Court File No. 31-1855569

ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)
(COMMERCIAL LIST)

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF QUALITY MEAT PACKERS LIMITED

BOOK OF AUTHORITIES OF QUALITY MEAT PACKERS LIMITED
(Motion Returnable April 10, 2014)

April 9, 2014

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IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF QUALITY MEAT PACKERS LIMITED

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LIST OF AUTHORITIES

TAB 1

CanLII

Bank of Nova Scotia v. Freure Village of Clair Creek, 1996 CanLII 8258 (ON SC)

Date:	1996-05-31
Parallel citations:	40 CBR (3d) 274
URL:	http://canlii.ca/t/1wbtz
Citation:	Bank of Nova Scotia v. Freure Village of Clair Creek, 1996 CanLII 8258 (ON SC), <http://canlii.ca/t/1wbtz> retrieved on 2014-04-09
Print:	PDF Format
Noteup:	Search for decisions citing this decision
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OntarioSupreme Court
Bank of Nova Scotia v. Freure Village of Clair Creek
Date: 1996-05-31

Bank of Nova Scotia

and

Freure Village on Clair Creek et al

Ontario Court of Justice (General Division –Commercial List) Blair J.

Judgment – May 31, 1996.

John J. Chapman and John R. Varley, for Bank of Nova Scotia.

J. Gregory Murdoch, for Freure Group (all defendants).

John Lancaster, for Boehmers, a Division of St. Lawrence Cement.

Robb English, for Toronto-Dominion Bank.

William T. Houston, for Canada Trust.

May 31, 1996. Endorsement.

[1] BLAIR J.: – There are two companion motions here, namely:

(i) the within motion by the Bank for summary judgment on the covenants on mortgages granted by "Freure Management" and "Freure Village" to the Bank, which mortgages have been guaranteed by Freure Investments; and

(ii) the motion for appointment by the Court of a receiver-manager over five different properties which are the subject matter of the mortgages (four of which properties are apartment/townhouse complexes totalling 286 units and one of which is an as yet undeveloped property).

This endorsement pertains to both motions.

The Motion for Summary Judgment

[2] Three of the mortgages have matured and have not been repaid. The fourth has not yet matured but, along with the first three, is in default as a result of the failure to pay tax arrears. The total tax arrears outstanding are in excess of $850,000. The Bank is owed in excess of $13,200,000. There is no question that the mortgages are in default. Nor is it contested that the monies are presently due and owing. The Defendants argue, however, that the Bank had agreed to forebear or to stand-still for six months to a year in May, 1995 and therefore submit the monies were not due and owing at the time demand was made and proceedings commenced.

[3] There is simply no merit to this defence on the evidence and there is no issue with respect to it which survives the "good hard look at the evidence" which the authorities require the Court to take and which requires a trial for its disposition: see Rule 20.01 and Rule 20.04, *Pizza Pizza Ltd v. Gillespie* 1990 CanLII 4023 (ON SC), (1990), 75 O.R. (2d) 225 (Gen. Div.); *Irving Ungerman Ltd. v. Galanis* 1991 CanLII 7275 (ON CA), (1993) 4 O.R. (3d) 545 (C.A.).

[4] On his cross-examination, Mr. Freure admitted:

(i) that he knew the Bank had not entered into any agreement whereby it had waived its rights under its security or to enforce its security; and

(ii) that he realized the Bank was entitled to make demand, that the individual debtors in the Freure Group owed the money, that

they did not have the money to pay and the $13,200,000 indebtedness was "due and owing" (see cross-examination questions 46-54, 88-96, 233-243).

[5] As to the guarantees of Freure Investments, an argument was put forward that the Bank changed its position with regard to the accumulation of tax arrears without notice to the guarantor, and accordingly that a triable issues exists in that regard.

[6] No such triable issue exists. The guarantee provisions of the mortgage itself permit the Bank to negotiate changes in the security with the principal debtor. Moreover, the principal of the principal debtor and the principal of the guarantor – Mr. Freure – are the same. Finally, the evidence which is relied upon for the change in the Bank's position – an internal Bank memo from the local branch to the credit committee of the Bank in Toronto – is not proof of any such agreement with the debtor or change; it is merely a recitation of various position proposals and a recommendation to the credit committee, which was not followed.

