

2013 COMMERCIAL INSOLVENCY
TECHNICAL UPDATE

**Prepared by
Kimberley A. Robertson and
Sarah J. Nelligan**

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Barristers and Solicitors
1600 Cathedral Place
925 West Georgia Street
Vancouver, B.C. V6C 3L2

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INTRODUCTION

We are pleased to provide the Commercial Insolvency Technical Update for the 2013 CAIRP Insolvency & Restructuring Vancouver Forum.

Neither this paper nor this discussion is intended to be an exhaustive reporting of all commercial cases and developments over the past year, We have intentionally omitted reference to either of the Supreme Court of Canada decisions, *Indalex* and *Atibibowater*, as multiple articles can be located on either from a simple Google Search. Rather, we have sought to provide an overview of some of the more interesting decisions of the past year or so, in which the focus has been, to a significant degree, getting back to the fundamentals.

Not only have the courts been undertaking the constantly evolving assessment necessary to strike a balance between the various stakeholders in a realization and restructuring, whether it be under the *Bankruptcy and Insolvency Act*¹ (“BIA”), the *Companies’ Creditors Arrangement Act*² (“CCAA”), or through a receivership, but they have also sought to re-focus attention to the basic and underlying principles and objectives that ought to be pursued, and the role and obligations that court officers have in doing so.

Of course, in the changing landscape of commerce in British Columbia, particularly as it relates to the mid-market nature of the files, the need to include cost-effectiveness in any balance is paramount. Accordingly, some of these recent decisions have caused the profession to consider more critically the different processes that are available, the benefits and drawbacks of each, and the roles that we all play in achieving the objectives, in a way that is affordable to the stakeholders.

ISSUES AS TO THE INITIATING PROCESS: Who, Where, Why and When?

1. *Who: Proper parties to CCAA Proceedings*

CCAA Proceedings are commenced by way of a petition, brought by the debtor seeking to avail itself of its protection. The Court has confirmed that other related parties to the petitioner are not proper parties to the proceedings, unless they fit within the statutory requirements of the CCAA.

Great Basin Gold Ltd. (Re)³

Great Basin Gold Ltd. (“GBGL”) is a Canadian publicly traded international mining company which, through its subsidiaries, operates or holds title to gold mining assets in South Africa (“Burnstone”) and Nevada (“Hollister”). Following the commencement of business rescue proceedings in South Africa by the Burnstone subsidiaries in late September 2012, GBGL commenced proceedings in British Columbia under the CCAA.

¹ R.S.C. 1985, c. B-3, *as amended*

² R.S.C. 1985, c. C-36 *as amended*

³ 2012 BCSC 1773

On the initial hearing, which was conducted *ex parte*, GBGL obtained approval of DIP financing, secured by a DIP charge.

Prior to the CCAA proceedings, the Hollister and Burnstone subsidiaries had each been financed under separate credit facilities (with the DIP lenders participating in both facilities) which were secured by separate collateral. On a comeback hearing on notice to other key stakeholders, an ad hoc group of GBGL's senior unsecured debentureholders (the "Ad Hoc Group"), objected to the approval of the DIP financing, and sought to substitute it with their own DIP financing proposal. The Ad Hoc Group also sought to add its US subsidiary Great Basin Gold Inc. ("GBG Inc.") and GBG Inc.'s subsidiaries Rodeo Creek Gold Inc. ("Rodeo") and Antler Peak Gold Inc. ("Antler") as Petitioners to the proceedings.

After accepting that British Columbia's *Supreme Court Civil Rules* allowed for the addition or substitution of parties only with that party's consent⁴, the Court considered whether the CCAA provided the necessary jurisdiction to do so in any event, or provided inherent jurisdiction to do so. To that end, the Court reviewed ss. 2 and 3(1) of the CCAA, which state that the Act applies to "debtor companies" and the definitions of both "debtor companies" and "company"; meaning a company that is either incorporated in Canada or does business in Canada and is insolvent. GBG Inc., Antler, and Rodeo did not do business in Canada nor did they have assets in Canada. As such, the Court held that these companies could not be considered "debtor companies" as defined in the CCAA. Accordingly, there was no jurisdictional basis to add those companies to the CCAA proceedings.

2. *Where: Jurisdiction of the Court, venue rules*

After the 2007 filing of the Pope & Talbot Ltd. CCAA Proceedings in Ontario, and what ultimately (and after great discourse) became a consensual transfer of the file to British Columbia, insolvency professionals have had to consider more fully the issue of what court has jurisdiction for a restructuring.

Sargeant v. Worldspan Marine Inc.⁵

This matter concerned a partially constructed super yacht, Worldspan Marine Inc. ("Worldspan") (the insolvent builder), and a number of creditors, some of whom had commenced proceedings in the Federal Court and obtained either arrest warrants against the vessel or caveats. Together with its affiliated companies, Worldspan brought an application in the British Columbia Supreme Court under the CCAA seeking creditor protection and, *inter alia*, a stay of the Federal Court proceedings so that it could develop a viable restructuring plan that would allow it to complete the construction of the yacht.

The Court considered whether it had jurisdiction to make an initial order given the fact that the Federal Court had already exercised its jurisdiction in respect of the yacht. One maritime lien claimant in particular, Offshore Interiors Inc. ("Offshore") argued that its claims fell within the jurisdiction of the Federal Court over matters relating to Canadian maritime law. Though recognizing Offshore's position respecting maritime jurisdiction, the Court noted that this was not a situation where one court, through the exercise of its jurisdiction, entirely occupied the field to the exclusion of all other courts. The exercise of jurisdiction by the Federal Court with respect to matters of maritime law did not preclude the exercise by the British Columbia Supreme Court of its jurisdiction under the CCAA. That being said, while the Court granted much of the

⁴ Rule 6-2, British Columbia *Supreme Court Civil Rules*.

⁵ 2011 BCSC 767.

relief requested, including a general stay of all proceedings, it refused to specifically stay the Federal Court proceedings “as a matter of comity”. Instead, the Order of the Court included a specific request to the Federal Court for its assistance to recognize the stay. The Court noted that the British Columbia Supreme Court and the Federal Court “working cooperatively and each exercising its own jurisdiction should be able to avoid any insuperable conflicts between their respective jurisdictions”.⁶

Wheatland Industrial Park Inc. (Re)⁷

Wheatland Industrial Park Inc., concerns a joint venture the purpose of which was to develop and market approximately 306 acres of land near Calgary, Alberta legally owned by an Alberta incorporated company called Wheatland Industrial Park Inc. (“Wheatland”). There were approximately 50 joint venturers, the majority of which resided in British Columbia and each of which owned a beneficial interest in the subject property. A substantial number of the joint venturers (though not the majority) sought the appointment of a judicial trustee or receiver over the assets of the joint venture after what they considered to be the mismanagement, breach of fiduciary duty and a breach of trust. The remaining joint venturers opposed the appointment on a variety of grounds, including that the BC Court lacked the jurisdiction to make such an appointment over land in Alberta based on the conflict of law rule known as the “foreign immovable” rule.

