IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Federal Gypsum Company (Re), 2007 NSSC 384

Date: 2007/12/14
Docket: SH 285667
Registry: Halifax

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

- and -

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

Judge: The Honourable Justice A. David MacAdam

Heard: November 29, and December 14, 2007, Orally, in Halifax, Nova Scotia

Written Decision: January 29, 2008

Counsel: Maurice P. Chaisson/Graham Lindfield, for the Federal Gypsum Company
Carl Holm, Q.C. for BDO Dunwoody Goodman Rosen Inc.
Thomas Boyne, Q.C. for the Royal Bank of Canada
Robert Sampson/Robert Risk for Enterprise Cape Breton Corporation and Cape Breton Growth Fund Corporation
Michael Pugsley for Her Majesty in Right of the Province of Nova Scotia (Nova Scotia Economic Development) and Nova Scotia Business Incorporated
Michael Ryan, Q.C./ Michael Schweiger for Black & McDonald Limited

By the Court:

[1] By Order dated September 18, 2007, the Applicant, Federal Gypsum Company, (herein "the Company" or "the Applicant"), obtained an Order providing for a stay of proceedings pursuant to s.11 of the *Companies Creditors Arrangement Act*, R.S.C 1985, c. C-36, (the "CCAA"). BDO Dunwoody Goodman Rosen Inc. was appointed monitor, (herein "the Monitor"). On September 24, 2007 the Applicant successfully applied for approval of debtor in possession, (herein "DIP") financing, in the amount of $350,000.00. The initial Order provided for a stay of proceedings against the Applicant up to and including October 18, 2007, or such later date as the court may by further order determine, and on October 18, 2007 the stay date was extended to November 29, 2007. On November 5, 2007 the Company made a further application for additional DIP borrowing powers, with approval, from the financing, to retire the creditor holding security on the operating line. DIP financing in the amount of $1,500,000.00 was granted, subject to a restriction on the amount to be advanced. The application to pay out the operating line creditor was denied. On November 22, 2007 a further application was made to establish the Claims Bar process which, with minor changes, was approved.

[2] At issue is:

1. Preliminary approval of the plan of arrangement (the "Plan") prepared by Federal Gypsum Company (the "Company") for the purposes of presenting the Plan to the Company's creditors;

2. Classification of the creditors for the purpose of voting on the Plan;

3. Calling of a meeting of the Company's creditors pursuant to the *Companies' Creditors Arrangement Act* (the "CCAA");

3. Extension of the Stay Termination Date set out in the initial order made by this Court on September 18, 2007 (the "Initial Order") pursuant to the CCAA and extended by the subsequent Order of this Court to November 29, 2007 at 4:00 p.m.; and

4. Arrangements for additional debtor in possession ("DIP") financing to the Company pursuant to the CCAA.

1. Preliminary Court Approval

[3] Counsel for the Company, noting there is nothing in the CCAA requiring the approval of the court for the Company's plan, acknowledges that "...the jurisprudence establishes that such approval is generally necessary prior to calling a meeting of such creditors...". Recognizing the burden is on the Applicant, Counsel suggests the standard to be met is whether the plan is "doomed to failure" as suggested by the British Columbia Court of Appeal in *Hongkong Bank of Canada v. Chef Ready Foods*

Ltd. (1990), 4 C.B.R. (3d) 311 (B.C.C.A.) at p.88; *Philip's Manufacturing Ltd. v. Hongkong Bank of Canada* (1992), 9 C.B.R. (3d) 25 (B.C.C.A.) at para 7; and *Pacific National Lease Holding Corp.* (1992), B.C.J. No. 2309 (B.C.C.A.) at para.25.

[4] In his written submission Counsel references the decision of Austin J. in *Bargain Harold's Discount Ltd. v. Paribas Bank of Canada* (1992), 10 C.B.R. (3d) 23 (Ont. C.J. Gen. Div.). Citing Doherty J.A. in *Nova Metals Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101, Austin J. at paras. 37, 38 and 39 stated:

> 37. As to the degree of persuasion required, Doherty J.A. in Elan said at p.316 [O.R.]:
>
> > 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: Edwards, 'Reorganizations under the Companies' Creditors Arrangement Act', supra, 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.
>
> 38. In *Ultracare Management Inc. v. Zevenberger (Trustee of)* (1990), 3 C.B.R. (3d) 151, (sub nom. *Ultracare Management Inc. v. Gammon*) 1 O.R. (3d) 321 (Gen. Div.), Hoilett J., at p.330 f [O.R.], suggests that the test is whether the plan, or in the present case, any plan, 'has a probable chance of acceptance.'

