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The CCAA and Real Estate Development Companies

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The CCAA[2] is the most flexible Canadian statute under which a corporation can restructure its business. When compared against the BIA,[3] the CCAA looks like a blank canvass and lends itself well to invention and mutual compromise. The overarching goal of the CCAA is for the debtor corporation to formulate a plan of compromise or arrangement that is approved by the corporation's creditors or to effect a going concern sale, both of which are intended to provide greater value to the creditors than if the debtor corporation were liquidated under the BIA.

However, proceedings under the CCAA are expensive and typically involve priority charges over the property of the debtor corporation for professionals, directors and officers of the debtor corporation, and interim financing, which can have the effect of eroding creditors' realization.

Despite the flexibility of the CCAA, certain types of businesses may be less suitable for its application. Three recent decisions of the Ontario Superior Court of Justice (Commercial List), *Dondeb,*[4] *Edgeworth*[5] *and Hush Homes,*[6] involved real estate development companies seeking protection under the CCAA. These cases all shared similar facts: the debtor corporations were in the business of real estate development and investment and had several single-purpose subsidiary corporations, each of which owned a discrete piece of real estate. Each piece of real estate was encumbered by at least one mortgage and many were cross-collateralized. Mortgages accounted for the vast majority of the first-ranking secured indebtedness. The debtor corporations sought protection under the CCAA and certain of their respective lenders opposed the applications on the basis that it would be more advantageous and cost efficient for them to proceed with an orderly sales process under their respective mortgage security.

Dondeb

In *Dondeb*, the debtor corporations sought relief under the CCAA to enable a liquidation of their assets and property. DIP financing and a charge to secure it, as well an administrative charge to secure the fees and expenses of the professionals involved in the CCAA administration, were all sought. The application was opposed by various secured lenders who collectively held approximately 75% of the value of the secured indebtedness. The basis for the opposition was that: (i) the properties would be more appropriately sold under the mortgage security; (ii) the DIP financing and administration charges unnecessarily burdened the equity of the properties; (iii) the

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[1] Ian Aversa is a partner in the Financial Services Group and Jeremy Nemers is an associate in the Financial Services Group. The authors would like to thank Daniel Everall, a student-at-law at Aird & Berlis LLP, for his assistance in preparing this paper.
[2] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [CCAA].
[3] *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [BIA].
[4] *Re Dondeb Inc.,* 2012 ONSC 6087 [*Dondeb*].
[5] *Romspen Investment Corp. v. Edgeworth Properties, et. al.,* 10 November 2011, CV-11-9452-00CL, Receivership Order of the Honourable Justice Campbell (Ont. S.C.J. [Comm. List.]) and *Re Edgeworth Properties Inc., et. al.,* 10 November 2011, CV-11-9409-00CL, CCAA Order of the Honourable Justice Campbell (Ont. S.C.J. [Comm. List.]) [*Edgeworth*].
[6] *Re Hush Homes Inc.,* 2015 ONSC 370 [*Hush Homes*].

lenders had lost all faith in management and its ability to generate revenue from the real estate; and (iv) no plan would be realistically accepted by the lenders because there was no underlying business to restructure that would yield greater value for them than through enforcement of their own respective mortgage security.

In the result, the Court refused to grant the requested relief under the CCAA for the reason that a successful plan could not be presented that would receive creditor approval in any meaningful fashion. Instead, Justice Campbell issued a receivership order under the BIA which, in His Honour's view, would achieve an orderly liquidation of most of the properties and protect the revenue from the operating properties with the hope of some recovery of equity in those properties not "under water". Each property subject to the receivership was compartmentalized such that all of its revenues and expenses were allocated to that particular property. His Honour noted that using the CCAA for the express purpose of a liquidation must only be done with caution, particularly when the alternative of an overall less expensive receivership can accomplish the same goal.

Edgeworth

The facts in *Edgeworth* are functionally equivalent to *Dondeb*, except that in *Edgeworth*, only one of the underlying properties was fully developed and there were several thousand secured and unsecured creditors independent of the first-ranking mortgagees. The applicant corporations sought relief under the CCAA as a means to provide a single comprehensive forum to address all stakeholder claims. The mortgagees opposed the application on grounds similar to those in *Dondeb*, including a loss in faith of management, there being no viable business to restructure, and the erosion of equity due to the priority DIP financing and administration charges.

In the result, the Court issued two concurrent orders: one under the CCAA to provide a single and comprehensive forum for all stakeholders, and another receivership order under the BIA, which allowed for the appointment of a receiver over the various properties subject to mortgages. However, the outcome of the *Edgeworth* proceedings, which pre-dated the decision in *Dondeb*, may not have been as effective or efficient as initially envisioned and likely weighed in the Court's treatment of *Dondeb*.

Hush Homes

Most recently, in *Hush Homes*, the Court again considered an application for an initial order under the CCAA to restructure a developer with several single-purpose subsidiary corporations. The secured creditor with a first-ranking mortgage over one of the development sites, at the time still raw land not even zoned for the proposed housing use, opposed the order as it preferred to commence power of sale proceedings per its rights as mortgagee. Unlike *Dondeb* and *Edgeworth*, however, the debtors' proposed plan contained a repayment of the secured creditor's first-ranking mortgage.

The Honourable Justice Penny reviewed the case law surrounding development companies and the CCAA, noting that the priorities of security are often straightforward and, in the cases dealing with raw land, there may be no business activity being carried out. However, His Honour emphasized the discretionary nature of both an order appointing a receiver and an initial order under the CCAA, and further noted that there is no “generic” prohibition against a land development business obtaining protection under the CCAA.

Justice Penny did not see how the objecting creditor would be worse off under the CCAA than in a receivership process. His Honour found “on the unique facts of this case” that the prejudice to the objecting creditor would be roughly the same whether realization took place in a receivership or a CCAA context and, therefore, granted the relief sought under the CCAA.

Conclusion

Debtor companies with disparate real estate development and investment properties in different entities and encumbered by first-ranking mortgages from several lenders may have difficulty proposing a plan that is more advantageous than the remedies available to the mortgagees under their respective security. There is little incentive for these lenders with first-ranking security to agree to a plan that will likely involve the erosion of their security in favour of priority DIP financing and administration charges. If a debtor corporation is insolvent and not able to complete the development of its real estate properties without further funding, its mortgage lenders may be in a better position by asserting their respective mortgage remedies rather than permitting management to remain in control under the CCAA. Any proposed filing under the CCAA will need to take into account the potential prejudice to first-ranking mortgagees.