The foreign immovable rule prohibits a court from adjudicating on the right and title to lands not located within its jurisdiction. An exception to this rule does permit courts to impose obligations on parties within its jurisdiction with respect to foreign immovables. This exception is referred to as the “*in personam*” exception because it operates on the person not the property in question (despite the fact that the land may be affected by the obligation now imposed on the person within the court’s jurisdiction).

In this case, the petitioners were seeking to have a trustee appointed in substitution to Wheatland to deal with the property in Alberta. Specifically, they sought an order permitting the trustee to (a) take possession and exercise control over the land; (b) receive, preserve, and protect the property; (c) execute, assign, lease, and endorse documents of whatever nature in respect of the property; (d) initiate, prosecute, and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the property; (e) sell, convey, transfer, lease, or assign the property; and (f) apply for any vesting order or other orders necessary to convey the property free and clear of any encumbrances. The Court agreed with the respondents that the trustee could only carry out these functions if the legal title to the property was transferred from Wheatland. Such a transfer would be prohibited by the foreign immovable rule, would not fall under the *in personam* exception, and accordingly, the Court concluded it did not have the jurisdiction to appoint a judicial trustee over the property.

Alternatively, the petitioners sought the appointment of a receiver. The purpose of the appointment of a receiver is to preserve and protect assets which might otherwise be in jeopardy. Though the Court did find that the property had been and continued to be in jeopardy or peril because of the conduct of Wheatland’s directors, it held it did not have jurisdiction to appoint a receiver over the subject property on the basis that such an appointment would affect the internal management of Wheatland and matters of internal management of a corporation should be determined by courts of the corporation’s domicile, *i.e.*) where a company is incorporated (in this case, Alberta).

⁶ *Ibid*, para. 47.

⁷ 2013 BCSC 27.

Being satisfied that the appointment of a judicial officer (be it a trustee or receiver) was necessary in the circumstances but lacking the jurisdiction to do so, the Court held that the matter of the appointment of a judicial trustee or a receiver should be referred to the Court of Queen's Bench of Alberta for determination and requested that the Alberta Court accept a transfer of the proceedings for that purpose.

3. Why: Considerations for Appointing a Receiver, the Debate Continues

Following *United Savings Credit Union v. F & R Brokers Inc. et. al.*,⁸ there was a general view that the appointment of a receiver by a secured creditor, where debenture security specifically made that remedy available in a default situation, was almost as of right upon a default, absent extraordinary circumstances. However, subsequent decisions such as *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*,⁹ suggested that the appointment was not automatic, and that the secured creditor would have to establish that the appointment was just and convenient.

In the past year the court has further considered this issue.

First West Credit Union v. 687830 B.C. Ltd.¹⁰

In these foreclosure proceedings, the Court was called upon to consider an application by the Petitioner, First West Credit Union ("First West") for an order appointing a receiver and manager pursuant to s. 39 of the *Law and Equity Act*, R.S.B.C. 1996 c. 253 ("LEA") and Rule 10-2 of the *Supreme Court Civil Rules*. In so doing, the Court considered authorities relating to where a mortgage agreement provides for a receiver in the event of default; authorities which fell into one of two conflicting camps:

1. That unless party opposing the appointment of a receiver can show that extraordinary circumstances are present, the appointment at the instigation of a foreclosing mortgagee should be made as a matter of course if the mortgagee can show default under the mortgage;¹¹ or
2. the party seeking an appointment of a receiver by the court must satisfy the court that it is just and convenient to do so.¹²

In this case, the Court felt that no matter what line of authority was followed, the appointment of a receiver was appropriate given the conduct of the mortgagor and the risk to the subject property. Accordingly, the Court declined to elaborate further on the current state of the law in this area in British Columbia.

⁸ 2003 BCSC 640 ("*United Savings*").

⁹ 2009 BCSC 1527 ("*Maple Trade*").

¹⁰ 2012 BCSC 908.

¹¹ *United Savings*, *supra* note 8, at para. 15.

¹² *Red Burrito Ltd. v. Hussain*, 2007 BCSC 1277, at para. 47; and *Maple Trade*, *supra* note 9.

Canadian Imperial Bank of Commerce v. Can-Pacific Farms Inc.¹³

In these foreclosure proceedings, the petitioner sought the appointment of a receiver pursuant to s. 143(1) of the BIA and s. 39 of the LEA. After a consideration of the principles set out in *United Savings*, the Court granted the order as a matter a course, stating that the history of the matter had made the appointment of a receiver inevitable and that the respondent had not met the onus to show that there were compelling commercial or other reasons not to make the order.

The Court went on to distinguish *Maple Trade*, stating that it was clear that *United Savings* and those decisions that followed it were not brought to the attention of the Court in *Maple Trade*. As such, the Court held that *Maple Trade* (and *Textron Financial Canada Limited v. Chetwynd Motels Ltd.* (“*Textron*”),¹⁴ which relied upon that decision) did not accurately reflect the law in British Columbia with respect to appoint a receiver in a mortgage context.

Cascade Divide Enterprises Inc. v. Laliberte¹⁵

Here a secured creditor sought to appoint a receiver pursuant to s. 39 of the LEA and s. 243 of the BIA. In considering the application, the Court relied upon the factors set out in *Maple Trade* and *Textron*, which include: 1) whether irreparable harm might be caused if no order were made; 2) the risk to the security holder; 3) the nature of the property; 4) the preservation and protection of the property; 5) the balance of convenience to the parties; 6) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others; 7) the effect of the order upon the parties; 8) the conduct of the parties; 9) the cost to the parties; and 10) the likelihood of maximizing return to the parties.

The Court referred to these factors, with the caveat that they acted as a guide alone in terms of what is to be considered on such an application. Because the appointment of a receiver is “extraordinary relief which should be granted cautiously and sparingly”,¹⁶ the overarching consideration for the Court must be whether it is just and convenient to make the appointment.

4. *When: Entitlement to a Period of Redemption before a Receiver Can Sell*

Since the Courts of Chancery began considering property rights, the fundamental right of redemption afforded a land owner facing foreclosure has been held to be an absolute right. However, as the practice associated with appointing receivers has evolved, particularly with the volume of real estate developments over the last decade, there has been a blurring of this absolute right.

¹³ 2012 BCSC 437.

¹⁴ 2010 BCSC 477.

¹⁵ 2013 BCSC 263.

¹⁶ *Ibid*, para. 81.