> 39 These two standards are in conflict, Ultracare requiring the probability of success, and Elan requiring something less. Having regard to the nature of the legislation, I prefer the test enunciated by Doherty J.A. in Elan. In *First Treasury Financial Inc. v. Cango Petroleums Inc.* (1991), 3 C.B.R. (3d) 232 (Ont. Gen. Div.) at p.238, I expressed the view that the statute required 'a reasonable chance' that a plan would be accepted. [emphasis added by counsel]

[5] Also referenced by counsel is *Fairview Industries Ltd., Re* (1991), 11 C.B.R. (3d) 43 (N.S.S.C.), where, at para. 80, Glube, C.J.T.D., (as she then was), observed:

> 80 I have no hesitation in accepting the line of cases which are concerned with the concept of requiring a reasonable probability of success in the meetings to be held to deal with any proposal. (See *Diemaster Tool*, supra, and *First Treasury Financial Inc. v. Cango Petroleums Inc.* (1991), 3 C.B.R. (3d) 232, 78 D.L.R. (4th) 585 (Ont. Gen. Div.)). In my opinion, it would seem to be totally impractical and extremely costly to continue to prepare a plan when there is no hope that it will be approved. [emphasis added by counsel]

[6] In his submission, counsel notes the reference to an article by Stanley E. Edwards by Osborn J. in *Ursel Investments Ltd., Re* (1990), 2 C.B.R. (3d) 260 (S.K.Q.B.), at para.47, (reversed on other grounds at (1992), 10 C.B.R. (3d) 61 (S.K.C.A.)).

> 47 Stanley E. Edwards in his article 'Reorganizations Under the Companies' Creditors Arrangement Act' which appeared in (1947) 25 the Can. Bar Rev., 587 outlined the main problems which counsel and the courts will face in applying the Act. This article suggests that the Court before it orders a meeting of the creditors under ss. 4 and 5 of the Act must first be satisfied that:

> (a) The companies should be kept going despite insolvency.
>
> (b) The public has an interest in the continuation of the enterprise, particularly if the companies supply commodities or services that are necessary or desirable to large numbers of consumers, or if they employ large numbers of workers who would be thrown out of employment by its liquidation.
>
> (c) The plan of reorganization is so framed that it is likely to accomplish its purpose.
>
> (d) The plan should embrace all parties, if possible, but particularly secured creditors.
>
> (e) The reorganization plan should be fair and equitable as between the parties.

[7] Counsel says the Company has been in "significant discussions" with the term lenders, Cape Breton Growth Corporation, (herein "CBGC"), and Enterprise Cape Breton Corporation, (herein "ECBC"), (herein collectively referred to as the "Federal Crown Corporations"); Nova Scotia Business Inc., (herein "NSBI") and Nova Scotia - Office of Economic Development, (herein "NSOED"), (herein collectively referred to as the "Nova Scotia Crown Corporations"), each of whom hold or purport to hold, first secured charges on some of the fixed assets of the Company, as do the Federal Crown Corporations. Counsel anticipated, that in view of the plan proposing to retire

the operating line provided by Royal Bank of Canada (herein “Royal Bank”), their acceptance of the plan.

[8] In fact, the Royal Bank by its counsel in both written and oral submissions indicated its objection to the proposed extension of the stay termination date and the request for additional DIP financing. Counsel for the Royal Bank noted that in the affidavit of Rhyne Simpson, Jr., Director and President of the Applicant, that the Federal Crown Corporations and the Nova Scotia Crown Corporations did not appear to be on side with the proposed plan, and as the Royal Bank had repeatedly taken the position it did not support the process and would object to the plan of arrangement accordingly, “...it would seem clear that the proposed plan of compromise will not be approved.” Counsel also suggests the court should consider whether, even if adopted by the creditors, the Plan has a reasonable probability of success. In this respect counsel suggests that to continue the process for another two months would involve “...significant expense and risk to the secured lenders, when it appears that the Company would not be able to successfully implement the plan even if accepted by the creditors.” The Plan, in the submission of counsel, is deficient in that notwithstanding the proposal to repay the Royal Bank on the implementation date, the Company did not have the resources to do so. Counsel, referencing the report of the

Monitor, and taking into account the extent of the DIP financing and the amount of the outstanding operating loan of the Royal Bank, says the Company would not have sufficient funds in place, on approval of the Plan, to retire the Royal Bank operating loan.

[9] Through the course of the Application, counsel for the Federal Crown Corporations and the Nova Scotia Crown Corporations indicated they had no objection to either the extension of the stay termination date or the request for additional DIP financing. In doing so, counsel made it clear that they were not agreeing with the Plan as filed but rather were prepared to provide the Company with an opportunity to continue dialogue and discussions with the creditors concerning the nature and content of the final plan that would be submitted to a vote of the creditors.