[7] Accordingly, summary judgment is granted as sought in accordance with the draft judgment filed today and on which I have placed my fiat. The cost portion of the judgment will bear interest at the *Courts of Justice Act* rate.

Receiver/Manager

[8] The more difficult issue for determination is whether or not the Court should appoint a receiver/manager.

[9] It is conceded, in effect, that if the loans are in default and not saved from immediate payment by the alleged forbearance agreement – which they are, and are not, respectively – the Bank is entitled to move under its security and appoint a receiver-manager privately. Indeed this is the route which the Defendants – supported by the subsequent creditor on one of the properties (Boehmers, on the Glencairn property) – urge must be taken. The other major creditors, TD Bank and Canada Trust, who are owed approximately $20,000,000 between them, take no position on the motion.

[10] The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the*Courts of Justice Act*, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally *Third Generation Realty Ltd. v. Twigg*(1991) 6 C.P.C. (3d) 366 (Ont. Gen. Div.) at pages 372-374; *Confederation Trust Co. v. Dentbram Developments Ltd.* (1992), 9 C.P.C. (3d) 399 (Ont. Gen. Div.); *Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd.* (1984), 54 C.B.R. (N.S.) 18 (Sask. Q.B.) at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* reflex, (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]).

[11] The Defendants and the opposing creditor argue that the Bank can perfectly effectively exercise its private remedies and that the Court should not intervene by giving the extraordinary remedy of appointing a receiver

when it has not yet done so and there is no evidence its interest will not be well protected if it did. They also argue that a Court appointed receiver will be more costly than a privately appointed one, eroding their interests in the property.

[12] While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver – and even contemplates, as this one does, the secured creditor seeking a court appointed receiver – and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager.

[13] Here I am satisfied on balance it is just and convenient for the order sought to be made. The Defendants have been attempting to refinance the properties for 11/2 years without success, although a letter from Mutual Trust dated yesterday suggests (again) the possibility of a refinancing in the near future. The Bank and the debtors are deadlocked and I infer from the history and evidence that the Bank's attempts to enforce its security privately will only lead to more litigation. Indeed, the debtor's solicitors themselves refer to the prospect of "costly, protracted and unproductive" litigation in a letter dated March 21st of this year, should the Bank seek to pursue its remedies. More significantly, the parties cannot agree on the proper approach to be taken to marketing the properties which everyone agrees must be sold. Should it be on a unit by unit conversion condominium basis (as the debtor proposes) or on an en bloc basis as the Bank would prefer? A Court appointed receiver with a mandate to develop a marketing plan can resolve that impasse, subject to the Court's approval, whereas a privately appointed receiver in all likelihood could not, at least without further litigious skirmishing. In the end, I am satisfied the interests of the debtors themselves, along with those of the creditors (and the tenants, who will be caught in the middle) and the orderly disposition of the property are all better served by the appointment of the receiver-manager as requested.

[14] I am prepared, in the circumstances, however, to render the debtors one last chance to rescue the situation, if they can bring the potential Mutual Trust refinancing to fruition. I postpone the effectiveness of the order appointing Doane Raymond as receiver-manager for a period of three weeks from this date. If a refinancing arrangement which is satisfactory to the Bank and which is firm and concrete can be arranged by that time, I may be spoken to at a 9:30 appointment on Monday, June 24, 1996 with regard

to a further postponement. The order will relate back to today's date, if taken out.

[15] Should the Bank be advised to appoint Doane Raymond as a private receiver/manager under its mortgages in the interim, it may do so.

[16] Counsel may attend at an earlier 9:30 appointment if necessary to speak to the form of the order.

Motions granted.

TAB 2

2005 BCSC 351
British Columbia Master

Cantrail Coach Lines Ltd., Re

2005 CarswellBC 581, 2005 BCSC 351, [2005] B.C.W.L.D. 2533, 10 C.B.R. (5th) 164

IN THE MATTER OF THE PROPOSAL OF CANTRAIL COACH LINES LTD.