The CCAA and the Importance of Full and Frank Disclosure in *Ex Parte* Hearings

Ian Aversa and Jeremy Nemers
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CanaSea[8] provides us with a reminder of the importance of full and frank disclosure in the context of *ex parte* applications under the CCAA.[9] In this case, the Honourable Justice Penny of the Ontario Superior Court of Justice (Commercial List) took the unusual step of declaring the initial CCAA order to be *void ab initio* because the applicants failed to provide adequate disclosure at the *ex parte* hearing. His Honour found that the subsequently produced evidence did not support the assertions made by the applicants regarding their eligibility for CCAA protection, and was critical of their failure to meet their "high obligations of candour and disclosure on an *ex parte* application." Leave to appeal was denied by a single judge of the Court of Appeal for Ontario.[10]

This case involved a network of related companies in the oil and gas field that can be collectively referred to as the "**CanaSea Group**". CanaSea PetroGas Group Holdings Limited ("**Holdings**"), a Canadian holding company, owned 100% of the shares of two Singaporean subsidiaries. The Singaporean subsidiary at issue, CanaSea Oil and Gas Group Pte. Ltd. ("**COGG**"), owned 100% of the shares of CanaSea PetroGas Investment Inc. ("**CPII**"), a Canadian holding company, which itself owned 100% of the shares of CanaSea Oil and Gas Ltd. ("**COGL**"), a Saskatchewan corporation. COGL was the only operating entity in the CanaSea Group, and held the major assets of the CanaSea Group, including certain petroleum and natural gas licences.

At the *ex parte* hearing to obtain the initial order, the applicants provided what they purported to be unaudited financial statements and represented to the Court that the entities were eligible for CCAA protection because they: (i) had liabilities in excess of $5 million; (ii) were unable to meet their obligations as they came due; and (iii) had finances that were "inextricably intertwined" through intercompany advances. This last point was particularly important, as COGG – one of the Singaporean corporations – was the issuer of certain notes representing 49% of the CanaSea Group's overall outstanding debt. The applicants alleged that COGG's two Canadian subsidiaries, CPII and COGL, were "on the hook" for these notes due to the intercompany obligations.

Two creditors holding these notes issued by COGG subsequently brought a motion to remove COGG from the CCAA proceedings. Among other things, they argued that Ontario courts lacked the statutory jurisdiction to issue the initial order in respect of COGG. The moving creditor group wished instead to pursue its rights and remedies under the notes in Singapore, as per the terms of the notes.

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[7] Ian Aversa is a partner in the Financial Services Group and Jeremy Nemers is an associate in the Financial Services Group. The authors would like to thank Stephen Crawford, a student-at-law at Aird & Berlis LLP, for his assistance in preparing this paper.
[8] *Re CanaSea Petrogas Group Holdings Ltd.*, 2014 ONSC 6116 [*CanaSea*].
[9] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [CCAA].
[10] 2014 ONCA 824.

Upon the evidence produced by the creditors at the motion, most of which was obtained on the cross examination of the founder and director of the CanaSea Group, Justice Penny came to the conclusion that the initial order had been incorrectly issued. The evidentiary record only supported a finding that Holdings and the two Singaporean companies were insolvent and had liabilities in excess of $5 million – not CPII or COGL. There was no evidence of intercompany loan agreements, and CPII and COGL were not “on the hook” for COGG’s notes – the entities in the CanaSea Group were not “inextricably intertwined.” Further, the applicants had failed to disclose all financial statements prepared during the year before the application, as required under section 10(2)(c) of the CCAA; they had merely disclosed profit and loss statements and a general ledger, not the unaudited financial statements that had been prepared.

Overall, the applicants had failed to meet their “high obligations of candour and disclosure on an *ex parte* application,” and the ‘real’ debtors in the proceeding, the Singaporean entities, had very little connection to Canada. As such, Justice Penny found it appropriate to declare the initial order *void ab initio*. Parties bringing *ex parte* applications should be mindful of these obligations when considering what evidence should be presented to the court to justify the relief sought. Further, in the context of applications for CCAA protection, the eligibility criteria must be met; it is insufficient to merely assert a related group of companies without providing evidence of intercompany loan agreements or other intercompany obligations.

The Limited Scope of Investigative Receiverships

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In *Akagi*,[12] the Court of Appeal for Ontario (the "**Court of Appeal**") discussed so-called "*investigative receiverships*" and clarified the scope of powers granted where an investigative receiver is appointed to enforce judgment debts. In this case, the Court of Appeal set aside a series of receivership orders issued by the Ontario Superior Court of Justice (Commercial List) under section 101 of the CJA[13] for "*overreaching*".[14] The decision provides strong criticism of the casual manner in which the series of *ex parte* orders were sought and granted, and serves as a further reminder of the importance of making full and frank disclosure.

Background

The facts giving rise to this case stem from a tax programme, marketed and sold by Synergy Group (2000) Inc. ("**Synergy Group**") to, amongst other investors, Mr. Trent Akagi. After being reassessed by Canada Revenue Agency ("**CRA**") and realizing that the programme was a scam, Mr. Akagi sued for fraud and was successful in obtaining default judgment for $137,000 against Synergy Group and certain associated individuals.

Almost two months after default judgment was awarded, Mr. Akagi had taken no apparent steps to enforce the default judgment. Nevertheless, Mr. Akagi proceeded to apply for an *ex parte* order appointing J.P. Graci & Associates as receiver (in such capacity, the "**Receiver**") over all the assets, undertakings and property of Synergy Group and Integrated Business Concepts Inc. ("**IBC**").[15] IBC had not been named as a defendant in Mr. Akagi's initial claim against Synergy Group, but, together with Synergy Group, had been the subject of a CRA investigation.

In support of the *ex parte* application, Mr. Akagi relied on a three-page affidavit in which he characterized himself as a victim, as well as a judgment creditor, of Synergy Group and the other individuals named in the initial claim. Attached to this affidavit were three documents pertaining to the CRA investigation into the affairs of Synergy Group and IBC. Mr. Akagi failed to swear as to his belief in the truth of the contents of the attached documents, and he did not disclose that the CRA investigation had been terminated months before he brought the application. Still, on the basis of this affidavit, the application judge granted the receivership order pursuant to section 101 of the CJA, stating in a brief endorsement of being "*satisfied that the grounds for relief*

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[11] Ian Aversa is a partner in the Financial Services Group and Jeremy Nemers is an associate in the Financial Services Group. The authors would like to thank Amy Marcen-Gaudaur, a summer student at Aird & Berlis LLP, for her assistance in preparing this paper.
[12] *Akagi v. Synergy Group (2000) Inc.*, 2015 ONCA 368, 125 O.R. (3d) 401 [*Akagi*].
[13] *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended [CJA].
[14] *Akagi*, *supra* note 12 at para 59.
[15] *Ibid* at para 30.

sought have been made out".[16] This initial order was the first step in what the Court of Appeal referred to as a "*sprawling receivership*".[17]

A further series of *ex parte* orders then turned the proceedings into a wide-ranging investigative receivership of the interaction between Synergy Group and approximately 3,815 victim investors.[18] These further orders extended the Receiver's powers to reach 43 individuals and entities named in the CRA investigation, only two of which were judgment debtors of Mr. Akagi, and only three of which actually had a connection to his underlying fraud claim. The Court of Appeal noted that the reach of the orders granted was "*breathtakingly broad*" in that they:

