C.) — referred to

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Generally — referred to

s. 1 — referred to

s. 2(b) — referred to

s. 11(d) — referred to

Canadian Environmental Assessment Act, S.C. 1992, c. 37

Generally — considered

s. 5(1)(b) — referred to

s. 8 — referred to

s. 54 — referred to

s. 54(2)(b) — referred to

Criminal Code, R.S.C. 1985, c. C-46

s. 486(1) — referred to

Rules considered:

Federal Court Rules, 1998, SOR/98-106
R. 151 — considered

R. 312 — referred to

APPEAL from judgment reported at 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (Fed. C.A.), dismissing appeal from judgment reported at 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (Fed. T.D.), granting application in part.

POURVOI à l'encontre de l'arrêt publié à 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (C.A. Féd.), qui a rejeté le pourvoi à l'encontre du jugement publié à 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (C.F. (1re inst.)), qui avait accueilli en partie la demande.

The judgment of the court was delivered by *Iacobucci J.*:

I. Introduction

1 In our country, courts are the institutions generally chosen to resolve legal disputes as best they can through the application of legal principles to the facts of the case involved. One of the underlying principles of the judicial process is public openness, both in the proceedings of the dispute, and in the material that is relevant to its resolution. However, some material can be made the subject of a confidentiality order. This appeal raises the important issues of when, and under what circumstances, a confidentiality order should be granted.

2 For the following reasons, I would issue the confidentiality order sought and, accordingly, would allow the appeal.

II. Facts

3 The appellant, Atomic Energy of Canada Ltd. ("AECL"), is a Crown corporation that owns and markets CANDU nuclear technology, and is an intervener with the rights of a party in the application for judicial review by the respondent, the Sierra Club of Canada ("Sierra Club"). Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance in the form of a $1.5 billion guaranteed loan relating to the construction and sale of two CANDU nuclear reactors to China by the appellant. The reactors are currently under construction in China, where the appellant is the main contractor and project manager.

4 The respondent maintains that the authorization of financial assistance by the government triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 ("CEAA"), which requires that an environmental assessment be undertaken before a federal authority grants financial assistance to a project. Failure to undertake such an assessment compels cancellation of the financial arrangements.

5 The appellant and the respondent Ministers argue that the CEAA does not apply to the loan transaction, and that if it does, the statutory defences available under ss. 8 and 54 apply. Section 8 describes the circumstances where Crown corporations are required to conduct environmental assessments. Section 54(2)(b) recognizes the validity of an environmental assessment carried out by a foreign authority provided that it is consistent with the provisions of the CEAA.

6 In the course of the application by Sierra Club to set aside the funding arrangements, the appellant filed an affidavit of Dr. Simon Pang, a senior manager of the appellant. In the affidavit, Dr. Pang referred to and summarized certain documents (the "Confidential Documents"). The Confidential Documents are also referred to in an affidavit prepared by Dr. Feng, one of

(3) Adapting the Dagenais Test to the Rights and Interests of the Parties

53 Applying the rights and interests engaged in this case to the analytical framework of *Dagenais* and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:

> A confidentiality order under R. 151 should only be granted when:
>
> > (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
> >
> > (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

54 As in *Mentuck*, *supra*, I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well-grounded in the evidence and poses a serious threat to the commercial interest in question.

55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest," the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *Re N. (F.)*, [2000] 1 S.C.R. 880, 2000 SCC 35 (S.C.C.), at para. 10, the open court rule only yields" where the *public* interest in confidentiality outweighs the public interest in openness" (emphasis added).

56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest." It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly & Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (Fed. T.D.), at p. 439.

57 Finally, the phrase "reasonably alternative measures" requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

B. Application of the Test to this Appeal

(1) Necessity

58 At this stage, it must be determined whether disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and whether there are reasonable alternatives, either to the order itself or to its terms.

59 The commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality. The appellant argues that it will suffer irreparable harm to its commercial interests if the confidential documents are