Master Groves

Heard: March 1, 2005
Judgment: March 1, 2005
Docket: Vancouver B050363

Counsel: H. Ferris for Petitioner
R. Finlay for Creditor (Volvo)

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Proposal — Time period to file — Extension of time

Petitioner company was tour bus operation with 25 years experience — Petitioner suffered serious drop-off in business in recent years — Petitioner missed payment to secured creditor in January 2005 — Petitioner filed notice of intention to make bankruptcy proposal — Petitioner brought application for extension of time in filing proposal — Secured creditor opposed application — Application granted — Extension of time would allow petitioner to make viable proposal — It was disingenuous for secured creditor to oppose proposal even before proposal was made — No evidence existed that extension would substantially prejudice secured creditor — Although circumstances of petitioner clearly prejudiced secured creditor to some degree, minor prejudice did not jeopardize their security.

Table of Authorities

Cases considered by *Master Groves*:

N.T.W. Management Group Ltd., Re (1993), 19 C.B.R. (3d) 162, 1993 CarswellOnt 208 (Ont. Bktcy.) —

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

APPLICATION for extension of time for filing bankruptcy proposal.

***Master Groves*:**

1 This is my decision on the matter of the proposal of Cantrail Coach Lines Ltd. who I will refer to as Cantrail.

2 Cantrail applies to the Court pursuant to s. 50.4(9) of the *Bankruptcy and Insolvency Act* for extension of time for filing a proposal.

3 VFS Canada Inc., who I will refer to as Volvo, a secured creditor of Cantrail, opposes the application and cross-applies for a termination of the proposal period and for an order to substitute the current trustee for a trustee of their choosing, though the substance of the substitution of the trustee application was not argued before me.

4 The facts are that Cantrail is a tour bus operation, a family-owned business, operating in the Lower Mainland of British Columbia, on Vancouver Island and into Washington State. They are a company of some 25 years standing. They have 26 employees and they have 22 buses in their operations and two headquarters, one in Delta, British Columbia and one in Port Alberni.

5 Over one half of their buses, 13 in total, are secured by the secured creditor Volvo. Cantrail appears to have been facing some financial difficulties recently which a number of companies in the travel industry are facing. It is certainly true in this part of the world that there has been a general decline in the travel industry related to what are now historical factors such as September 11th and SARS. More recently, and more significantly, the decline in the US dollar has made the travel industry generally and the travel industry specifically for Cantrail difficult. It appears to have caused a significant challenge for Cantrail to continue to operate profitably.

6 Cantrail was apparently able to meet its obligations up until the 16th of January 2005. On that date it missed a payment to its secured creditor Volvo. Demand was made by Volvo on the 20th of January 2005 and perhaps in response to that, but in any event, on the 1st of February, 2005 Cantrail issued a Notice of Intention to make a Proposal. There are, I am advised, 81

creditors of Cantrail who have been notified of this application and only Volvo objects.

7 I am satisfied that under the proposal thus far, and this is not contested in the affidavit, Cantrail has been able to meet its obligations to its employees as well as the obligations to statutory authorities. The suggestion in the materials is that Cantrail has been operating within the initial budget set by the trustee under the proposal.

8 As indicated, Cantrail is applying purport to s. 50.4(9) of the *Bankruptcy and Insolvency Act*. That reads and I will take out some of the language that is not necessary:

> The insolvent person may, before the expiration of a 30-day period mentioned in subsection (8), apply to the Court for an extension of that period and the Court may grant such extensions not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiration of the 30-day period mentioned 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.

9 Volvo applies under s. 50.4(11), the section relating to termination of proposals. That section reads, and again I am taking out some unnecessary language:

> The Court may, on application by a creditor, declare terminated before it actually expires the 30-day period mentioned 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 expiry of the period in question,
>
> (c) the insolvent person will not likely be able to make a proposal before the expiry 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.

Essentially, s. 50.4(11) is the mirror of s.50.4(9).

10 The test that Cantrail has to meet is essentially threefold. The first consideration is, are they acting in good faith? I would say on this point it was not argued nor does it appear to be disputed that they are. Secondly, would they likely make a viable proposal if the extension were granted. Thirdly, they must show no creditor would be materially prejudiced by the extension.

11 I am satisfied on reading the case law provided by counsel that in considering this type of application an objective standard must be applied. In other words, what would a reasonable person or creditor do in the circumstances. The case of *N.T.W. Management Group Ltd., Re*, [1993] O.J. No. 621 (Ont. Bktcy.), a decision of the Ontario Court of Justice, is authority for the proposition that the intent of the *Act* and these specific sections is rehabilitation, and that matters considered under these sections are to be judged on a rehabilitation basis rather than on a liquidation basis.