When realizing upon land collateral in the context of a commercial enterprise, the standard practice has become to do so by way of a debenture action, rather than a foreclosure proceeding, despite that the security generally being realized upon is a “mortgage”, that being an “interest in land created by a written instrument providing security for performance of a duty or the payment of a debt”¹⁷. In proceeding in this manner, the right of redemption, which is a matter of course in a foreclosure proceeding, has largely been given little consideration when granting a receiver the authority to sell real property.

The courts have, however, now provided commentary confirming that regardless of the manner in which the mortgage is being enforced, through foreclosure or through the appointment of a receiver with the power of sale, the right of redemption survives.

Imor Capital Corp. v. Bullet Enterprises Ltd.¹⁸

Bullet Enterprises Ltd. granted a debenture to IMOR with Bullet as Mortgagor and by the other defendants as covenantors. The debenture was registered in both the British Columbia Personal Property Registry and the New Westminster Land Title Office against certain real property (“Property”). The term of the debenture expired and proceedings were commenced wherein the petitioner sought the appointment of a receiver manager pursuant to s. 243(1) of the BIA and s. 39 of the LEA. The powers requested for the receiver manager included the ability to:

1. “to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business:
 - a. without the approval of this Court in respect of any transaction not exceeding \$50,000 provided that the aggregate consideration for all such transactions does not exceed \$200,000 and
 - b. with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause,

and in each such case notice under Section 59(10) of the Personal Property Security Act, R.S.B.C. 1996, c. 359 shall not be required;
2. to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property.”

The Defendants did not oppose the appointment but did argue that a redemption period should be set by the Court and that the petitioner and/or receiver manager should not be granted the power to sell assets until that redemption period had expired. Accordingly, the question before the Court was whether the setting of a redemption period where the security is a debenture is different than where the security is a mortgage charging land. The Court held that it was not.

In reaching its decision, the Court considered a number of decisions, all of which supported the position that redemption periods will be set in debenture holders’ actions and an order for conduct of sale will not be

¹⁷ Black’s Law Dictionary

¹⁸ 2012 BCSC 899.

made in favour of the debenture holder until a redemption period has expired. The Court held that proceeding in such a fashion would allow for commercial certainty and result in procedures relating to the enforcement of agreements for sale, mortgages and debentures to be dealt with in a consistent manner. Accordingly, the Court in cases such as these will set a redemption period in accordance with the equities existing relating to the value of the property and to the debt owing under the security that is being enforced. If the value of the property charged is sufficient to cover the debt, the usual redemption period of six months will apply.

ISSUES AFFECTING STAKEHOLDERS: **The Balancing Act Continues**

Some of the issues that have been decided in the past year have been to specifically provided guidance on the interests of the stakeholders, and the processes available to them. To some extent, the court's consideration of these issues arises from efforts to apply the 2009 amendments of the BIA and CCAA, such as the issues surrounding critical suppliers. However, the courts have also been called upon to resolve the competing interests of, among other things, secured creditors, economic and non-economic stakeholders including environmental regulators, employee benefit providers, lien claimants, and what has been termed as "vulture creditors".

1. CCAA Critical Suppliers: Should Critical Suppliers be unwilling DIP Lenders?

With the 2009 amendments came s. 11.4 which provides a mechanism whereby a debtor company under the CCAA can, seek a court order to compel "critical suppliers", that being ones who provide goods or services critical to the operations of the debtor company, to continue to supply notwithstanding previous defaults in the supply agreement or lack of consent of the supplier, on such terms as the court considers appropriate, including giving the supplier a charge over the debtor's company's property, in priority to secured creditors.

The ability of the Court to order continued supply on such terms it deems appropriate assists the restructuring company to manage its financial resources, including the need for DIP financing as s.11.01 of the Act otherwise provides that suppliers do not have to advance goods and services on credit, but can demand cash on delivery.

However, the BC Supreme Court has recently said the financial considerations, specifically that the debtor company has the ability to pay on credit, is not a determining factor in making a critical supplier order.

Catalyst Paper

In *Catalyst Paper*, the restructuring had originally been sought under the *Canada Business Corporations Act*¹⁹ ("CBCA"). Consequently, the initial CBCA order contained a standard term requiring suppliers to continue to supply goods and services, and to extend credit, in accordance with the existing agreements in place with the debtor company, but no term requiring cash on delivery payment terms, as would have been required under s. 11.01 of the CCAA, upon Catalyst advising the court that they would continue to pay their suppliers in the ordinary course.

¹⁹ R.S.C. 1985, c. C-44

The CBCA reorganization failed, and Catalyst filed for CCAA protection, with the Initial Order providing for the continuation of supply on the usual and standard term in the model initial order, namely that they continue to supply, however on the basis that they could demand immediate payment on delivery for post filing supplies.

Three days after the pronouncement of the Initial Order, Catalyst brought an application on notice to its secured creditors, as required, for a declaration that 16 of their suppliers were “critical suppliers” and therefore obligated to provide their goods and services in accordance with the agreements in place, with no credit terms.

While there was little doubt that the suppliers were critical to the ongoing operations of Catalyst, the suppliers argued that, given the stay language in the Initial Order which precluded them from terminating their agreement, there was no need for the declaration that they be critical suppliers. Further, to compel them to continue to supply on credit, without evidence that the credit, as opposed to the goods or services being supplied, was necessary, disregarded the purpose of s. 11.01. They argued that the intention of the legislature in enacting s. 11.04 was to provide a mechanism to compel a person to deal with the debtor company against its will, when there was no other alternative.

In this case, as the suppliers were continuing to supply, and there was no evidence that credit terms could not be met by the company through its DIP financing, there was an alternative: the status quo as already provided in the Initial Order and borrowing rights. By not using available DIP financing and compelling the suppliers to supply on credit, the court was, in essence, compelling the suppliers to extend that credit themselves, unwillingly and without any of the benefits of being a creditor such as lending fees which they negotiate based on the risks of dealing with a distressed debtor. In addition, they had no ability to determine if the charge on the property was of any value.

In response, Catalyst argued that the undisputed fact that the suppliers were critical and that the company could not meet cash flow requirements thus requiring DIP financing was sufficient to bring itself within s. 11.04, particularly where the total credit that the Critical Suppliers were advancing was approximately \$14,000,000.

The Court agreed with Catalyst, noting that the Monitor had agreed with the position of the Catalyst. Accordingly, the suppliers were required to continue to supply goods and services on credit. To address the argument that the suppliers were now creditors, the monitor was directed to develop reasonable credit terms to apply to them, and interest was set at the same rate as the DIP facility, plus 2% per annum. To address the concern that the charge may be inadequate, the court ordered that the amount secured be 130% of the post filing indebtedness.