[10] In respect to the Royal Bank's concern the company would not have the necessary resources to retire its operating loan, even if the plan was approved by the creditors, counsel indicated the Company is in negotiations both with the DIP financing lender and other potential lenders to arrange financing to take effect upon approval of the plan, and presumably would, as a result, have the necessary resources to retire the Royal Bank operating loan.

[11] A further concern raised by counsel for the Royal Bank related to the allocation of responsibility for administrative and operating expenses during the stay, as between the various secured creditors. In the earlier applications, it had been stipulated that the share of such expenses would be borne by the secured creditors in proportion to their respective indebtedness. Counsel for the Royal Bank suggested the possibility that some of the other secured creditors could enter into agreements whereby only one or two would recover on their assets and therefore a limitation of responsibility to share any expenses to the amount recovered could adversely affect the share of such expenses borne by the Royal Bank. Counsel for the Monitor advised that although there were agreements between various secured lenders involving a sharing of recovery, there was no agreement suggesting that any of the secured creditors had foregone their entitlement to repayment of their share of any realization on assets on which they held security. Therefore the concern, as acknowledged by counsel for the Royal Bank, was ameliorated.

[12] In view of the relatively low threshold on the Company in seeking Court approval to have a plan of arrangement submitted to the creditors for a vote, I am

satisfied the plan should proceed and the creditors should determine whether they do, or do not accept the plan as finally filed.

2. Classification of Creditors

[13] The proposed Classification of Creditors, as set out in s. 3.3 of the Plan, is as follows:

(a) Operating Lender – This category will consist of Royal Bank of Canada for the amounts owing under its operating line of credit as of the Filing Date;

(b) Term Lenders – This category will consist of Enterprise Cape Breton Corporation, Cape Breton Growth Fund Corporation, Her Majesty in Right of the Province of Nova Scotia (Nova Scotia Economic Development) and Nova Scotia Business Incorporated (collectively, the 'Term Lenders');

(c) Lease Lenders – This category will consist of Royal Bank of Canada for its leases on rolling stock, Ford Credit Canada Limited, National Leasing Limited, First Union Rail Corporation and Nova Scotia Business Incorporated for its lease on the premises located in Port Hawkesbury, Nova Scotia in which the Business operates (collectively, the 'Lease Lenders');

(d) Unsecured Creditors;

(e) Shareholders of the Company – This category will consist of Federal Gypsum Inc. and Blue Thunder Construction Ltd. (collectively, the 'Shareholders')

[14] Counsel for Black and MacDonald Limited, (herein "BML") who purport to hold a subordinate secured charge on assets of the Company, objected to the classification of BML as an unsecured creditor. Counsel for the Federal Crown Corporations and for the Nova Scotia Crown Corporations also indicated a potential concern with the proposed classification and, in particular, the classification of the Royal Bank as a separate secured class. Counsel were invited to submit further written submissions as to their concerns.

[15] In his written submission, counsel for the Company references *Stelco Inc., Re* (2005), 15 C.B.R. (5th) 307 (Ont. C.A.), and the observations of Blair, J.A., at paras.23-25:

> 23 In *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.), Paperny J. nonetheless extracted a number of principles to be considered by the courts in dealing with the commonality of interest test. At para. 31 she said:
>
> > In summary, the cases establish the following principles applicable to assessing commonality of interest:
> >
> > > 1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test;

> 2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation.
>
> 3. The commonality of interests are to be viewed purposively, bearing in mind the object of the C.C.C.A., namely to facilitate reorganizations if possible.
>
> 4. In placing a broad and purposive interpretation on the C.C.C.A., the court should be careful to resist classification approaches that would potentially jeopardize viable plans.
>
> 5. Absent bad faith, the motivations of creditors to approve or disapprove [of the Plan] are irrelevant.
>
> 6. The requirement of creditors being able to consult together means being able to assess their legal entitlement as creditors before or after the plan in a similar manner.
>
> ...
>
> 25 In the passage from his reasons cited above (paragraphs 13 and 14) the supervising judge in this case applied those principles. In our view he was correct in law in doing so.

[16] In his written submission, counsel also references *NsC Diesel Power Inc., Re* (1990), 79 C.B.R. (N.S.) 1 (N.S.T.D.) and the comments of Davison, J., at paras. 27-29.

> 27 In my view the court should avoid putting in the same class parties with a potential conflict of interest. I see that such a conflict could arise as between subcontractors and those with direct contracts with the owner. They have different contractual rights. A subcontractor may vote for a reduced amount of claim knowing he could still claim the deficiency from the general contractor, and this is cited as only an example of the possibility of conflict.
>
> 28 The test that was suggested by Bowen L.J. in *Sovereign Life Assur. Co. v. Dodd*, [1892] 2 Q.B. 573 (C.A.), dealing with the English legislation, is to place in one class persons 'whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.'
>
> 29 With those principles in mind, I would direct the subcontractors with liens to comprise a separate class.