12 I am also satisfied that it would be important in considering the various applications before me to take a broad approach and look at a number of interested and potentially affected parties, including employees, unsecured creditors, as well as the secured creditor that is present before the Court.

13 Considering those factors and considering the remaining two steps of the test under s. 50.4(9), the second aspect of the test is would Cantrail likely be able to make a viable proposal. On this point Volvo says that it has lost faith in Cantrail and intends to vote against the proposal, any proposal, that would be generated.

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 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 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.

17 Here, as indicated, there are 81 creditors. There is no proposal as of yet. The trustee has set out in a lengthy affidavit and letter attached to it the possibility of a buyout of this operation, or a merger, and even the possibility of a refinancing. There is a possibility, though as of yet uncertain, that Volvo could be paid out in full. It is in my view somewhat disingenuous for the secured creditor to say that they would vote no to any proposal under any circumstances when on the facts here there is no evidence of bad faith and there is no determination at this stage as to what the proposal will actually be. It may be a proposal which gets them out of the picture completely by some form of payout — a proposal which if they voted against they would probably be viewed as irrational businesspeople.

18 In my view, the current attitude of the secured creditor is not determinative of this issue especially in light of the fact that the proposal has not yet been formulated.

19 I note the words in the legislation are "a viable proposal". According to the *Concise Oxford Dictionary* viable means

feasible. Viable also means practicable from an economic standpoint.

20 I am impressed thus far with the efforts of Cantrail and with the efforts of the trustee, Patty Wood, in trying to get this matter resolved. I am satisfied that the insolvent company, in my view, would likely be able to make a viable proposal, a proposal that is at least feasible, a proposal that would be practicable from an economic standpoint, if the extension being applied for were granted.

21 Under the third aspect of the test, I must be satisfied that no creditor would be materially prejudiced if extension being applied for were granted. That aspect of the test uses the term "materially prejudiced." There is a difference, in my view, between being prejudiced and being materially prejudiced. Again, consulting the *Concise Oxford Dictionary* materially means substantially or considerably. The creditor here must be substantially or considerably prejudiced if the extension being applied for is granted.

22 There is no doubt that Volvo has been prejudiced by the circumstances which have befallen Cantrail and befallen Volvo as a secured creditor. The *Act* in and of itself, and the possibility of a proposal, does create simple prejudice by staying the obligations of a person attempting to make a proposal during the period of time in which the proposal is being formulated. There is no evidence before me of anything other than normal or perhaps average prejudice to Volvo. There is no evidence of substantial prejudice or considerable prejudice. There is no evidence that in not being allowed to realize their security at this time that there is, for example reduced security or, for example, that there are buyers out there for these assets they wish to seize under their security who will not be around once the proposal has had its opportunity to succeed or fail, once it has been completely formulated and presented to creditors. There is no worse case scenario for Volvo if the proposal is allowed to run a reasonable course. In my view, there is no evidence on which Volvo can rely to show that it has been materially prejudiced.

23 That being said, I am satisfied that Cantrail has met the test of applying for an extension of time for filing a proposal and I am granting the extension for a further 45 days from the 3rd of March 2004.

24 It stands to reason from this analysis that the applications of Volvo are dismissed.

Application granted.

TAB 3

2004 BCSC 1258, 2004 CarswellBC 2339, 5 C.B.R. (5th) 23

2004 BCSC 1258
British Columbia Supreme Court

Cougar Metal Industries Inc., Re

2004 CarswellBC 2339, 2004 BCSC 1258, 5 C.B.R. (5th) 23

IN THE MATTER OF THE NOTICE OF INTENTION TO FILE A PROPOSAL OF COUGAR METAL INDUSTRIES INC.

Morrison J.

Heard: September 14, 2004
Judgment: September 14, 2004
Docket: Vancouver 11-247445

Counsel: John Grieve for Applicant
Christopher Ramsay for Cougar Metal Industries Inc.
Michael Howcroft for Wilkinson Steel

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Proposal — Time period to file — Termination of time period

Creditors supplied TNS Inc. with steel — TNS Inc. filed notice of bankruptcy — Creditors alleged that TNS Inc. made large orders of steel shortly before filing for bankruptcy — Creditors brought application to terminate period for making proposal — Application dismissed — Although ordering patterns of TNS Inc. were suspicious, proof of bad faith was not made out — Termination of time to make proposal was extraordinary remedy.