Further, given the comments of Catalyst, and its cash flow forecasts, indicating that there was an anticipated improvement in the short term, the Court granted liberty for the Critical Suppliers to apply to have the order set aside, with the onus being on Catalyst to show that the Critical Supplier Order remained a necessity.

Approximately 6 weeks later, 5 of the Critical Suppliers brought an application to terminate the Order as against them, arguing that there was no sufficient liquidity to pay out the Critical Supplier Charge and to pay them on cash on delivery basis, in accordance with s. 11.01, again raising the argument that they were conscripted as “involuntary DIP lenders”.

Ultimately an agreement was reached whereby a trust fund was established, to be administered by the Monitor, such that the court did not need to further consider the issue further, specifically whether or not the debtor company must show that DIP financing is not otherwise available to provide sufficient cash flow to

meet cash on delivery supply terms, rather than force an unwilling party to participate in the financial risk of the restructuring process.

This case is illustrative of the court's willingness to foist not only the loss of pre-filing unpaid accounts on creditors, but also the financial risk of the restructuring process itself by compelling them to extend credit. In this case the court attempted to address the issues that arose with the suppliers now being unwilling lenders by having terms negotiated by the Monitor, and interest in line with the DIP facility.

2. Competing DIP Lenders – whose prejudice matters?

Great Basin Gold Ltd. (Re)²⁰

As stated above, in addition to seeking the addition of various US Subsidiaries to the proceedings, at a comeback hearing on notice to other key stakeholders, an ad hoc group of GBGL's senior unsecured debentureholders (the "Ad Hoc Group"), objected to the approval of the DIP financing, and sought to substitute it with their own DIP financing proposal. The Ad Hoc Group had objected to the requirement under the original DIP financing that one of its US subsidiaries ("GBG Inc.") was to provide a secured guarantee over its assets (the "GBG Inc. Guarantee") of the existing South African ("Burnstone") subsidiaries' obligations and that this guarantee could be called upon in the event that the proceeds derived from the sale or restructuring of the Burnstone subsidiaries were insufficient to pay out the existing Burnstone obligations. The Ad Hoc Group also objected on the grounds that the current DIP came with the condition that a Burnstone subsidiary was required to enter into an advisory agreement with the DIP lenders, as advisers, under which the DIP lenders would earn an advisory fee upon the sale of the Burnstone assets (the "Advisory Fee"). The Ad Hoc Group argued that the Advisory Fee was a disguised interest expense that, when taken together with the other interest and fees payable to the DIP lenders, constituted a criminal rate of interest contrary to the Criminal Code.

The Ad Hoc Group's DIP proposal did not require a GBG Inc. Guarantee or an advisory relationship and payment of related fees.

The Court considered the factors in section 11.2(4) of the CCAA governing approval of DIP financing and held that they should be applied in contested DIP circumstances to decide who should be the DIP lender and the terms on which the DIP financing should be provided. The factors the Court felt were most important to consider in this instance were which DIP proposal would most likely enhance the prospects of a viable compromise or arrangement,²¹ whether any creditor would be materially prejudiced as a result of the security or charge,²² and the opinion of the monitor.²³

The Court acknowledged that the statutory test required it to consider whether any creditor would be materially prejudiced as a result of the DIP charge. While the Court was sympathetic to the Ad Hoc Group, the potential prejudice it faced as a result of the GBG Inc. Guarantee was not one specifically targeted to it

²⁰ *Supra*

²¹ CCAA, s. 11.2(4)(d).

²² CCAA, s. 11.2(4)(f).

²³ CCAA, c. 11.2(4)(g).

but was rather, a prejudice that would be suffered by other stakeholders. The Court stated that this “prejudice” had to be weighed against the benefits of obtaining DIP financing.

In affirming the initial DIP financing, the Court found that the prejudice to the Ad Hoc Group as a result of the GBG Inc. Guarantee was speculative, as the GBG Inc. Guarantee would not be called upon in a situation where the Burnstone assets were sufficient to pay out the existing Burnstone lenders. GBGL was in urgent need of funds and both GBGL’s board of directors and the Monitor recommended the original DIP approval be affirmed. The Court wasn’t satisfied that the Ad Hoc Group’s proposed DIP financing would result in funding in the time-frame required. In that regard, the Court found that the original DIP lenders’ proposal was the only viable financing option and the risks of not obtaining that financing outweighed the potential prejudices.

3. Pension Benefit Providers: To pay or not to pay - who gets the benefit of “wages” protection under WEPPA

In *Ted LeRoy Trucking Ltd. v. Century Services Inc.*,²⁴ the British Columbia Supreme Court held that, among other forms of compensation, contributions on behalf of employees to third party benefit providers have the priority given to “wages” and “compensation” under the BIA. As part of its wage package, Ted LeRoy agreed to remit contributions for benefits including life and disability insurance, provincial Medical Services Plan premiums, extended health care and dental coverage. The benefits were provided by union health and welfare and long term disability plans, as well as Pacific Blue Cross. Following on the heels of the Court’s decision, the Trustee in Bankruptcy, and Receiver, of Ted Leroy Trucking Ltd. requested that Third Party Benefit Providers file proofs of claims under the BIA.

Her Majesty the Queen, in Right of the Province of BC (the “Crown”) subsequently sought to expunge the proofs of claim filed by various Third Party Benefit Providers such as the Trustees of the employee’s Health and Welfare Plans, Pacific Blue Cross and the Unions representing the employees.

Ted LeRoy, BCSC

The B.C. Supreme Court reviewed the previous Ted LeRoy Trucking decision (which was upheld by the British Columbia Court of Appeal) and held that the issues presently before the Court had already been decided in those earlier decisions. Specifically, the Court noted the Court of Appeal’s finding that “wages” for purposes of s. 81.3 of the BIA extends to payments made by an employer to third parties pursuant to a contract of employment (i.e., money that is not payable directly to an employee). Whether the payment was made by an assignment or direction to the third party, the Court viewed it as “a transfer of the employee’s money” for the benefit of the employee, not the third party, and therefore entitled to protection under the BIA. As a result, the Court upheld the decision of the Trustee, concluding that the amounts owed to the benefit providers would qualify as “wages” for purposes of s. 81.3 of the BIA, and thus be entitled to the protection of a secured creditor.

The Crown had also sought to expunge the proofs of claim on the basis that they were not filed by the employees. The BCSC rejected the argument on the basis of section 126(2) of the BIA which provides that proofs of claim for wages of workers may be made by “the bankrupt may be made in one proof by the bankrupt, by someone on the bankrupt’s behalf, by a representative of a federal or provincial ministry responsible for labour matters, by a representative of a union representing workers and others employed by

²⁴ 2009 BCSC 41, aff’d 2010 BCCA 223, leave to appeal to SCC dismissed [2010] S.C.C.A. No. 259.

the bankrupt or by a court-appointed representative...”. While recognizing that that list did not include Third Party Benefit providers, the BCSC held that proofs of claim need not be filed by employees, but can also be filed on behalf of employees and found that such a technical fault should not defeat an otherwise legitimate claim. Therefore, the BCSC designated the Third Party Benefit Providers as “court-appointed representatives” so that they could fall squarely with the section.