- extended the Receiver's powers to apply to 43 individuals and entities;
- contained sweeping injunctive provisions enjoining all targets and operating on a worldwide scale;
- authorized the Receiver to register certificates of pending litigation against the target's property, which included those targets against which no action or application had been commenced to seek such relief; and
- granted a $500,000 borrowing charge against the frozen funds of the targeted entities to fund the Receiver's activities.[19]

None of these further orders was sought or obtained with a formal notice of motion, notice of application or factum, and the only evidence filed by the Receiver was one single report. The majority of correspondence between the Receiver and the application judge was undertaken via e-mail, with many attendances left unrecorded on the court docket. The various individuals and entities subjected to the receivership were not notified of such until after the final sweeping order was granted, at which point they applied to the application judge to have the orders set aside, which application was dismissed.[20]

Outcome

The Court of Appeal set aside the entire series of orders, noting that the receivership was intended from the very beginning to be "*an investigation of the affairs of those involved in the broad tax scheme (and of others even beyond that) on behalf of 3,800 non-party investors*,"[21] which purpose "*is beyond the scope of what could be justified in a single-creditor receivership involving an outstanding claim of, at most, perhaps $122,000*."[22] In so noting, the Court of Appeal reminded the insolvency bar that the purpose of a receiver in aid of execution under

[16] *Ibid*.
[17] *Ibid* at para 23.
[18] *Ibid* at paras 33-38.
[19] *Ibid* at para 43.
[20] *Ibid* at para 56.
[21] *Ibid* at para 103.
[22] *Ibid* at para 102.

section 101 of the CJA is to "*protect the interests of the claimant seeking the order where there is a real risk that its recovery would otherwise be in 'serious jeopardy'*."[23]

While it was therefore unnecessary to decide the appeal based on procedural irregularities, the Court of Appeal nonetheless emphasized that, had the matter not proceeded in such a relaxed manner, it would have been less likely to have gone astray. It was further cautioned that the practicality of the Commercial List's expedited processes must be measured against procedural safeguards meant to protect the interests of the parties, including the need to make full and frank disclosure on an *ex parte* order. Allowing processes to become overly casual resulted in the "*galloping nature of the receivership*" which otherwise might have been reined in.[24]

Nonetheless, the Court of Appeal confirmed that an investigative receivership, when conducted properly, can be both a useful and an appropriate tool:

> *Clearly, there are situations where the appointment of a receiver to investigate the affairs of a debtor or to review certain transactions – including even, in proper circumstances, the affairs of and transactions concerning related non-parties – will be a proper exercise of the court's "just and convenient" authority under s. 101 of the [CJA].*[25]

To assist as to when an investigative receivership would be useful and appropriate, the Court of Appeal provided the following guidance and operational parameters:

- the appointment of an investigative receiver must be necessary to alleviate the risk posed to the plaintiff's right to recovery;

- the primary objective of investigative receiverships is to gather information and "*ascertain the true state of affairs*" concerning the financial dealings and assets of a debtor or a debtor and a related network of individuals or corporations;

- the investigative receiver does not control the debtor's assets or business, leaving the debtor to carry on in a manner consistent with the preservation of its property; and

- the investigative receivership must be carefully tailored to what is required to assist in the recovery of the claimant's judgment while at the same time protecting the defendant's interests and to go no further than necessary to achieve these ends.[26]

Substantively, the decision is critical of both the Receiver and the application judge for allowing the receivership to proceed on such a misguided course. The orders granted were overreaching, in that they froze assets and property worldwide, and authorized the Receiver to determine whether wrongs were suffered by a group of unidentified non-parties, which parties were not represented in the proceedings.

[23] *Ibid* at para 101.
[24] *Ibid* at para 94.
[25] *Ibid* at para 66.
[26] *Ibid* at para 90.

Although not expressly discussed in the decision, a presumptive side effect of having a set of receivership orders set aside – including the initial order – is that both the receiver and its counsel would lose the benefit of the priority charge securing their fees over the debtor's property. Thus, as a practical matter, a creditor initiating improper receivership proceedings may quite literally be stuck footing the bill.

Professional Fees in Insolvency Proceedings

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Two recent Ontario Superior Court decisions, one of which was affirmed by the Court of Appeal for Ontario, imposed significant reductions in legal fees for court-appointed officers and their legal counsel on the basis that the amounts sought were unreasonable in consideration of the work performed. In *Diemer*[28] and *TNG Acquisition*,[29] the Honourable Justices Goodman and Brown, respectively, exercised their judicial discretion in scrutinizing the fees sought. Their analyses were guided by the principles of reasonableness and fairness. In performing these analyses, they followed the Court of Appeal's decision in *Bakemates*,[30] which held that the onus is on a receiver to demonstrate that the amount of its fees is fair and reasonable when the court's approval of fees is sought. This principle is further supported in *Belyea*,[31] in which the New Brunswick Court of Appeal held that a receiver's compensation must be a fair and reasonable measure of its services, and that those services should be administered as economically as possible.

Diemer (Ontario Superior Court of Justice)

In *Diemer*, a January 2014 decision, the Court was asked to approve the fees and disbursements of receiver's counsel in the amount of $255,955. In reducing this amount to $157,500, the Honourable Justice Goodman held that, notwithstanding the initial receivership order permitting the receiver's counsel to charge standard rates,[32] the fees charged were not appropriate given the nature of the receivership.

Justice Goodman took several factors into consideration, as listed at paragraph 9 of *Diemer*:

> (i) whether the nature and extent of the value of the assets handled have a linear relationship with the fees sought (in general, the lower the value of the assets, the lower the cost of administering the assets);
>
> (ii) whether there were complications or difficulties encountered during the receivership, as this would provide support for a claim for higher costs; and
>
> (iii) the cost of comparable services when performed in a prudent and economical matter.

In regards to factor (iii), His Honour noted that legal fees from London, Ontario lawyers were lower than their colleagues in Toronto, and since this receivership was administered in the

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[28] *Bank of Nova Scotia v. Diemer*, 2014 ONSC 365 [*Diemer*].
[29] *TNG Acquisition Inc. (Re)*, 2014 ONSC 2754 [Commercial List] [*TNG Acquisition*].
[30] *Bakemates International Inc. (Re)*, [2002] O.J. No. 3569 (Ont. C.A.).
[31] *Belyea v. Federal Business Development Bank*, [1983] N.B.J. No. 41 (N.B.C.A.).
[32] The relevant language in the order tracked the language contained in the Model Receivership Order.

London area, a representative London rate should be used for comparison purposes in examining the appropriateness of the fees claimed by the receiver's counsel.

Justice Goodman also commented that receiver's counsel had not updated the court on its accrued costs generated in supporting the receiver in administering the receivership, noting that while there is no obligation for receiver's counsel to seek the court's approval for fees on a routine basis, it would be prudent to do so in matters where costs are running high relative to the value of the assets being administered. The Court also took issue with the fact that senior partners did not delegate sufficiently in what His Honour regarded as a simple matter, where junior lawyers or staff could have competently performed the necessary work.