[17] Counsel then references from the further comments of Justice Blair in *Stelco*, *supra*, at paras. 30 and 35-36:

> 30 We agree with the line of authorities summarized in *Canadian Airlines Corp., Re* and applied by the supervising judge in this case which stipulate that the classification of creditors is determined by their legal rights in relation to the debtor company, as opposed to their rights as creditors in relation to each other. To the extent that other authorities at the trial level in other jurisdictions may suggest to the contrary – see, for example *NsC Diesel Power Inc., Re*, *supra* – we prefer the Alberta [ie. *Canadian Airlines* (*supra*)] approach.
>
> ...
>
> 35 Finally, to hold the classification and voting process hostage to the vagaries of a potentially infinite variety of disputes as between already disgruntled creditors who have been caught in the maelstrom of a CCAA restructuring, runs the risk of

> hobbling that process unduly. It could lead to the very type of fragmentation and multiplicity of discrete classes or sub-classes of classes that judges and legal writers have warned might well defeat the purpose of the Act: ...
>
> 36 In the end, it is important to remember that classification of creditors, like most other things pertaining to the CCAA, must be crafted with the underlying purpose of the CCAA in mind, namely facilitation of the reorganization of an insolvent company through the negotiation and approval of a plan of compromise or arrangement between the debtor company and its creditors, so that the debtor company can continue to carry on its business to the benefit of all concerned. As Paperny J. noted in *Canadian Airlines Corp., Re*, 'the Court should be careful to resist classification approaches that would potentially jeopardize viable Plans.' [emphasis added by counsel]

[18] Counsel for the Company suggested the concerns raised by Davison, J. in *NsC Diesel, supra*, were not present here and that the proposed classification system was based on a "commonality of interest" and was appropriate. Any minor deficiencies, counsel suggests are "...clearly outweighed by the purposive benefits of the classes as presented in the Plan", referencing the comments of Justice Blair at para. 6 in *Stelco, supra*.

3. The Black and MacDonald Limited Classification

[19] BML claims as secured creditor of the company, and objects to the classification placing it in the unsecured class. Counsel for BML asserts his client holds a security agreement "... charging all of the companies right, title, and interest

in and to all equipment and proceeds thereof", excluding only the leased equipment. Counsel acknowledges BML executed a postponement and subordination agreement in favour of both the term lenders and the operating lender such that it holds a subordinate security on the assets charged in favour of both the term lender and the operating lender. After noting the six principles outlined by Paperny, J. in *Canadian Airlines Corp., Re, supra,* counsel references para 22:

> ... the commonality test cannot be considered without also considering the underlying purpose of the C.C.A.A. which is to facilitate reorganizations of insolvent companies. To that end, the court should not approve a classification scheme which would make a reorganization difficult, if not impossible, to achieve. At the same time, while the C,C.A.A. grants the court the authority to alter the legal rights of parties other than the debtor company without their consent, the court will not permit a confiscation of rights or an injustice to occur. (emphasis added)

[20] Paul G. Goodman, President of the Monitor, in an Affidavit filed in this application, deposes:

> ... it is the Monitor's opinion that, subject to the currently intervening charge of the DIP lender and the Administrative Charge, as at the date of the Initial Order and as at December 7:
>
> (a) the assets on which RBC holds security are sufficient to provide for a 100% payout of its Operating Loan;
>
> (b) the assets on which NSBI, OED, CBGF & ECBC hold security, if realized on, would leave each of these creditors with a significant deficiency;

(c) as B & M's security interest is subordinated to those of RBC, NSBI, OED, CBGF & ECBC there would be no assets remaining to be realized on by B & M under its security and in the result its security has no value.

[21] The flexibility afforded the Court, in respect to CCAA applications, is to ensure that Plans of Arrangement and Compromise are fair and reasonable as well as designed to faciliate debtor reorganization. Justice Romaine, in *Ontario v. Canadian Airlines Corporation,* 2001 ABQB 983, at paras. 36-38 stated:

> [36] The aim of minimizing prejudice to creditors embodied in the CCAA is a reflection of the cardinal principle of insolvency law: that relative entitlements created before insolvency are preserved: R. v. Goode, *Principles of Corporate Insolvency Law,* 2nd ed. (London: Sweet & Maxwell, 1997) at 54. While the CCAA may qualify this principle, it does so only when it is consistent with the purpose of facilitating debtor reorganization and ongoing survival, and in the spirit of what is fair and reasonable.
>
> [37] Paperny J. (as she then was) also discussed the purpose of the CCAA in *Re Canadian Airlines Corp.,* (2000), 265 A.R. 201 (Q.B.), aff'd [2000] A. J. No. 1028 (C.A.), online: QL (AJ) (C.A.), leave refused [2001] S.C.C.A. No. 60. At para. 95, she stated that the purpose of the CCAA is to facilitate the reorganization of debtor companies for the benefit of a broad range of constituents.
>
> [38] Paperny J. also noted in para. 95 that, in dealing with applications under the CCAA, the court has a wide discretion to ensure the objectives of the CCAA are met. At para. 94, she identified guidance for the exercise of the discretion in *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.) at p. 9 as follows:

> 'Fairness' and 'reasonableness' are, in my opinion, the two keynote concepts underscoring the philosophy and workings of the Companies Creditors Arrangement Act. Fairness is the quintessential expression of the court's equitable jurisdiction - although the jurisdiction is statutory, the broad discretionary powers given to the judiciary by the legislation which make its exercise in equity - and 'reasonableness' is what lends objectivity to the process.

[22] Counsel for BML suggests the Court should give weight to its status as a secured creditor. In fact, however, on the evidence presented to date, it would appear that BML's claim has no value, other than as an unsecured claim against the Company. In the opinion of the Monitor, there would be no assets available to BML, in the event of a liquidation of the Company's assets and therefore its security has "no value". I am satisfied that in classifying BML as an unsecured creditor, there is no "confiscation of rights or ... injustice". This security, having no apparent value, they are therefore unsecured and their classification as an unsecured creditor is both fair and reasonable in the circumstances.

4. The Royal Bank Classification

[23] The term lenders, being the Nova Scotia Crown Corporations and the Federal Crown Corporations, object to the classification of the operating lender, being the

Royal Bank, in a separate class. Counsel for the Federal Crown Corporations references *Stelco Inc. Re*, *supra*, and the observations of Blair, J. A., at paras 21-22:

> 21 Everyone agrees that the classification of creditors for CCAA voting purposes is to be determined generally on the basis of a 'commonality of interest' (or a 'common interest') between creditors of the same class. Most analyses of this approach start with a reference to *Sovereign Life Assurance Co. v. Dodd* (1892) , [1891-94] All E.R. Rep. 246 (Eng. C.A.), which dealt with the classification of creditors for voting purposes in a winding-up proceeding. Two passages from the judgments in that decision are frequently cited:
>
> At pp. 249-350 Lord Esher said:
>
> > The Act provides that the persons to be summoned to the meeting, all of whom, is to be observed, are creditors, are persons who can be divided into different classes, classes which the Act [FN3] recognizes, though it does not define. The creditors, therefore, must be divided into different classes. What is the reason for prescribing such a course? It is because the creditors composing the different classes have different interests, and, therefore, it a different state of facts exists with respect to different creditors, which may affect their minds and judgments differently, they must be separated into different classes.
>
> At. p. 251, Bowen L.J. stated:
>
> > The word 'class' used in the statute is vague, and to find out what it means we must look at the general scope of the section, which enables the court to order a meeting of a 'class of creditors to be summoned. It seems to me that we must give such a meeting to the term 'class' as will prevent the section being so worked as to produce confiscation and injustice, and that we must confine its meaning to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.

> 22 These views have been applied in the CCAA context. But what comprises those 'not so dissimilar' rights and what are the components of that 'common interest' have been the subject of debate and evolution over time. It is clear that classification is a fact-driven exercise, dependent upon the circumstances of each particular case. Moreover, given the nature of the CCAA process and the underlying flexibility of that process – a flexibility which is its genius – there can be no fixed rules that must apply in all cases.

[24] Counsel for the Federal Crown Corporations, as well as for the Nova Scotia Crown Corporations, suggest that carving out a separate class for Royal Bank, from the remaining secured creditors, runs contrary to the principles outlined by Justice Paperny in *Canadian Airlines Corp., Re, supra.* Although not disputing the appropriateness of the creation of a class of creditors of "lease lenders", "unsecured creditors", and "shareholders", Counsel suggest the classification of two classes of secured creditors would create fragmentation that is unnecessary and contrary to the "commonality of interest" principle. Secured creditors are, in the submission of counsel, secured creditors and there is no reasonable, logical, rational and practical reason not to have all the secured debt within the same class.