Table of Authorities

Statutes considered:

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

2004 BCSC 1258, 2004 CarswellBC 2339, 5 C.B.R. (5th) 23

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

Rules considered:

Rules of Court, 1990, B.C. Reg. 221/90
App. B, s. 2(2)(c) — referred to

APPLICATION by creditors to terminate time period for proposal.

***Morrison J.*:**

1 This is an application by Terra Nova Steel Incorporated, one of the creditors of Cougar Metal Industries Inc. that the time for Cougar Metal industries Inc. to make a proposal be terminated and that Cougar Metal Industries Inc. be deemed to have made an assignment as of today or the date this order is pronounced.

2 There are three creditors who have filed affidavit evidence before me. They are basically in the steel and metal distribution service and they have provided steel products to Cougar Metal. They are particularly concerned because, as Mr. Howcroft has said, there has been a significant spike in the ordering pattern by Cougar Metal in the month of August 2004 just prior to the execution and the filing of the notice under the *Bankruptcy Act*.

3 On August 27th, 2004, Cougar Metal executed a notice of intention to make a proposal. That was filed a few days later on September 2nd, 2004. The three creditors who are before me include Wilkinson Steel and Metals, a division of Premetalco Inc., known as Wilkinson Steel, and the affidavit from Carol Bouck, the manager of that company, indicates that the amount of product ordered by Cougar Metal from Wilkinson Steel in August 2004 was 500 percent more than was ordered by Cougar Metal during the previous calendar year, 2003.

4 Terra Nova Steel Inc., another creditor of Cougar Metal, has been supplying steel metal products since 1989 to Cougar Metal. The affidavit of Rhonda Caldwell, credit manager of Terra Nova, indicates that in August 2003, because of Cougar Metal defaulting on its account, they reduced Cougar Metal's credit line from $50,000 to $30,000 and at that point Cougar Metal essentially stopped purchasing from Terra Nova. However, they commenced again in February 2004 and by August 10th, 2004 or beginning on that date, August 10th, they placed some six orders which totalled $32,019.75.

5 The shipping dates were provided in the affidavit although the exact dates that the orders were placed were not. The same goes for the affidavit of Caroline Bouck, which affidavit indicates invoice dates and delivery dates all in August except for the last one, September 1st delivery date and September 2nd invoice date for the last amount but again there were no order dates given there.

6 The third creditor before me is Russel Metals Inc. and the credit manager Rinardo Ramey has deposed that as of August 2004 Cougar Metal had ordered Forsyth had delivered — sorry, Russel Metals I gather is known as A.J. Forsyth — and

Forsyth had delivered $67,737.98 in metal products.

7 All three creditors want the right to go on to the premises of Cougar Metal and retrieve as much of the goods as they can under the circumstances. They have thus made their application under s. 50.4(11) of the *Bankruptcy Act* which states that:

> Court may terminate the period for making proposal and that is that the court may on application by the trustee, the interim receiver, if any, appointed under s. 47.1 or a creditor declare terminated before its actual expiration the 30-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.

8 And that is the subsection under which the application is made.

9 I believe the 30-day period is now 11 days into that period and Mr. Ramsay, counsel for Cougar Metal, argues that there would be severe and serious prejudice to all if such a termination were to be allowed. That would mean Cougar Metal would go immediately into bankruptcy with serious and I suppose devastating consequences to the company itself, to the employees and to other creditors.

10 There is an affidavit filed by Mr. Huska, who is president of Cougar Metal Industries Inc., and he has in his affidavit dealt with the jobs and invoices for which Cougar Metal required the steel products from each of the three creditors who are before the court today.

11 The dates of certain bids have been provided by Mr. Huska. The dates of contracts that were awarded to Cougar Metal have been provided in his affidavit and the dates of the orders, which gives this court a more complete picture along with the invoice dates and delivery dates that have been provided in the affidavits on behalf of the applicants.