***Diemer* (Court of Appeal for Ontario)**

On December 1, 2014, in a unanimous decision written by Justice Pepall, the Court of Appeal for Ontario upheld Justice Goodman's decision.[33] The court-appointed receiver, as appellant, advanced three grounds of appeal and submitted that the motion judge erred:

> (i) by failing to apply the provisions of the appointment order, which entitled the receiver's counsel to charge fees at its standard rates;
>
> (ii) by reducing the receiver's counsel's fees in the absence of evidence that the fees were not fair and reasonable; and
>
> (iii) by making unfair and unsupported criticisms of counsel.[34]

The Court of Appeal dismissed the appeal, finding that the motion judge did not err in its reduction of the fees. While the Court found that certain of the facts were open to interpretation, it deferred to Justice Goodman's analysis, finding that the motion judge had drawn conclusions based on evidence from the record in order to conclude that the fees were not fair and reasonable. The Court of Appeal found that the relevant *Bakemates* principles and *Belyea* factors had been identified and applied in the motion judge's analysis. While the Court found there were some unfair criticisms made of receiver's counsel, it held that the motion judge's analysis resulting in the reduction of fees was appropriate.

TNG Acquisition

In *TNG Acquisition*, a May 2014 decision, a trustee in bankruptcy (the "**Trustee**") sought an order authorizing the former Chief Restructuring Officer to distribute costs to the company's Monitor (the "**Monitor**"), appointed under the CCAA,[35] and to the Monitor's legal counsel. The costs were associated with the Trustee's request relating to certain events which took place during the Monitor's appointment, and the retrieval of related documentation. The Honourable Justice Brown, then of the Ontario Superior Court of Justice (Commercial List), referred to this task as an "archive-retrieval request."

[33] *Bank of Nova Scotia v Diemer*, 2014 ONCA 851.
[34] *Ibid* at para 28.
[35] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [CCAA].

While His Honour found that the time spent to obtain, review and deliver the documentation was reasonable, the fees charged for such work were not. His Honour referred to the court's discretion to review the reasonableness of the fees charged and reduced the amount to be distributed.

Specifically, Justice Brown took issue with the seniority and rates of professionals tasked to complete the work, holding that if a partner or senior manager elects to perform work of a clerical or administrative nature, then he or she should bill at clerical or administrative rates. Counsel's fees, when "measured against the simplicity of the request," were held to render the submitted costs unreasonable.

Finally, the Monitor's charge of 9% of total costs, allocated to cover "administrative expenses", was found to be unreasonable. His Honour held that administrative costs are generally contemplated in the hourly rates of professionals, and as such, both the Monitor's and its counsel's costs were reduced.

Practical Application of *Diemer* and *TNG Acquisition*

Courts in Ontario have recently demonstrated an active willingness to exercise discretion in the approval of professional fees claimed in respect of bankruptcy and insolvency matters. Accordingly, professionals in this field should keep the following in mind:

1. Be careful and precise when preparing and providing information contained in fee affidavits. This applies to legal counsel as well as other professionals submitting such claims.

2. Ensure that work is performed by individuals with the appropriate skill level and billing rates for a particular task. Tasks should be delegated to the appropriate person for the task. Clerical and administrative tasks should not be performed by senior professionals, or, in the event that timelines or other factors necessitate that this work be performed by a more senior professional, appropriate rates should be applied that reflect the level of skill required for the work performed. In its decision, the Court of Appeal noted that "value should pre-dominate over the mathematical calculation reflected in the hours times hourly rate equation."[36] Value appears to drive the Court of Appeal's analysis of fairness and reasonableness, as "the focus of the fair and reasonable assessment should be on what was accomplished, not on how much time it took."[37]

3. Regularly seek approval of professional fees and disbursements as proceedings progress. While a motion specifically for the approval of professional fees seems unnecessary, regularly seeking fee approval in motions for other substantive relief seems appropriate.

4. The practice of allocating administrative expenses as line items in invoices to account for general overhead expenses may need to be revised or eliminated. Justice Brown noted that 9% of total costs is unreasonable and should instead be reflected in the hourly rates

[36] *Ibid* at para 45.
[37] *Ibid* at para 45.

charged.[38] Professional service providers may need to review the manner in which these costs are defrayed in order to ensure that they can be recaptured without the possibility that the Court will refuse to approve such costs.

5. Geographic location (for the purposes of generating comparative local professional fees) and the nature of the proceedings are factors that will be considered when fees are reviewed in order to determine whether the assets are being administered as economically as possible.

6. The Court of Appeal confirmed that *Bakemates* enunciates appropriate principles to be applied when passing accounts, and *Belyea* identifies relevant factors to be considered – but this list of factors is not exhaustive. *Bakemates* further confirms that the onus is on the receiver to prove that the compensation for which it seeks approval (including on behalf of its counsel) is fair and reasonable, and that an analysis of such fees will focus on issues of fairness and reasonableness.

[38] *TNG Acquisition, supra* note 29 at paras 19-20.

The $45 Million Cost of Improper Conflict Checking

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At the height of the 2008-2009 global financial crisis, both General Motors Corporation ("**GM**") and General Motors of Canada Limited ("**GMCL**") found themselves running out of cash at an alarming rate, unable to borrow from the private market and in urgent need of government assistance for survival. As a precondition to any assistance, both the U.S. and Canadian governments required GMCL to, amongst other things, slash its increasingly bloated dealership network, which had been plagued for years by too many dealers serving too small a market. Against this backdrop, and faced with the very real possibility of an imminent filing under the CCAA[40] – which was ultimately averted only hours before such filing was scheduled to be heard by the Commercial List in Toronto – GMCL was authorized by its U.S. parent to earmark $218 million to negotiate wind-down agreements ("**WDAs**") and notices of non-renewal with 290 of GMCL's 705 dealers. WDAs were eventually given to 240 dealers and they were given six calendar days to decide whether or not to accept the automaker's offer. Most of the dealers accepted the offer.

These facts gave rise to *Trillium*,[41] wherein a group of former dealers (the "**Class Members**") brought a class action against not only GMCL, claiming that the automaker breached its statutory and common law duties as franchisor to the dealers, but also Cassels Brock & Blackwell LLP ("**Cassels**"), which had been retained as legal counsel in connection with the crisis by each of the dealers, the Canadian Automobile Dealers Association ("**CADA**") and Industry Canada ("**Canada**"), and which, according to the claim, had breached its contractual and fiduciary duties to the dealers by, amongst other things, simply being retained by all these parties in the first place.

While the Honourable Justice McEwen of the Ontario Superior Court of Justice dismissed the claim against GMCL, holding that it did not breach any of its obligations as a franchisor to the franchisee dealerships, His Honour did conclude that Cassels breached its contractual and fiduciary duties to the dealers and awarded damages in the amount of $45 million against the law firm, representing the Class Members' lost opportunity to negotiate with GMCL for increased wind-down payments. Cassels has stated that it is actively pursuing an appeal.