Finally, the Crown argued that there was no debt owing to employees, that the benefits were provided by the Third Party Benefit Providers, and thus nothing was owed to the employees. The court rejected this argument as well, and confirmed that the “debt” owing to the employees is the amount that Ted LeRoy failed to remit to the Third Party Benefit Providers.

The Crown appealed.

Ted LeRoy, BCCA

In allowing the Crown’s appeal, the Court drew a distinction between employees not receiving their health benefits from an insurance provider (which would enjoy super-priority status pursuant to section 81.3 of the BIA) and an insurance provider who provided the health benefits but did not receive payment for premiums owing under the insurance policy (which the BCCA held was simply an unsecured claim against the bankrupt’s estate). As such, the BCCA confirmed that the only unpaid benefit contributions that are subject to the super priority provided under section 81.3 of the BIA are those that are owed to employees at the time of the bankruptcy. In this case, while benefit contributions were owed to the benefit providers, benefits were provided to the employees. As a result, nothing was owed to the employees and the benefit providers’ claims for the outstanding amounts rank with all other unsecured debts of the bankrupt.

It should be noted that while holding that the unpaid amounts from an employer to third parties for benefits pursuant to a contract of employment would not have super priority if the employee actually received the benefits, the BCCA’s decision could allow for unpaid benefits to have super priority protection if the employees had not received the promised benefits at the time of the bankruptcy, and then made a claim for the contributions. However, the benefit providers would have no claim at all in such a situation, as they did not provide the benefits.

4. Creditors vs. Creditors: “Vulture” Creditor Groups

The focus on a restructuring, as it pertains to creditors, is generally on the debtor company’s equitable treatment of them. However, in a unique turn of events, in *Blackburn Developments Ltd.* the court was put to the task of focusing on the treatment of creditors not by the debtor, but by a “voluntary” creditor, willingly entering into the restructuring by buying the debts of creditors and stepping into their collective shoes and, in the process, potentially becoming a majority creditor.

Blackburn Developments Ltd.²⁵

Blackburn Developments Ltd. (“Blackburn”) was the owner of a golf course and development lands, with a complicated debt structure given that there were a number of different legal titles, each of which had a different set of mortgagees with the majority in number of secured creditors being “out of the money” in

²⁵ 2011 BCSC 167.

terms of the value of the assets, those being the development land itself and the company's significant tax attributes which were available only with a Plan of Arrangement, likely lost on a bankruptcy.

Because of the significant level of discourse and distrust of the secured creditors, but potential gain if the tax attributes could be preserved, the Court ordered a two track process whereby Blackburn could propose a restructuring plan capitalizing from the tax attributes, while the Monitor marketed its assets so that if Blackburn was unable to restructure, the creditors' realization would not be delayed. The court recognized that this two tracked process was ultimately flawed, as the nature of the assets, particularly the tax attributes, precluded a simple "asset sale", as to capitalize on the tax attributes, a restructuring would ultimately have to occur with the purchaser becoming the shareholder of the Blackburn.

Ultimately the Monitor was able to negotiate a restructuring term sheet by which a company, Pinnacle RTS was willing to provide sufficient funds to pay the amounts of the secured creditors, to the extent they were "in the money", with funds to unsecureds, through a corporate restructuring resulting in Pinnacle becoming the sole shareholder. Upon the resignation of the Blackburn Creditors, the court made an order allowing the Monitor to execute the Pinnacle term sheet and bring the plan of arrangement based upon it to a meeting of creditors for its approval. It was made clear by the court that it was not in any way restricting the rights of creditors to vote against the Pinnacle plan.

However, Blackburn had also been pursuing a financial and corporate restructuring with a company called Streetwise Capital Partners Inc., a private investment firm run by investors dedicated to profiting from distressed companies and self-described as a "Vulture Fund". To garner support for a restructuring with Streetwise, Blackburn encouraged its creditors to assign their unsecured debt to Streetwise for 2 cents on the dollar. In this respect, a Claims Process Order had been made which included the right of creditors to assign their claims, with the assignee then being entitled to vote their claim. Blackburn had in fact sent an email to its creditors which the Monitor said contained misleading and inaccurate information that may well have misled creditors into assigning their claims.

Through the debt purchasers, Streetwise was able to acquire a majority vote of the unsecured debt, effectively giving them control of the restructuring.

Streetwise proposed a transaction to the Monitor pursuant to which Streetwise would become the sole shareholder of Blackburn and acquire its tax attributes through a restructuring that required a plan of arrangement. Streetwise proposed a capital contribution, payment of a portion of the restructuring costs and payment of \$1,250,000 as a fund to make a distribution to unsecured creditors.

The principal difference between the Pinnacle and Streetwise proposals was that the Pinnacle proposal called for Blackburn to retain its real estate holdings and provided sufficient capital to satisfy senior secured claims while the Streetwise proposal called for a disposition of those real estate assets, except for the golf course.

At the meeting of the creditors to vote upon the Pinnacle proposal, Streetwise voted down the plan and it was defeated. However, the Monitor (with support from Pinnacle and the largest and first mortgagee), sought to have the votes disallowed. The Monitor made a distinction between the right to vote a claim and a right to receive a dividend, arguing that the court had the jurisdiction to disallow votes, but not the right to a receive a dividend on a proven claim.

With respect to the vote, the argument raised by the Monitor was that Streetwise was voting the acquired claims for an improper purpose, namely as part of its larger scheme to frustrate the Pinnacle Plan so that it would acquire the tax attributes itself. Accordingly, the court had the jurisdiction to disallow the vote.

The Court noted that it did not matter why Streetwise became involved in the process, only what its motivation was in casting its vote, and that the court would have to be satisfied that “there was conduct amounting to an abuse of process or other tortious or near tortious character and that that conduct has resulted in a substantial injustice” before the court could exercise its discretion to disallow a vote of a creditor. The Monitor suggested that the allegedly misleading email went to that issue. The Court accepted the company’s evidence that he believed at the time that the Streetwise deal was the best deal for the creditors. In other words, the statements made were true “at the time”.

The Monitor also raised concern about the use of “Vulture Funds” in Canadian restructurings, despite that it is a relatively common occurrence in the US, and submitted that they should be precluded in CCAA proceedings. The Court found that there was no compelling policy reason why a sweeping prohibition ought to have been made. Regardless, the court noted that that was an issue for Parliament to resolve, not the courts.

Accordingly, the court refused to disallow the votes of Streetwise, and the plan with Pinnacle was voted down.