[25] Counsel for the Federal Crown Corporations refers to *Keddy Motor Inns, Re* (1992), 13 C.B.R. (3d) 254 (N.S.C.A.), and the decision of Justice Freeman, where at paras. 21-22, he notes an article by Ronald N. Robertson, Q.C., in a publication entitled "Legal Problems on Reorganization of Major Financial and Commercial

Debtors", Canadian Bar Association - - Ontario Continuing Legal Education, April 5, 1983. The author comments to the effect that the CCAA authorizes the Court to alter the legal rights of parties, other than the debtor company, without their consent, and secondly that the purpose of the Act is to facilitate reorganizations and this is a factor to be considered at every stage of the process, including in the classification of creditors. As such, to accept "identity of interest" in classification of creditors would result in a "multiplicity of discreet classes" making reorganizations difficult, if not impossible.

[26] Counsel's submission also refers to *Fairview Industries Ltd., Re* (1991), 11 C.B.R. (3d) 71, 1991 Carswell NS 36, where Glube, C.J.T.D., (as she then was), at paras. 32-33, commented as follows:

> I have no difficulty in rationalizing the decisions in *Norcen* and *Elan*. In my opinion, whether the security is on 'quick' assets or 'fixed' assets, the companies listed under Fairview secured creditors and Shelburne secured creditors, except for Central Capital, all have a first charge. There does not have to be a commonality of interest of the debts involved, provided the legal interests are the same. In addition, it does not automatically follow that those who have different commercial interests, that is, those who hold security on 'quick' assets, are necessarily in conflict with those who hold security on hard or fixed assets. Just saying there is a conflict is insufficient to warrant putting them into separate classes.
>
> In the present case, all the secured creditors of Fairview and all the secured creditors of Shelburne, except Central Capital, have a first charge of some sort, even though

> the security of each differs. They have a common legal interest, excluding Central Capital. I find that there is a commonality or community of interest of the secured creditors of Fairview and the secured creditors of Shelburne. Based on this position, I find that the Fairview secured creditors shall continue as one group.

[27] The submission by counsel for the Federal Crown Corporations continues:

> Like the situation in Fairview, both RBC and the Term Lenders each have a first charge of some sort, even though the type of asset differs. There is clearly a common legal interest in the debtor Company amongst each of the secured creditors. The distinction between security on 'quick' assets such as accounts receivable and inventory as opposed to security on hard or fixed assets as has been put forward by RBC (herein referred to as Royal), throughout is clearly not determinative.

[28] Counsel also references the additional comments of Chief Justice Glube, at para. 19:

> I suggest that all counsel are reading too much into the two decisions *Norcen Energy Resources Ltd. V. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20, 64 Alta L.R. (2d) 139,[1989] 2 W.W.R. 566 (Q.B.) and *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 [hereinafter *Elan*]. In my opinion the two cases do not set up two 'lines' of cases reaching different conclusions. I suggest that each was decided on their particular facts. The court should be wary about setting up rigid guidelines which 'must' be followed. The *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the 'C.C.A.A.') is intended to be a fairly summary procedure and should not be stretched out over months and years with protracted litigation. Quite definitely, each case must be decided on its own unique set of circumstances.

[29] One of the circumstances considered in the Company's proposal to separately classify the term lenders and the operating lender is the opinion of the Monitor that

upon liquidation the operating lender would recover the full amount of its operating loan, while there would be a substantial shortfall in respect to the term lenders. This opinion reflects the reported levels of receivables and inventory outlined in the various Monitor's reports, as compared with the indebtedness to the operating lender, and suggests that on a liquidation the operating lender would be successful in retiring its outstanding indebtedness. Also, the appraisal of the fixed assets, on the basis of an orderly liquidation, would appear to suggest a substantial shortfall in realization by the term lenders. Clearly, in respect to the relationship to the Company by the operating lender and the term lenders, the prospects for recovery on an orderly liquidation, being considerably different, would not be consistent with the "commonality" principle, at least, as it may relate to the prospects for recovery. There is also a very real difference in the nature of the assets on which they are secured, in that in the one instance the security is on fixed real assets and in the other on receivable and inventory. The latter are subject to ongoing fluctuations as the Company continues in operation.

5. Conclusion on Classification

[30] There is nothing in the submission of Counsel, nor in the circumstances to warrant altering the classification proposed by the Company. BML's security has, apparently, little or no value. Each of the Federal Crown Corporations and the Nova Scotia Crown Corporations appear to have sufficient votes to derail the proposed Plan. There is no reason to deny the Royal Bank, who would then not have such a veto over the Plan, inclusion in the fixed asset lenders security classification. The Company has not suggested they be in the same class, and no reason has been advanced to warrant departing from the Company's proposed classification.