The case reminds professionals of the conflicts that can easily and quickly develop in fast-paced insolvency proceedings, and of the importance to have proper conflict-checking procedures in place to deal with same – both at the outset of an insolvency matter, and as the matter evolves and becomes increasingly complex. Although not the focus of this article, the case also provides guidance to franchisors as to their duties in a "*challenging, fast moving and dire economic*

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[39] Ian Aversa is a partner in the Financial Services Group and Jeremy Nemers is an associate in the Financial Services Group. The authors would like to thank Kyle Elliott, a summer student at Aird & Berlis LLP, for his assistance in preparing this paper.
[40] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended [CCAA].
[41] *Trillium Motor World Ltd. v. General Motors of Canada Limited*, 2015 ONSC 3824, [2015] O.J. No. 3602 [*Trillium*].

situation,"[42] which duties are not negated by these exceptional circumstances but ultimately "*must take their colour from that context*."[43]

The Cassels' Retainers

Cassels was found to have been involved in four different retainers in respect of the GMCL matter:

i. a longstanding retainer with CADA, a not-for-profit organization representing over 3,000 dealers across Canada, pursuant to which retainer a subfile was opened in April 2009 to provide CADA with legal assistance concerning the problems that GMCL was facing;

ii. a retainer commencing in March 2009 with some of GMCL's Saturn-brand dealers (the "**Saturn Dealers**"), facilitated by CADA, to provide the Saturn Dealers with legal advice with respect to, amongst other issues, GMCL's legal ability to terminate the Saturn Dealers' dealership agreements;

iii. a retainer commencing in March 2009 with Canada, with respect to a potential commercial financing transaction between, amongst other parties, Canada and GMCL; and

iv. a retainer commencing in May 2009 with many of the GMCL dealers generally (the "**GMCL Dealers**") via a steering committee that was intended to represent all the GMCL Dealers in the event that GMCL were to file for some form of bankruptcy protection (the "**Steering Committee**"), and which Steering Committee was comprised of certain GMCL Dealers. This retainer, also facilitated by CADA, was hotly contested at trial, as was its scope.

While it is impossible to distill all the relevant evidence from *Trillium*'s 136-page decision into a few paragraphs, as the above retainers and Cassels' handling of same intersected in various combinations and permutations to ground Cassels' liability, what follows are some of the most salient facts referenced by Justice McEwen's decision.

Examples of Shortcomings

Prior to accepting the final retainer with the GMCL Dealers, certain of Cassels' lawyers met on April 21 to discuss whether it was appropriate to accept the GMCL Dealers' retainer. They concluded that acceptance would not create a conflict with the Canada retainer or the Saturn Dealers retainer, but that an ethical wall should be erected as a precautionary measure, and that each of Canada, the Saturn Dealers and the GMCL Dealers should be advised about the existence of the "other" retainers.

According to testimony, there was no discussion as to whether Canada's position after a potential CCAA filing might be adverse to that of the GMCL Dealers; however, it was made clear internally that Cassels "*could not take on the government, if such a circumstance arose, in any*

[42] *Ibid* at para 116.
[43] *Ibid*.

CCAA proceeding,"[44] such that "*[o]nce we got in the CCAA … it's conceivable that we could not act for the dealers at that time*."[45] While the evidence was that this "proviso" had been accepted in principle by CADA, Cassels did not communicate the "proviso" to the actual client, being the GMCL Dealers. Moreover, although at least one lawyer who had not participated in past meetings expressed concerns to certain of his colleagues after viewing the new retainer on the daily file opening report, noting that he could "*see some points of conflict that may develop between [Canada] and the GM dealers,*"[46] these concerns were not escalated to the appropriate internal channels or otherwise addressed adequately. Reviewing this evidence, Justice McEwen commented as follows:

> Not surprisingly, due to this unexplained reticence to discuss potential conflicts among the partners, a full discussion concerning multiple retainers did not take place. Although there was sensitivity for unconflicted loyalty to Industry Canada, there appears to have been no similar sentiment for the GMCL dealers' interests.[47]

Apart from its preventative shortcomings as amongst the various retainers, Cassels also encountered difficulties *within* individual retainers as the GMCL saga unfolded. For example, on May 15, GMCL told CADA that WDAs would be offered to a group of GMCL Dealers, which information was transmitted to Cassels during a conference call organized by CADA that day. The Steering Committee, which was now "*faced with the impossible task of representing the interests of both the 42 percent that were losing their dealerships and the 58 percent that were continuing with GMCL,*"[48] advised Cassels not to get involved, and Cassels simply accepted the Steering Committee's instructions without probing the conflict that had emerged.

Relying on examples such as the above, His Honour concluded as follows:

> Cassels acted irresponsibly and unprofessionally by failing to have an effective conflicts checking system in place – that is, one which actually leads to lawyers discussing and resolving potential conflicts. Cassels is liable for its failure to heed the alarm bells that were audible, despite the deficiencies of its conflicts checking system. It is also liable for how it responded to the readily apparent conflicts amongst the dealers. Further, Cassels breached its contractual duties to the Class Members and was negligent in maintaining a Wait-and-See Approach and failing to address the Steering Committee's compromised position.[49]

One issue that plagued Cassels throughout the chronological timeline of the GMCL saga was the misidentification of CADA's role. Specifically, His Honour held that certain Cassels lawyers conflated the ongoing retainer with CADA with the retainer for all the GMCL Dealers, such that the lawyers "*somehow came to the conclusion that CADA was in fact the exclusive and discrete*

[44] *Ibid* at para 390.
[45] *Ibid* at para 391.
[46] *Ibid* at para 395.
[47] *Ibid* at para 397.
[48] *Ibid* at para 528.
[49] *Ibid* at para 381.

client of the subsequent retainer and not the GMCL [D]ealers themselves."[50] His Honour found this conflating view to be "*untenable*."[51]

In addition to there being confusion as to the client's identity for the GMCL Dealers' retainer, the scope of such retainer was also ambiguous. Justice McEwen cautioned the profession that "*limited scope retainers must clearly define the scope of the legal services to be provided and candidly explain these limitations to [the] clients*."[52] In the present case, "*the ambiguity in the retainer – e.g., whether it included complex restructuring, or whether certain pre-filing events could trigger the need to provide further legal services – must be resolved against Cassels*."[53]

Assessment of Liability

Ultimately, Cassels was found to have failed the GMCL Dealers in three material ways:

i. a conflict from the outset due to the pre-existing retainer with Canada;

ii. a failure to ensure that a non-conflicted Steering Committee was in place to instruct counsel, and, when the Steering Committee became conflicted, a failure to:

   a. advise the Steering Committee of its conflict; and

   b. advise the affected dealers, i.e. those that had received WDAs; and

iii. taking what His Honour generally described as a "Wait and See Approach" to the entire matter, instead of actively preparing for the consequences of the WDAs being issued.[54]

As $218 million had originally been earmarked to negotiate the WDAs, but only $126 million was ultimately paid by GMCL to the 202 dealers that accepted the WDAs, His Honour assessed that the difference – $92 million – represented a reasonable estimate of what the Class Members could have achieved through negotiations with GMCL for increased wind-down payments had Cassels not breached its duties to the Class Members. His Honour concluded that the Class Members had a 55 percent chance of obtaining a successful negotiation with GMCL, yielding a result of approximately $50 million. This amount was further adjusted to $45 million to reflect the fact that only 181 of the 202 affected dealers chose to participate in the class action. As part of closing argument, counsel for the Class Members had urged His Honour to assess damages within the range of $375 million to $425 million.