5. Builders’ Lien Claimants: Priority over Practicality?

The standard forms of Model Initial Orders and Orders appointing Receivers generally provide for super-priority for borrowing charges and charges for professional fees of the court officers. As restructuring over single purpose real estate developments began growing, we saw the courts tightening the availability of that super-priority where secured creditors were not given notice and/or were not in agreement with having their security primed as the issue with that was illustrated in these cases, given that there was no real “plan” per se, other than to complete and sell: a liquidating plan.

As a result, real estate developers are generally unable to obtain CCAA protection without creditor consent, and what is likely their own further advance of funds to complete the project. There are many reasons why a secured creditor would support a CCAA, particularly if there are significant presales to be preserved because of the requirements of the *Real Estate Development Marketing Act*.

In the last year, the BC Court of Appeal has provided a further reason by finding that there is no inherent jurisdiction to grant priority to a Receiver’s Borrowing Charge over a claim of lien under the Builder’s Lien Act, a jurisdiction that only exists under the CCAA.

Bank of Montreal v. Peri-Formwork Systems Inc.²⁶

The Bank of Montreal was the secured lender to Pointe of View Developments Inc. (“POV”), among others, the developers of a five phase residential land development project in Squamish. The Bank has provided an original mortgage, which was registered in the principal amount of \$37,968,650 (the “Original Mortgage”).

POV fell into default under the Mortgage and, in June 2009, demand was made which was immediately followed by an application by POV under the CCAA for an Initial Order.

²⁶ 2012 BCCA 4, leave to SCC dismissed

At that time, a number of unpaid contractors and sub-contractors, including Peri-Formwork Systems Inc. (“Peri Form”) had registered liens against the project.

The Bank was in agreement with the granting of the Initial Order, with only a small initial \$2M DIP for the purpose of having the Monitor complete a cost to complete report and determine if a build-out was warranted. The Cost to Complete suggested that an “as is” sale at that time would result in a significant loss to the Bank, and no payment whatsoever to the lien claimants. A build-out, it was anticipated, would likely still result in a loss to the Bank on its mortgage, but much less. In short, it seemed clear that regardless of whether there was an immediate sale of the property as is, or a build out and sale, the lien claimants were not likely to recover any amount under their lien.

Ultimately, a DIP facility of \$21M was approved to complete construction and the Bank granted a super priority over all claims, including lien claims. A set of the lien claimants who had opposed the order appealed that decision, but let the appeal lapse.

Subsequently, POV failed to comply with the terms of the DIP facility (a fact that is disputed by POV and is the subject of any outstanding reasons to be issued on the principals’ guarantees), which resulted in the stay of proceedings expiring and a Receiver being appointed by the Bank in the CCAA proceedings, with the Bank obtaining an Order that the Receiver be authorized to borrow the \$21M to complete construction, with an Order being made that the Receiver’s Borrowing Charge have priority over all claims, including the lien claims. The application for priority was brought by the Bank based upon three alternative bases: Inherent jurisdiction under the CCAA, under s. 32(5) of the *Builder’s Lien Act*, which allows “further advances” under a mortgage to rank before a lien claim where it is necessary for the improvement and finally, that it could instead make an order under s. 24 of the *Builder’s Lien Act* discharging the liens for security, which in this case would be nominal (\$1) as there was clearly no value to their lien on the asset as of that date.

The court preferred to grant the priority on the basis of s. 32(5) of the *Builders Lien Act*. The lien claimants filed an appeal of that order. They did not, however, seek a stay.

The Bank then also commenced separate foreclosure proceedings, naming the lien claimants as Respondents. Aside from the Bank’s objective of seeking judgment for its debts (which it could not do in the CCAA proceedings), the Bank also, at that time as the new CCAA amendments had not yet been enacted, required the use of the foreclosure proceedings to obtain vesting orders that would clear the liens. In particular, the Land Title Office would only vest from title named respondents and those who filed after a certificate of pending litigation filed *in a foreclosure proceeding*.²⁷ For clarity, the Bank had an order pronounced in the Foreclosure Proceedings recognizing and adopting the order appointing the Receiver in the CCAA.

The two actions then proceeded in tandem, with the construction ultimately being completed, and well over a hundred of the units in the development with the sales proceeds being paid out in accordance with the order granting the Borrowing Charge priority.

At the appeal, the lien claimants argued that the court had no inherent jurisdiction to grant priority over their liens, and that s. 32(5) could not apply because the Mortgage was already at its limit and no “further advances” could be made under it. Instead this borrowing was a new loan altogether, and to a new borrower (the Receiver) and therefore could not be considered under that section.

²⁷ Note: The Land Title Office will now accept a vesting order that specifically references section 36(6) of the CCAA without each chargeholder being named as a party to a proceeding.

The Bank and the Receiver both argued that that was an overly restrictive interpretation of that provision of the *Builders' Lien Act*, and the intention of parliament in enacting it, which was to not limit the availability of credit in distressed situations and effectively frustrate a completion that would benefit the creditors. Regardless, there were two alternative bases for getting the same result, the inherent jurisdiction of the court, or discharging the lien altogether for nominal security given that there was no value to them at the time given the lack of equity in the project.

Nonetheless, the Court of Appeal took the position that on a plain reading, the word “further advance” connects the advance to something that already exists, and that this was a new loan, particularly when read in conjunction with other provisions in the act relating to mortgages.

As to the alternative submissions, the Court found that there was no inherent jurisdiction for the court to order priority to a builder’s lien, finding that the CCAA had effectively come to an end, and that it was clear they were “doomed to failure”. As the court had no inherent jurisdiction under the terminated CCAA, there was no jurisdiction, the court found, to subordinate the lien’s priority as exists under the *Builders' Lien Act*.

Although the reasons for judgment do not clearly set out the reasoning, the court, in passing, referred to its previous 1975 decision of the Court of Appeal, *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.*, which found that because the *Builders Lien Act* states that a lien has priority over a “Receiving Order”, it has priority over an Order appointing a Receiver. The Bank had asked the Court to overrule its prior decision (and in fact sought a 5 member panel for that purpose) on the basis that a “Receiving Order” is not an order appointing a receiver, rather it is a statutory term under the BIA meaning an order assigning an insolvent party into bankruptcy. Despite the request for the 5 member panel, the Court of Appeal merely said that “this was not pressed on appeal and need not be considered further”.

Accordingly, the Court of Appeal ordered that the liens’ priority be “restored” to its original priority.

Mission Creek Mortgage Ltd. v. New Recreations Ltd.²⁸

Not surprisingly, counsel for lien claimants sought to capitalize on *Peri Formworks* decision and apply the Court’s reasoning to preserve lien claimants’ priority in the CCAA context.