3. The Creditors' Meeting

[31] Sections 4 and 5 of the CCAA provide:

> 4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> 5. Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

[32] Counsel for the Company references the observation of Paperny J. in *Fracmaster Ltd., Re* (1999), 11 C.B.R. (4th) 204 (A.B.Q.B.), at para.24:

> 24 I also note the principle that even where a plan is proposed, the court need not order a meeting of the creditors or class of creditors. That is because ss.4 and 5 of the CCAA, which provide for such meetings, are permissive, not mandatory. As Houlden and Morawetz state at 10A-11: 'If the court believes that the proposed plan or arrangement is not in the best interests of creditors, it may refuse to make the order...[I]f the plan lacks economic reality, the court will also refuse to make the order.'

[33] In the circumstances and having regard to my earlier comments, I am satisfied there should be a meeting of creditors to consider and vote on the Plan.

4. Extension of Stay of Proceedings

[34] In view of the preliminary approval of the Plan and the calling of a meeting of creditors to consider and vote on the Plan, it necessarily follows that there should be an extension of the stay to enable the Company to present the Plan to the creditors, to conduct the claims process as previously ordered and to determine whether the creditors have voted in favour or against the Plan. In *Cansugar Inc., Re*, 2004 NBQB 7, Justice Glennie, in referencing s.11(6) of the CCAA, noted:

> In my opinion, the requirements of section 11(6) of the C.C.A.A. have been satisfied in this case. The continuation of the stay is supported by the overriding purpose of the C.C.A.A., which is to allow an insolvent company a reasonable period of time to reorganize and propose a plan of arrangement to its creditors and the Court, and to prevent maneuvers for positioning among creditors in the interim. [emphasis added by counsel]

[35] To similar effect, Topolniski J. in *San Francisco Gifts Ltd., Re,* 2005 ABQB 91, at para. 28 observed:

> The court's role during the stay period has been described as a supervisory one, meant to: '...preserve the status quo and to move the process along to the point where an arrangement or compromise is approved or it is evident that the attempt is doomed to failure.' That is not to say that the supervising judge is limited to a myopic view of balance sheets, scheduling of creditors' meetings and the like. On the contrary, this role requires attention to changing circumstances and vigilance in ensuring that a delicate balance of interests is maintained. [emphasis added by counsel]

[36] Notwithstanding the objection by the Royal Bank, including the potential prejudice as outlined by counsel in the event there is a deterioration in the value of the assets securing its operating loan, continuation of the stay is to be supported in view of the overriding purpose of the CCAA "...to allow an insolvent company a reasonable period of time to reorganize and propose a plan of arrangement to its creditors and the court...".

5. **Additional DIP Financing**

[37] According to counsel, providing the court approves presentation of the Plan to the creditors and the extension is granted, the Company will require additional DIP financing. In referencing the cash flow projections and the anticipated need for additional financing, counsel notes that the proposed increase is somewhat smaller than the earlier cash flow projections had anticipated. The reason, counsel suggests, is "...due in part to a slower than anticipated growth in sales which has reduced the Company's cash requirements." Counsel continues:

> It is clear from the cash flow reports prepared by the Company, however, that there is indeed a growth in sales which will require additional financing.

[38] Although approval has already been made for initial DIP financing, with its "super-priority" security in favour of the DIP lender and later for additional DIP financing, each application must be considered on its own merits and in the circumstances then existing. In respect to this Application, counsel again references the observations of C. Campbell J. In *Re. Manderley Corp.* (2005), 10 C.B.R. (5th) 48 (Ont. S.C.J.), at para.18:

> 18 The operative legal principles are set out in the following quotations from Houlden and Morawetz' Bankruptcy & Insolvency Analysis (Carswell, 2004), section N16 – Stay of Proceedings – CCAA – at page 18:

> Although the C.C.A.A. makes no provision for DIP financing, it seems to be well established that, under its inherent powers, the court may give a priority for such financing and for professional fees incurred in connection with the working out of a C.C.A.A. plan.

Also referenced is *Hunters Trailer & Marine Ltd., Re* (2001), 295 A.R. 113 (Q.B.), and the comment by Wachowich J., at para. 32:

> 32 Having reviewed the jurisprudence on this issue, I am satisfied that the Court has the inherent or equitable jurisdiction to grant a super-priority for DIP financing and administrative charges, including the fees and disbursements of the professional advisors who guide a debtor company through the CCAA process.

Counsel notes the three issues outlined by Glennie J. in *Re Simpson's Island Salmon Ltd., supra,* at paras.16-17 and 19:

> 16 In order for DIP financing with super-priority status to be authorized pursuant to the CCAA, there must be cogent evidence that the benefit of such financing clearly outweighs the potential prejudice to secured creditors whose security is being eroded. See *United Used Auto & Truck Parts Ltd., Re,* [1999] B.C.J. No. 2754 (B.C.S.C. [In Chambers]), affirmed [2000] B.C.J. No. 409 (B.C.C.A.)
>
> 17 DIP financing ought to be restricted to what is reasonably necessary to meet the debtor's urgent needs while a plan of arrangement or compromises is being developed.
>
> 19 A Court should not authorize DIP financing pursuant to the CCAA unless there is a reasonable prospect that the debtor will be able to make an arrangement with its creditors and rehabilitate itself.