12 The standard of proof is that of a balance of probabilities and the argument is that there has been bad faith because of the timing of the execution of the notice and the sudden spike in the ordering pattern that has been referred to by the applicant. I am left with some suspicion, but I am not satisfied on a balance of probabilities that bad faith has occurred under the circumstances.

13 The application is not granted, accordingly. In saying that, I am aware that it is an unusual remedy and a serious one. The allegations of bad faith are not made frivolously but on all of the evidence before me I do not have the required satisfaction that I should have with regard to the test of balance of probabilities. Suspicion does not amount to what is required. The application is dismissed.

(Submissions)

14 THE COURT: I do not think this is a case for special costs. I think Scale 3 is appropriate and payable within seven days.

Application dismissed.

TAB 4

2001 CarswellOnt 2540
Ontario Superior Court of Justice [Commercial List]

MGI Packers Inc. v. Livestock Financial Protection Board

2001 CarswellOnt 2540, 27 C.B.R. (4th) 101

Re: MGI Packers Inc., Muller's Meats Limited, Maple Freezers Inc., Continental Trading Company Inc. and Specialty Commercial and Industrial Leasing Ltd. (Applicants) v. Livestock Financial Protection Board (Respondent)

Livestock Financial Protection Board (Applicant) v. MGI Packers Inc., Muller's Meats Limited, Maple Freezers Inc., Continental Trading Company Inc., Specialty Commercial and Industrial Leasing Ltd. and GMAC Commercial Credit Corporation (Respondents)

Lax J.

Heard: July 9 and 10, 2001
Judgment: July 11, 2001
Docket: 2517/01, 2570/01

Counsel: *A. Irvin Schein*, for Applicants/Respondents, MGI et al.
D. Bryan Holub, for Respondent/Applicant, Livestock Financial Protection Board
O. Pasparakis, for Respondent, GMAC Commercial Credit Corporation - Canada

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy --- Interim receiver — Appointment

Meat packaging company entered into security agreement with creditor — Company decided to engage in self-liquidation without appointment of receiver — Company retained financial services corporation to assist in collection of accounts receivable — Representative of secured creditor sent auditor to monitor liquidation — Liquidation was successful and debt to secured creditor was paid in full — Livestock Board, which acted as insurer for unpaid cattle farmers, asserted priority claim — Board brought application for declaration that there had been functional appointment of receiver — Company brought application for declaration that there had been no such appointment — Board's application dismissed — Company's application granted — Evidence did not support contention that liquidation process represented "pseudo-receivership" undertaken to defeat priority creditors — Financial services corporation never took possession of company's business, and had no signing authority or involvement with banking arrangements — Throughout process, company tried to locate buyer for remaining assets — Secured creditor's representative merely oversaw process, and his role as observer was inconsistent with receivership situation — Process

was conducted openly and Board was advised of existence of secured creditors — Overall course of conduct was more consistent with company's seeking to avoid receivership — Fact that representative of financial services corporation described himself as "soft receiver" at one meeting did not mean he was receiver within meaning of s. 243(2) of Bankruptcy and Insolvency Act — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 243(2).

Receivers --- General principles — Miscellaneous principles

Meat packaging company entered into security agreement with creditor — Company decided to engage in self-liquidation without appointment of receiver — Company retained financial services corporation to assist in collection of accounts receivable — Representative of secured creditor sent auditor to monitor liquidation — Liquidation was successful and debt to secured creditor was paid in full — Livestock Board, which acted as insurer for unpaid cattle farmers, asserted priority claim — Board brought application for declaration that there had been functional appointment of receiver — Company brought application for declaration that there had been no such appointment — Board's application dismissed — Company's application granted — Evidence did not support contention that liquidation process represented "pseudo-receivership" undertaken to defeat priority creditors — Financial services corporation never took possession of company's business, and had no signing authority or involvement with banking arrangements — Throughout process, company tried to locate buyer for remaining assets — Secured creditor's representative merely oversaw process, and his role as observer was inconsistent with receivership situation — Process was conducted openly and Board was advised of existence of secured creditors — Overall course of conduct was more consistent with company's seeking to avoid receivership — Fact that representative of financial services corporation described himself as "soft receiver" at one meeting did not mean he was receiver within meaning of s. 243(2) of Bankruptcy and Insolvency Act — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 243(2).