In *Mission Creek*, various lien claimants had liens registered after Mission Creek’s mortgage. In 2010, in an order pronounced in the CCAA proceedings, the liens were cancelled pursuant to s. 24 of the *Builders Lien Act*, with security for the liens being posted, but paid from proceeds of a DIP facility, pending a determination as to the validity of the claims (the “Security Fund”), with the DIP being secured against the Security Fund.

The CCAA failed and foreclosure proceedings were commenced, in which a sale of the property was completed resulting in a shortfall of \$4M to the mortgagee, Mission Creek.

The lien claimants took the position that they had priority to the Security Fund over the mortgagee, given that the DIP had been repaid. The Lien claimants relied upon *Peri Formworks*, which the court noted was the closest “on point” decision in respect of this matter.

²⁸ 2012 BCSC 1931

However, the Court specifically distinguished it as the advances in issue were not made under the authority of the CCAA, whereas in this case, when the court made the order creating the Security Fund, and the DIP financing orders, and when the petitioner advanced the monies the purposes and goals of the CCAA Proceeding were to attempt a successful reorganization of New Recreations Ltd. through the continued development of the West Beach Lands Development Project, not only for New Recreations Ltd., but for all of its creditors. With those objectives in mind, the order was to be interpreted to preserve the status quo and give priority over the DIP financing.

As to the prior mortgages, the same reasons supported the finding that the lien claims did not have priority over advances made under the original Mortgage before the lien claims.

The Court makes the interesting comment that the intention of the Security Fund was not to create a fund to protect only the interests of the Lien Claimants at the expense of all other creditors. In this respect, the Court specifically notes that given the lack of equity in the lands when the CCAA was commenced, the fact that the lien claims were registered against the title to the Lands behind fully advanced Mortgages, and having regard to the sale price for which the Lands were sold, it is not only likely but almost certain that, but for, the existence of the CCAA Proceedings the liens would have been readily removed from title to the Lands by the petitioner in foreclosure proceedings (presumably referencing the availability of s. 24 of the *Builder's Lien Act* to have them removed on posting security).

In addition, the Court notes the impracticality of a lender in those circumstances lending more funds to put its own existing priorities at even more risk, when, in contrast, the lien claimants were always at risk of extinguishment because of their “junior” priority position and that the CCAA and DIP financing were the only opportunity they had to obtain any funding whatsoever.

ISSUES AFFECTING COURT OFFICERS: **Roles, Rights and Obligations**

As the role of court officers is rapidly evolves, the competing roles they play often come into conflict.

When acting as a Receiver, the roles, rights and obligations are generally clearly defined in the Order by which the Receiver is appointed, with any conflict then generally arising as to the parties to whom the Receiver owes any duty obligation.

In contract, when acting as a Monitor it is not as clear. Historically, Monitors under the CCAA were appointed in a pure “watchdog” capacity in complex restructurings. However, expectations upon Monitors have now changed significantly, with the Monitor’s role being much greater, particularly where there is concern or distrust between the debtor and secured creditor (but a common goal of maintaining a CCAA proceeding), or an inherent conflict. In many cases the Monitor under the CCAA is acting in a role that is similar to that as a Receiver, however without the benefit of the usual Court Order setting out their authority.

Calls to have various restructuring professionals appointed to ensure the delineation of these roles appear to provide a solution, however, that solution is not always cost efficient in this very cost conscious market. Accordingly, officers are often stepping outside of their usual roles.

1. *Monitors as Vendors: Sales Processes in CCAAs*

As noted above, *Blackburn* was one example where a court ordered the Monitor to undertake a sales process given the level of distrust of the creditors that a restructuring could be done, and the court's effort to prevent any prejudice to the creditors in allowing the company time to do so, by ordering the "two track" process. While, ultimately, a restructuring in that case was necessary to realize upon tax attributes, it illustrated the court's own understanding that a CCAA is no longer entirely debtor driven, and given that, the role of the Monitor may be broader than originally intended.

Certainly, sales process orders are a common feature of the CCAA, with the use of s. 36(6) which allows vesting of clear title becoming much more prevalent.

However the trend of having the Monitor control that process is becoming more prevalent, particularly where an "insider", such as one of the principals or directors, or key customers, of the insolvent debtor wishes to participate and gain ownership of the assets or company in which they had a significant role. The involvement of an insider can have a very negative or cooling effect in a sales process, as bona fide third party purchasers may not wish to compete in a process which on its face appears to be biased in favour of that insider.

In such situations, the desire to have independent oversight by an officer of the court, and the implementation of appropriate protocols to keep information confidential, is one way to alleviate concern about the integrity of the process

The Aviawest Group / Pacific Shores

The Aviawest Group ("Aviawest") was a privately held corporate group which developed and managed vacation properties, mostly on Vancouver Island, known as the Pacific Shores. Aviawest sought protection under the CCAA in December, 2011, with Grant Thornton as Monitor. Shortly afterward, it became clear that a Plan of Arrangement was not likely to come to fruition.

Accordingly, principals of the company began to consider how they could acquire the assets of the company themselves through a liquidation process.

Given the presence of the insiders, and the inherent conflict created by that, the Court directed the Monitor to develop a tender process whereby interest for the sale, transfer, lease and assignments of the debtor's real estate and other business assets could be solicited. Despite that it was acknowledged by all parties that there was no real prospect of a plan being presented, all parties, including the secured creditors, agreed that the sales and liquidation process would yield the best recovery if the business continued and the principals were left in control of the day to day operations.

In short, the appointment of a Receiver was not cost effective in the circumstances. However, the Monitor continued to exercise its statutory functions, including frequent financial reviews to ensure that the management of the business was being undertaken in good faith. Of course, with the management hoping to "buy" the business, there was also an inherent incentive for them to keep it operating well so as to not risk losing any good will.

A Sales and Investment Solicitation Process ("SISP") was then put forward by the Monitor, and approved by the Court. The SISP authorized the Monitor to implement a marketing process, while ensuring that it did not undertake any management functions. In addition, a confidentiality protocol was established to ensure that

the insiders (and the debtors generally) would not have any knowledge of the competing bids, but allowing that information to be shared with the secured creditors.

Such a provision would, on its face, contradict the principle that a Monitor is required to treat all stakeholders equally, i.e. in the ordinary case, ought not give information to the Secured Creditors which it holds back from the debtors, it was evident that this departure was necessary to ensure the integrity of the sales process was upheld. The debtors also agreed that the integrity of the process was more important than the duty of the monitor to disclose information equally.

Notably, the SISP order also provided necessary protection for the Monitor by including a specific provision limiting their liability arising from the enhanced role.

*Azure Dynamics Corporation*²⁹

Similarly, in the CCAA restructuring of Azure Dynamics Corporation (“Azure”), the court authorized a DIP Facility (without priority being given to any secured creditors) following by an Order authorizing a SISP. The loan agreement relating to the DIP contained a term requiring Azure to disclose of certain information to the DIP Lender, including information in respect of the SISP.