Lessons

A takeaway message for the profession is that, in light of the limited timeframes in which to act in respect of many insolvency proceedings generally and CCAA filings in particular, trying to manage around potential conflicts between parties can be at best dangerous, and at worst

[50] *Ibid* at para 419.
[51] *Ibid*.
[52] *Ibid* at para 472.
[53] *Ibid* at para 473.
[54] *Ibid* at paras 481, 532.

unreasonable and unrealistic. To a great extent, the conflicts in *Trillium* were not those that "*pop up unexpectedly during the CCAA process that could not have been identified or adequately assessed if identified … [but were] obvious conflicts that existed from the outset, in a very significant potential CCAA filing wherein many of the dealers, GMCL and Saturn alike, stood to lose their livelihoods.*"[55]

Although not the focus of this article, *Trillium* also provides guidance to franchisors as to their duties in a "*challenging, fast moving and dire economic situation*,"[56] which duties are not negated by these exceptional circumstances but ultimately "*must take their colour from that context*."[57] Weighing the immense financial and temporal pressures faced by GMCL against its contextual duties to the franchisees, His Honour ultimately concluded that "*[t]his is not a case about a franchisor taking advantage of its franchisees simply to squeeze a little more profit from the margins*"[58] and that providing dealers with a few more days to make a decision would, on the specific facts of this case, have "*require[d] too much of GMCL given the time pressures it was facing [and] the threat to its continued existence as a business enterprise*."[59]

[55] *Ibid*. at para 507.
[56] *Ibid* at para 116.
[57] *Ibid*.
[58] *Ibid* at para 115.
[59] *Ibid* at para 193.

The Ever-Tightening Law on PIPEDA and Mortgage Disclosure

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In a 3-2 decision for which leave to appeal to the Supreme Court of Canada has been granted,[61] the Court of Appeal for Ontario (the "**Court**") held in *Trang*[62] that, owing to the consent requirements of PIPEDA,[63] a judgment creditor/lender seeking to obtain a mortgage discharge statement from another lender, for the purpose of allowing the sheriff to sell the mortgaged property in satisfaction of the judgment, may only obtain such statement in two limited circumstances:

i. where the debtor had previously consented to the mortgage discharge statement's release pursuant to a term in the underlying loan agreement with the judgment creditor; or

ii. pursuant to an Order made for the examination of the mortgagee under Rule 60.18(6)(a) of the Rules,[64] which provides, in part, that "*[w]here any difficulty arises concerning the enforcement of an order, the court may … make an order for the examination of any person who the court is satisfied may have knowledge of [the debts owed to and by the debtor]*."

The decision upholds and further expands upon the Court's holding in *Citi Cards*,[65] wherein the Court refused to order the release of a mortgage discharge statement to the judgment creditor on similar PIPEDA privacy concerns In *Citi Cards*, the Court held that the judgment creditor had not pursued all its alternative remedies, having not moved for an Order to examine the debtor's wife, who held a 50 percent interest in the mortgaged property. Unlike the judgment creditor in *Citi Cards*, the creditor in *Trang* argued, amongst other things, that it had pursued all its alternative remedies, but the majority of the Court disagreed. *Trang* therefore appears to set the bar even higher than had been the case in *Citi Cards*, pending a decision from the Supreme Court.

Chronology of Events

The Bank of Nova Scotia ("**Scotiabank**") was the first mortgagee of real property registered to Phat and Phuong Trang (the "**Trangs**"). Royal Bank of Canada ("**RBC**") subsequently made a loan to the Trangs that went into default, which led to RBC obtaining judgment against the Trangs for a principal amount of approximately $26,000. This caused RBC to file a writ of seizure and sale with the Sheriff in respect of certain real property.

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[61] [2015] S.C.C.A. No. 54.
[62] 2014 ONCA 883, 123 O.R. (3d) 401, 379 D.L.R. (4th) 601, cited to O.R. [*Trang*].
[63] *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 [PIPEDA].
[64] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended [Rules].
[65] *Citi Cards Canada Inc. v. Pleasance*, 2011 ONCA 3, 103 O.R. (3d) 241.

RBC served the Trangs with notices of examination in aid of execution, but the Trangs did not appear or reply to the notice. RBC then requested a mortgage discharge statement from Scotiabank, after being advised by the Sheriff that it would not sell the property without the statement. Scotiabank replied that PIPEDA precluded the statement's release without the Trangs' consent. RBC therefore obtained an order for another examination of the Trangs in aid of execution. Once again, the Trangs neither appeared nor replied to the notice.

In light of the above, RBC brought a motion to compel Scotiabank to produce the mortgage discharge statement, which the motion judge dismissed on the basis that His Honour was bound by *Citi Cards*. RBC appealed, which appeal was quashed on the ground that the motion judge's order was interlocutory in that it did not finally dispose of the question of whether RBC could obtain an order requiring Scotiabank to produce the discharge statement. The panel hearing the appeal stated that RBC could seek to examine a Scotiabank representative under Rule 60.18(6)(a).

Although RBC then examined a Scotiabank representative, the representative appeared voluntarily and not by court order. During the examination, the representative took the position that PIPEDA prohibited Scotiabank from voluntarily disclosing the discharge statement.

RBC then brought a second motion to compel Scotiabank to produce the discharge statement, which the motion judge also dismissed, "*remaining of the view that PIPEDA, as interpreted by the Court of Appeal in* Citi Cards, *prohibits the release of the requested information*."[66] It was from this decision that RBC appealed in *Trang*.

RBC's Grounds of Appeal

RBC advanced several arguments on appeal, some of which revolved around a very technical interpretation of PIPEDA's provisions, schedules and definitions. In essence, RBC argued that the discharge statement did not constitute the Trangs' "*personal information*", that in any event PIPEDA allowed for the statement's release because the statement constitutes "*less sensitive*" information to which the Trangs' gave their "*implied consent*" to release and that, as a third ground, a "*reasonable person*" would believe it to be appropriate to order the disclosure when the alternative would be frustrating the enforcement of a court-ordered judgment. RBC also aimed to distinguish *Citi Cards* on its facts, and advanced an argument that the *Execution Act*[67] authorized the disclosure as a "*required by law*" exception permitted by PIPEDA.

Unanimous Holdings on Certain Arguments

Both the majority and the dissent agreed on several points:

i. a mortgage discharge statement constitutes the a debtor's "*personal information*";

ii. the "*reasonable person*" argument does not trump PIPEDA's requirements for obtaining actual consent or sheltering under a PIPEDA exception to obtain actual consent; and

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[66] *Trang, supra* para 62 at para 9.
[67] R.S.O. 1990, c. L.4. s. 28 [*Execution Act*].

iii. there was nothing in the *Execution Act* that required the mortgage statement to be issued as a matter of law.