Table of Authorities

Statutes considered:

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

s. 81.2(1) [en. 1992, c. 27, s. 38(1)] — considered

s. 243(2) "receiver" [en. 1992, c. 27, s. 89(1)] — considered

APPLICATION by Board for declaration that there had been functional appointment of receiver to wind up company; APPLICATION by company for declaration that there had been no functional appointment of receiver.

Endorsement. *Lax J.*:

1 There are two Applications[1] before me, which essentially seek the same relief. The central issue in each is whether there was the appointment of a receiver within the meaning of section 243(2) of the *Bankruptcy and Insolvency Act*[2]. The Livestock Financial Protection Board, which acts as an insurer for unpaid cattle farmers, asserts priority over the secured creditor, GMAC, under section 81.2(1) of the *BIA*. In order to rely on the priority granted by this section, there must be a sale and delivery of products for use in relation to the purchaser's business within 15 days of the first day on which there was a

receiver, within the meaning of section 243(2).

2 The parties appeared before Mr. Justice Farley, who directed a trial of an issue to determine whether "Gemini/Lebow was functionally appointed as a receiver (as that term is defined in s.243(2) of the *BIA*) by GMAC and if so when should the Board reasonably understood that had happened".

3 The brief facts are these. MGI is in the meat processing business. In 1999, it entered into a security agreement with GMAC. In 2000, Henry Muller, who is the principal of each of the applicant companies, attempted to negotiate a sale of the properties and business to Value Holdings Inc., through its consultants, Gemini Integrated Financial Services Corp. ("Gemini"). When the transaction fell through at the end of October 2000, MGI decided to cease business and engage in a self-liquidation. It was anxious to avoid the appointment of a receiver. With GMAC's concurrence, it retained Gemini, in the person of Randy Lebow, to assist it in the collection of its accounts receivable.

4 A formal engagement letter was entered into between Gemini and MGI and from November 2, 2000, Mr. Lebow began to attend at the premises on a daily basis to assist in the collection efforts as well as in other matters. As well, GMAC sent Italo Fortino from its audit department to monitor the liquidation. The liquidation was successful and by February 2001, GMAC's loan was paid out. However, GMAC did not release its security, because the Board notified GMAC and MGI in February 2001 that it was asserting a priority claim. These Applications followed soon after.

5 It is the Board's position that on November 1, 2001, there was an "arrangement" made between GMAC and MGI, which was not formalized, but amounted to a receivership. It sought to paint a picture of a company with a "gun at its head", in which Gemini, acting as agent for GMAC was *de facto* receiver for GMAC.

6 A receiver is defined in section 242(3) of the *BIA* as a person who has been appointed to take, or has taken, possession or control, pursuant to a security agreement or a court order, of all or substantially all of the inventory, the accounts receivable, or the other property of the debtor.

7 There is no evidence that either Gemini or Lebow was appointed by GMAC under the MGI Loan Agreement, or, in any manner. Gemini was retained by MGI as a consultant. Neither is there evidence that either Gemini or Lebow took possession or had control of any part of MGI's business. Lebow did not have a key, a pass card to the premises or access to the computer system. He had no involvement with the banking arrangements. He had no signing authority. He made no settlements on behalf of the business. While it is true that Lebow assisted with operational issues beyond the collection of accounts, it was Mr. Muller and Mark Ishoy, the company's general manager, who made the business decisions. Throughout the wind-down, Mr. Muller was attempting to find alternate financing and/or a buyer for the remaining assets. This is inconsistent with Gemini being in possession or control.

8 There is no evidence that Mr. Fortino, who attended the business daily for about three weeks, did anything other than keep a watchful eye on the liquidation process. If Mr. Lebow's role was as receiver for GMAC, Mr. Fortino's presence is unexplained. Why would GMAC need Mr. Lebow if it had Mr. Fortino? Mr. Fortino's role as an observer is inconsistent with this being a receivership.

9 As soon as the liquidation began, MGI ceased ordering or taking delivery of cattle. Shortly after GMAC made formal demand on its loan on November 2, 2000, Mr. Muller met with representatives of the Board. He disclosed to them that demand on the loan had been made and that the proceeds of the business were subject to a first charge in favour of GMAC and a second charge in favour of another secured creditor. Mr. Lebow attended that meeting as did Tom Hall and James Wideman on behalf of the Board. This is consistent with an open process and inconsistent with a disguised receivership.