Subsequently, the DIP Lender decided that it wished to participate in the sales process.

Following discussions amongst the main stakeholders, and specifically confirmation that very little information had been disclosed about the process to that point, and nothing sensitive, it was agreed by the debtors, monitor and secured creditors that they could make a bid.

However, in order to maintain the integrity of the process, a protocol was established to, firstly, relieve the Azure from any obligations to disclose information to it about the SISP process. In addition, it was agreed that the process would not be done through the Monitor as an intermediary, with no direct communication between the DIP Lender and Azure. The Court approved this arrangement.

While the DIP Lender did not ultimately make an offer, he was treated as potential bidder throughout and the protocol was kept in place to uphold the integrity of the process.

2. *Monitor’s Role in Claims Process – Who investigates and who pays?*

Claims Process Orders set out a clear process by which claims are to be considered and either rejected or approved. These are generally done independently, often by the debtors directly and merely overseen by the Monitor, sometimes by the Monitor itself, with the cost being borne from the plan proceeds, and thus the general body of creditors.

*Steels Industrial Products Ltd.*³⁰

Steels Industrial Products commenced CCAA proceedings in April, 2012, appointing Alvarez & Marsal as monitor. In addition, a CRO was appointed, since all the directors had resigned, to be assisted by Ernst &

²⁹ 2012 BCSC 781

³⁰ 2012 BCSC 1501

Young. The debtor determined quite quickly that a SISP should be implemented and, in the summer of 2012 a sale of the assets was approved and the proceeds paid out. In anticipation of the sale, a Claims Process Order was pronounced. By that point it was quite evident that a great deal of the claims would be made by related parties, which were detailed in the materials filed in support of the initial order, primarily as a result of shareholder loans.

The significant of related party claims was obvious. The amount available for distribution to unsecured creditors was between \$4 and \$4.2M. The total claims filed were for approximately \$31M. The related party claims were approximately \$19.2. 62% of the amount realized would therefore go to related parties if the claims are not disputed.

A group of unsecured creditors sought to retain Wolrige Mahon to assist them in reviewing and assessing the related party claims. Wolridge Mahon required access to the financial and accounting records going back to 2005 to do that, and estimated that its fees would be between \$25,000 and \$50,000. They sought an Order authorizing the review, and payment of the fees for it.

The court noted that, contrary to paragraph 21 of the Claims Process Order, neither the monitor, nor E&Y as advisor, had assisted the debtor, or Mr. Wood as CRO in reviewing these proofs of claim. Instead, they were reviewed only by Mr. Wood (which the monitor acknowledged was not the intention of the Claims Process Order). Mr. Wood's evidence showed that no meaningful dialogue had been undertaken with the disputing creditors to clarify the related party claims. The debtor, and Mr. Woods, just simply took the position that no further review of the claim was necessary.

The Court, although not asked to determine the validity of the claim, noted that there was little to back up the related party claims, with support for them being vague references to financial statements, with the submissions of the debtors being largely "trust the auditors" and "trust me".

The court noted that there are no set rules about the claims process, other than to ensure that the claims are determined in a manner that are fair and reasonable to all stakeholders.

The applicant creditors had justifiable concerns. In this case, the court had "no hesitation" in concluding that an independent review of the related party claims had to be undertaken, but at whose cost? The Monitor had advised the court that it was "staying above the fray" of the dispute between the parties, but that it would, if directed, undertake an independent review, in which case it would be cost borne by the estate. However, if it did so, it would be obliged to release the report to all interested parties.

Counsel for the applicant creditors sought to have Wolrige Mahon do the report, given that it is an adversarial matter and the Monitor ought to remain neutral. The court agreed and directed that Wolrige Mahon conduct the investigation and provide a report, that it be producible to the Monitor and any other unsecured creditor (other than the related parties) so they could determine if they wish to participate in the challenge of the claims, and granted a charge in favour of Wolrige Mahon for the costs of preparing the report.

3. Approval of Monitor's Reports – Not a Rubber Stamp

Commonly, when a Monitor files a report for a specific application it often obtains a procedural order "approving" the report, without a separate motion. The general view being that, in hearing the application, the court can approve the activities referenced in the report to the court for that purpose, such that actions could not then be complained about in later hearings.

For the most part, these types of orders are “rubber stamps”. Commentary in November 2012 made from the Manitoba Queen’s Bench has brought into question what exactly is being approved. While the comments were made in oral reasons, the Manitoba bench has considerable concern about the sentiment expressed within them.

In the CCAA of *Puratone Corporation*, the Monitor filed a pre-filing and first report and asked the court to approve them. The court declined to do so, on the basis that it was premature and “overly broad”. The monitor made a similar request again a month later, adding in its 2nd report. The court advising that it would consider the matter over the week. Upon considering the matter, the court took the view that, if the monitor was so inclined, it would be prudent to file a specific notice of its intention, rather than “piggy backing” another motion. In response to that comment from the court, the counsel noted that this was common practice developed in Ontario, it made sense to do it regularly while the issues are fresh and current, and that the monitor is the court’s officer and the court should favour a mechanism which encourages problems to be raised “sooner rather than later”.

The court ultimately agreed to approve the reports, but with significant qualifiers. In particular the court stated:

That does not mean that the monitor can necessarily bank on this approval for any challenge that might arise in the future. The report, in many respects, is general in nature, it describes what the monitor has done partly in generalities and partly with some specifics. If a problem arose with particular conduct which was only generally addressed in the report this approval may not withstand subsequent examination since the matter was not specifically described in the report.

I simply caution that the monitor should not necessarily feel that no subsequent challenge can be successfully made simply because I grant the order in the form which is being sought. It is not like a bar order that stops any further challenge. It is, however, an acknowledgment that the report has been read and there does not appear anything untoward about the activities of the monitor on its face. If a challenge is made in the future some explanation would presumably need to be given by the complaining party why the complaint was not raised shortly after the report was filed and served. However, even the absence of an explanation for the delay may not always prove fatal to the complaint.

In my view, the better practice, if a court officer wishes a clear mandate, is to specifically set out in the report those particular activities for which protection is sought and if ratification is requested, to set out the reasons why the judgments were made or the activities carried out. The monitor should also clearly delineate in the motion the specific activities for which it seeks approval. In that way, both the court and any third party who is reading the report might more readily understand why and what specifically is being approved and the order which ultimately issues would be more clear and specific and, therefore, less likely a future equivocation.

At the end of the day, I question which this is such a concern in a CCAA application which certainly does not have the time horizon of a prolonged receivership. Nonetheless, you have asked me for the order and I am prepared to grant it.