Disagreement emerged as to the remaining grounds of appeal:

i. whether PIPEDA allowed for the statement's release because the statement constitutes "*less sensitive*" information to which a debtor may give its "*implied consent*" to release; and

ii. whether *Citi Cards* could be distinguished on its facts.

The Majority's View

Writing for the majority, the Honourable Justice Laskin held that the discharge statement was not "*less sensitive*" information, and that the release of which therefore required express consent from the Trangs, which express consent had obviously not been given on the facts. While noting that it was "*tempting*" to conclude, based on the initial required registration of a mortgage, that its status was somehow "*less sensitive*", Justice Laskin noted that income records are almost always considered sensitive information under PIPEDA and that mortgage discharge statements were sufficiently akin to income records, in that the former contain personal financial information of the mortgagors, often of a significant financial asset. As Justice Laskin further commented:

> *A current mortgage balance is not publicly available information. Just because the legislature chose to make the details of a mortgage publicly available at the beginning of the mortgage relationship does not strip a mortgage balance during the course of a mortgage relationship of the sensitivity it would ordinarily have – a sensitivity for which implying consent to disclosure would be inappropriate.*[68]

Justice Laskin also noted that "*the context in which disclosure is sought increases the sensitivity of the information*,"[69] and that disclosure in the present case was not being sought by the mortgagee itself, but rather "*by a stranger to the mortgage relationship: RBC, a third party judgment creditor*."[70]

On the issue of whether *Citi Cards* could be distinguished on its facts, Justice Laskin held that it was sufficiently analogous with *Trang* in that the judgment creditor in both cases had not exhausted other means to obtain the discharge statement lawfully. Specifically, RBC could have obtained the statement by an express term in its own loan agreement with the Trangs, or, instead of merely having Scotiabank appear voluntarily for an examination, by a formal motion to examine Scotiabank under Rule 60.18(6)(a), the effect of which would be to require disclosure of the information as a matter of law, which falls within one of the PIPEDA consent exemptions.

Justice Laskin specified that the sheriff's mere refusal to sell the property without the discharge statement was not a sufficient "*difficulty*" on its own to merit relief under Rule 60.18(6)(a), but

[68] *Trang*, *supra* para 62 at para 55.
[69] *Ibid* at para 56.
[70] *Ibid*.

that in this case, RBC could show sufficient difficulty both because the Trangs failed to appear for two judgment debtor examinations and because Scotiabank would not voluntarily produce the discharge statement. Nonetheless, because RBC had not brought a motion under Rule 60.18(6)(a), Justice Laskin was not prepared to grant the relief that RBC was seeking, particularly as RBC was "*hardly an unsophisticated lender*"[71] and could have saved much time and expense "*with [some] foresight*."[72]

The Dissent's View

Writing for the dissent, the Honourable Justice Hoy would have held that the mortgage discharge statement constitutes "*less sensitive*" information, consent to the release of which was implied by the Trangs:

> *The fact that all the details of the Trangs' mortgage — the principal amount, the rate of interest, the payment periods and the due date – were made publicly available when the mortgage was registered makes the current balance outstanding on that mortgage* "less sensitive" *personal information. Indeed, absent prepayments or defaults under the mortgage, a third party could calculate the current balance outstanding on the mortgage from the details that were made publicly available when the mortgage was registered. The current mortgage balance is generally no more sensitive than the amount of the mortgage publically disclosed at the time that the mortgage was registered.*[73]

Moreover, according to Justice Hoy, the statement ought to have been considered "*less sensitive*" information once RBC scheduled an examination in aid of execution against the Trangs, because the Trangs then became required by law to bring the statement to the examination and produce same to RBC, exactly as Scotiabank would be required to do under Rule 60.18(6)(a).

Rather than distinguishing *Citi Cards* on its facts, Justice Hoy would have overruled the case altogether, noting that it had been the subject of unfavourable comments in Ontario, its holding was of little assistance to litigants planning their affairs and was therefore of low precedential value, it was of relatively recent vintage, it had been decided without the benefit of complete submissions regarding "*implied consent*" and, perhaps most important, it erected a roadblock of "*considerable cost, inconvenience and unnecessary litigation*."[74] In this regard, Justice Hoy noted that RBC had been forced to bring multiple motions and was before the Court of Appeal for the second time – with the matter still unresolved – all to enforce a modest claim of under $30,000. Although RBC may be a sophisticated litigant, creditors in other cases "*may be family members, neighbours, or small businesses who have lent relatively small amounts without the benefit of legal advice or legal documentation*,"[75] and should not be subjected to such a complex and lengthy judicial process.

[71] *Ibid* at para 86.
[72] *Ibid* at para 76.
[73] *Ibid* at para 118.
[74] *Ibid* at para 134.
[75] *Ibid* at para 127.

With the goal of at least removing one of the *Citi Cards*' roadblocks, Justice Hoy would have ordered Scotiabank to produce the statement to RBC without requiring a further motion under Rule 60.18(6)(a), on the basis that the Court has jurisdiction to grant the production order under PIPEDA regardless of the particular Rule under which the motion is brought. Although relevant to the particular facts of *Trang*, Justice Hoy would be prepared to grant a motion under Rule 60.18(6)(a) where the "*difficulty*" in enforcing judgment amounts to as little as the debtor's failure to respond to a written request to sign a form consenting to the provision of the discharge statement to the creditor.

Conclusion

The majority's interpretation of PIPEDA embraced a narrow and technical analysis of the lender's failure to satisfy the exemption requirements under the statute, such that the law in Ontario continues to tighten in respect of the instances where mortgage statements may be disclosed. In contrast, the dissent focused on the substantive practicalities of the case and those like it. While it remains to be seen which approach the Supreme Court of Canada will embrace, the ramifications of *Trang* – at least for the meantime – should entice prudent lenders to revisit their loan agreements and the consent provisions therein.

Nortel and the "Interest Stops" Rule

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On January 14, 2009, Nortel Networks Corporation ("**NNC**") and other related Canadian entities filed for and obtained protection under the CCAA.[77] Nortel Networks Inc. ("**NNI**") and other related US entities concurrently filed petitions under Chapter 11 of the United States Bankruptcy Code. Certain unsecured *pari passu* notes were issued by NNC, NNI and other Nortel entities between 1996 and 2009, each note being severally guaranteed by NNC and NNI. In total, bondholders made claims in both the Canadian and US proceedings for principal and pre-filing interest of US$4.092 billion against each of the Canadian and US estates.