[39] Counsel recognizes the court is engaged in a "balancing act that is the hallmark of DIP financing" as declared by C. Campbell J. in *Manderley*, *supra*, at para.27. At para.18, in *Simpson's Island Salmon Ltd.*, *supra*, Justice Glennie observed:

> Failure to grant an increase in the Administrative Charge would result in the Applicants no longer being able to continue their attempts at restructuring.

[40] Counsel suggests a similar result would occur if the proposed additional DIP was not approved and that so long as a reasonable chance of rehabilitation remains,

> ...a company under CCAA protection should be afforded what measures are available to aid that rehabilitation, despite the concomitant prejudice to its creditors. A successful restructuring continues to be in the best interest of both the Company and its creditors.

In counsel's submission, the "small additional prejudice to creditors" in allowing the additional DIP financing is "far outweighed by the potential benefits to all of the Company's stakeholders of allowing the Company the opportunity to present the Plan." Counsel's written submission concludes by referencing *Re Dylex Ltd.*, (1995) 31 C.B.R. (3d) 106 (ON C.J.- Gen. Div.) and the comment by Farley, J., to the effect that "...the mere fact that a significant secured creditor objects to such financing in no

way precludes the Court's ability to allow DIP financing." The submission continues by noting the observation of Wachowich J. in *Hunters* (2001), *supra*, at para. 32:

> ...If super-priority cannot be granted without the consent of secured creditors, the protection of the CCAA effectively would be denied a debtor company in many cases.

[41] In his objection, counsel for the Royal Bank reiterates the bank's concern that DIP financing will erode its security. Counsel speculates that the increase in DIP financing means the margin of its debt to the current assets secured by its security would be reduced and indeed, applying a 50 per cent margin rate, would be eliminated. In his written submission, counsel observed:

> Although there is no evidence before the Court as to the estimated diminution in value of current assets in the event of liquidation, there is such evidence regarding the fixed assets. The appraisal provided by Universal Worldwide LLC estimates the value of the fixed assets on 'orderly liquidation' at $2,850,000US but only $950,000 on 'quick/forced sale', a drop of 2/3 in the later case. A drop in value of 50% in the case of the current assets would see the Bank get nothing in the event that the additional DIP financing sought were granted and that a liquidation ensued. This is without consideration of any impact from the Administration Charge.

[42] It is clear the value of the security held by the Royal Bank is at risk by the continuation of the stay and the granting of additional DIP financing to enable the Company to present its Plan to its creditors for their consideration. However, the

latest report of the Monitor does not reflect a substantial erosion in the value of the assets secured by the Royal Bank. Exhibit 3 to the Monitor's Report of November 26, 2007 shows accounts receivable of $778,383.00, while on November 23 the amount was $958,232.00. With respect to inventory, the raw materials at September 21 are reported at $944,393.00 and finished goods at $561,220.00, for a total of $1,505,613.00. The totals for November 23 were raw materials at $723,465.00 and finished goods at $438,165.00, for a total of $1,161,630.00. Although there has been a decline, it would not appear to be substantial and no evidence was submitted to suggest any greater concern about a potential deterioration during the period encompassed by the request to extend the stay. Although the additional DIP, together with the additional administrative charges, will impact on any recovery on realization of assets in general, there is, notwithstanding the speculation of counsel for the Royal Bank, no evidence the bank's security will be rendered valueless in the event of an eventual liquidation, particularly in view of the allocation of approximately 95 per cent of the burden of the DIP and administrative charges to the assets secured to the Federal Crown Corporations and the Nova Scotia Crown Corporations. In the initial report by the Monitor, the preliminary calculation of secured creditor percentages was 5.53 per cent for the Royal Bank, (taking into account both its operating loan and lease loan), with the remainder to the other secured creditors,

including creditors holding leases. Although counsel for the Nova Scotia Crown Corporations suggested he would be submitting a revised figure for their loans, he further indicated it would not materially affect the percentages as outlined in the Monitor's Report. As such, the responsibility of the Royal Bank for the expenses of the restructuring are slightly over five per cent, and absent evidence of a material deterioration in the value of the assets secured under its security, as well as the value of the assets held by the other secured creditors, and in view of the need for the additional DIP financing to permit the Company to meet with and present to its creditors the Plan, I am satisfied to approve the additional financing and to grant the necessary priority contemplated by it.

J.