10 Although there is some controversy about statements attributed to Lebow in that meeting describing what was happening, the evidence of MGI is that the Board was told that this was not a receivership. If the Board was left in any doubt about this, I would have expected it to have immediately filed a proof of claim in order to comply with the 30-day time period required under s.81.2(1). It did not do this. The proof of claim was filed after a meeting that took place on February 5, 2001, where Mr. Lebow is alleged to have made statements that he was at MGI as "a soft receiver" and that GMAC was in control of the company's assets.

11 The only evidence that GMAC was in control of the company's assets arises from the banking arrangements. However, there is no evidence that the banking arrangements were any different in substance before or after November 2, 2000. Funding requests were submitted to GMAC both before and after this date. Much was made of the fact that the funding requests were considerably more detailed after November 2nd. It was submitted that this was done to satisfy GMAC. This is in fact true. It was the comptroller who prepared the funding requests and the details of the requests were included so that GMAC could be assured that its funds were being used in furtherance of the liquidation and in satisfaction of GMAC's demand for repayment of its loan. If this were a receivership, there would have been no need to satisfy GMAC on this score. This conduct is more consistent with the company seeking to avoid a receivership, rather than being in the midst of one.

12 After the February 5th meeting, the Board's solicitor prepared a memorandum. Significantly, the memorandum does not record the statements attributed to Mr. Lebow. It does record that at the meeting, Lebow advised that "he was not officially appointed as a Receiver under the security agreement and had no knowledge of past dealings prior to November of 2000 and had not reviewed any of the other assets of the corporation". It is evident from the memorandum that he neither believed, nor trusted Mr. Lebow. Nevertheless, this statement is consistent with all of the evidence, apart from the evidence of the participants at the meeting.

13 Each of the participants at the meeting went into the meeting believing that GMAC had appointed Lebow as receiver. I am inclined to think that this explains the solicitor's distrust of Mr. Lebow's assertion that he was not a receiver and also explains why the other participants recall Mr. Lebow describing his role and GMAC's role as they did. Although Mr. Lebow is a lawyer, he has no particular experience with bankruptcy and insolvency matters and was unaware of section 81.2(1) of the *BIA* until the Board's priority claim was received a few days after the meeting. Even if he believed that he was there as a "soft receiver" and said so at the meeting, this does not prove that he was a receiver within the meaning of section 243(2).

14 As soon as MGI ceased doing business, it triggered default under its security agreement with GMAC. GMAC could have appointed a receiver immediately and taken control of the business. Mr. Muller was anxious to avoid a receivership and its primary secured lender was prepared to co-operate. The liquidation was very successful and was achieved for a fee of $50,000. Within three months, $10 million of receivables had been collected and GMAC's loan was paid in full. This result turned out to be beneficial to both and may make it possible for other creditors to benefit as well.

15 There can, of course, be circumstances where a debtor and a secured creditor make an "arrangement" in order to disguise a receivership and that this is done for an improper purpose. The court must be vigilant to ensure that these kinds of

arrangements are not "pseudo-receiverships", which are undertaken to defeat claims of priority creditors. However, this is not such a case. I am satisfied that in this case, MGI's engagement of Gemini with the concurrence of GMAC was entirely appropriate and that Gemini was not a receiver within the meaning of section 243(2) of the *BIA*.

16 The application of MGI is granted with costs, which I fix at $25,000. The application of the Board is dismissed with costs payable to GMAC, fixed at $15,000.

Order accordingly.

Footnotes

[1] In Court File No. 2517/01, the applicants are MGI Packers Inc. et al. ("MGI") and the respondent is the Livestock Financial Protection Board ("the Board"). In Court File No. 2570/01, the applicant is the Board and the respondents are MGI and GMAC Commercial Credit Corporation ("GMAC").

[2] *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B.3, as amended ("BIA").

TAB 5

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
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

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.

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF QUALITY MEAT PACKERS LIMITED

Court File No. 31-1855569

ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)
(COMMERCIAL LIST)

BOOK OF AUTHORITIES OF QUALITY MEAT PACKERS LIMITED

(Motion Returnable April 10, 2014)

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