However, these bondholders have also claimed to be entitled to post-filing interest and related claims under the terms of the bonds. As of the end of 2013, these post-filing interest claims amounted to approximately US$1.6 billion. Given that the total assets realized worldwide on the sale of Nortel assets was approximately US$7.3 billion, these post-filing claims represented a significant portion of the total assets available for distribution to creditors. At a hearing before the Honourable Justice Newbould of the Ontario Superior Court of Justice (Commercial List) to determine the issue of whether the bondholders had rights to post-filing interest, the Court denied the bondholders' claims and sided with the objecting creditors, including former employees, disabled employees and retirees, citing the so-called "interest stops" rule.[78]

The "interest stops" rule is a common law rule that has been enshrined in statute under the BIA,[79] based on the fundamental principles of fairness and equality as between unsecured creditors in insolvency proceedings. While the CCAA is silent as to the right to post-filing interest, the objecting creditors successfully argued at the hearing that the rule should apply in the situation at hand because of the nature of this particular CCAA proceeding. Although CCAA proceedings are often used for the purpose of restructuring with an aim to continue the business as a going concern, the Nortel CCAA proceeding was, in reality, a "liquidating" CCAA proceeding.[80]

As such, Justice Newbould applied the "interest stops" rule to prevent the bondholders from claiming post-filing interest.[81] Citing the Supreme Court of Canada's decisions in *Century Services*[82] and *Indalex*,[83] His Honour interpreted the CCAA to strive for uniform treatment of creditors across insolvency regimes. This interpretation ensures that creditors will not choose to pursue liquidation through CCAA proceedings (rather than a liquidation proceeding under the BIA) for the sole purpose of achieving differential treatment of post-filing interest. Further, there

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[77] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [CCAA].
[78] *Re Nortel Networks Corp.*, 2014 ONSC 4777, 121 O.R. (3d) 228 at para 25 [*Nortel*].
[79] *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [BIA].
[80] Courts in Ontario have recognized that the CCAA can be used for the purpose of liquidating assets and proceedings of this nature are not uncommon in Ontario.
[81] *Nortel*, *supra* note 78.
[82] *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60 [*Century Services*].
[83] *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6 [*Indalex*].

are a number of policy reasons supporting the application of the "interest stops" rule, as it furthers the CCAA's objective of maintaining the status quo rather than allowing certain claims to grow disproportionately.

The bondholders advanced a number of arguments in support of their position. Justice Newbould rejected the idea that their contractual right under the bonds to post-filing interest was a property right, as the bonds were unsecured, citing *Thibodeau*[84] in support of this position. The bondholders also argued that it was premature for the court to rule on the post-filing interest issue in the absence of a plan of compromise or arrangement, but His Honour disagreed: the court was not compromising the bondholders' claims to post-filing interest in the absence of a plan, but instead was determining whether a claim to such interest existed pursuant to the claims procedure orders that were previously issued by the Court.

The bondholders also relied on the Court of Appeal for Ontario's decision in *Stelco*,[85] in which that Court stated that there was no persuasive authority supporting the application of the "interest stops" rule in a CCAA proceeding. However, His Honour distinguished this case on the basis that Stelco did not involve a claim for post-filing interest against the debtor, but rather involved a dispute between two classes of debenture holders.

Similarly, the bondholders relied on *Canada 3000*,[86] a case which involved an airline obtaining CCAA protection and the Monitor subsequently filing an assignment into bankruptcy on the airline's behalf three days later. The airline owed outstanding payments to certain airport authorities for the use of their facilities, and the airport authorities wished to seize certain aircraft that had been leased to the airline. The owners/lessors of the aircraft were found not to be liable for the outstanding payments, but nevertheless the airport authorities were allowed to seize and detain the aircraft until all amounts, including post-filing interest, were paid in full. At the Supreme Court, Justice Binnie briefly observed that a CCAA filing did not stop the accrual of interest.

Justice Newbould again distinguished this case on the facts, and noted that Justice Binnie's statement "should not be taken as a blanket statement that interest always accrues in a CCAA proceeding." His Honour noted that the Supreme Court had not analyzed the "interest stops" rule by considering the applicable common law and CCAA provisions, and viewed the statement as "simply conclusory" and possibly even "*per incuriam*." His Honour also noted that the amount of post-filing interest at issue in each case was vastly different and, once again, commented that these cases must be interpreted in light of the recent Supreme Court jurisprudence that indicates that creditors should receive similar treatment in BIA and CCAA proceedings.

An appeal to His Honour's decision has been argued at the Ontario Court of Appeal, and is currently reserved for judgment.

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[84] *Thibodeau v. Thibodeau*, 2011 ONCA 110 [*Thibodeau*].
[85] *Re Stelco Inc.*, 2007 ONCA 483 [*Stelco*].
[86] *Re Inter Canadian (1991) Inc. (Trustee of) Canada 3000 Inc.*, 2006 SCC 24 [*Canada 3000*].

Foreign Main Proceedings and Domestic Stays

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The Ontario Superior Court of Justice (Commercial List) recently applied the rules under the BIA[88] regarding recognition of foreign bankruptcy proceedings, the effect of which was to stay an existing class action in Ontario, thereby thwarting domestic collection efforts. In *MtGox*,[89] the defendant in a pending Ontario class action (the "**Ontario Class Action**") was also subject to a Japanese insolvency proceeding (the "**Japanese Proceeding**"). The trustee for the Japanese Proceeding (the "**Trustee**") sought a recognition order so as to, amongst other things, stay the Ontario Class Action.

MtGox Co. Ltd. ("**MtGox**"), a Japanese corporation with roughly 120,000 bitcoin or fiat currency deposit-holding customers from approximately 175 countries, filed a petition for the commencement of a civil rehabilitation proceeding in a Tokyo Court pursuant to Article 21(1) of the *Japan Civil Rehabilitation Act*. As rehabilitation looked increasingly unlikely, the Tokyo Court dismissed the civil rehabilitation, and, on April 24, 2014, entered a Japanese bankruptcy order. The Ontario Class Action was commenced on behalf of MtGox's Canadian deposit holders. Notice of the Class Action and statement of claim was provided to the Trustee pursuant to the Hague Convention.

Largely in response to the Ontario Class Action, the Trustee sought a recognition order pursuant to Part XIII of the BIA that would declare the Japanese Proceeding a foreign main proceeding, declare the Trustee a foreign representative and stay any claims, rights, liens or proceedings against or in respect of MtGox and its property.

The Japanese Proceeding was a judicial proceeding dealing with creditors' collective interests generally under the *Japan Bankruptcy Act*, a law relating to bankruptcy and insolvency, in which MtGox's property is subject to supervision by the Tokyo District Court. The Japanese bankruptcy therefore satisfied the requirements for a "foreign proceeding" under section 268(1) of the BIA, and was eligible to be considered a "foreign main proceeding".

To be considered a "foreign main proceeding" the foreign proceeding must be located in a jurisdiction that coincides with the bankrupt's centre of main interests ("**COMI**"). MtGox's COMI was considered to be in Japan because its registered head office was in Japan at the time of the Japan Proceeding and no rebutting factors were present. Once the Japanese Proceeding was recognized as a foreign main proceeding, the Trustee was entitled to the automatic stay against the Ontario Class Action, per subsection 271(1) of the BIA.

This case serves to remind domestic creditors dealing with foreign creditors that foreign bankruptcy proceedings may justify a domestic stay and hamper domestic collection efforts.

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[88] *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 [BIA].
[89] *Re MtGox Co., Ltd*, 2014 ONSC 5811, 122 O.R. (3d) 465 [MtGox].

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