

# Two Worlds Collide: When the Construction Lien Act Meets the Companies' Creditors Arrangement Act

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# WHAT IS THE PURPOSE OF THE COMPANIES CREDITORS ARRANGEMENT ACT?

*From Doherty J.'s dissent in Elan v. Comiskey (1990) (includes quotes from other decisions):*

"The purpose of the C.C.A.A. is to facilitate the making of a **compromise or arrangement** between an insolvent debtor company and its creditors **to the end that the company is able to continue in business.**

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The legislation is remedial in the purest sense in that it provides **a means whereby the devastating social and economic effects of bankruptcy or creditor-initiated termination of ongoing business operations can be avoided** while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

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. . . the Act was designed to serve a "broad constituency of investors, creditors and employees". Because of that "broad constituency" the court must, when considering applications brought under the Act, **have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest.**

# HOW DOES THE CCAA WORK

## Court-driven process:

- Application for Initial Order, typically without notice to creditors, other than key creditors, such as the primary lenders
- Initial Order contains a 30 day stay (typically extended)
- Stay gives company breathing room to:
  - i. develop formal Plan of Arrangement
  - ii. begin to restructure, which can include disclaiming or renegotiating agreements [complete]
- Very few mandated restrictions on Plan of Arrangement
- BUT, Plan of Arrangement is consensual - requires:
  - approval by a majority in number representing  $\frac{2}{3}$  in value of the affected creditors or class of creditors
  - Court sanction
- Plan is binding on the classes of affected creditors that approved it
- Because the Plan of Arrangement is consensual, there is considerable negotiation amongst the key players
- Much of the Court action that occurs during the process is about what happens during the process, including through modifications to the terms of the Initial Order

# PRINCIPAL CONSTITUENTS IN A CONTRACTOR CCAA

## Pre-existing

- Debtor/Applicant (Contractor)
- Owner
- Existing Lenders / Secured Creditors
- Lien Claimants (Subcontractors/Suppliers)
- Bonding Companies
- Employees
- Tax Authorities
- Pensions
- Other (unsecured) Creditors

## Additional

- Monitor
- DIP Lender
- Critical Suppliers

# THE INITIAL ORDER

Key Elements from a Creditor's or Supplier's Perspective:

- broad stay preventing any proceeding, enforcement or the exercise of any rights or remedies
- Debtor can disclaim or resile from agreements
- creates charges which "prime" or jump ahead of all other security interests, liens, trusts and claims in respect of:
  - the costs of the process (the Administration Charge)
  - debtor-in-possession financing (the DIP Charge)
  - directors and officers indemnification (the Directors Charge)
  - amounts owing to suppliers designated as "critical" (the Critical Suppliers Charge)
- suppliers of goods and services prevented from discontinuing, altering, interfering with or terminating the supply of goods and services BUT nothing prevents suppliers from demanding immediately payment for the goods or services supplied after the date of the Order

# SO, WHAT'S THE PROBLEM? (#1)

## Competing and Inconsistent Priority Regimes

*From the February 2, 2009 decision of Arnold-Baily J. in PCL Constructors Westcoast Inc. v. Norex Civil Contractors Inc.:*

. . . I also appreciate that the implications of this ruling may lead to somewhat **arbitrary results** . . . These consequences are, in my view, **the inevitable result of the collision of two legislative schemes designed by two levels of government, neither mindful of the other**. In the oft-quoted words of Justice Tallis in *TransGas* at 265, "it is not for this court to pass upon the propriety or wisdom of such legislation."

# SO, WHAT'S THE PROBLEM? (#2)

## Competing and Inconsistent Interests

*From the September 16, 2013 endorsement of Morawetz, J. in the Comstock CCAA matter:*

This motion underscores the inherent difficulty which surrounds the attempted reorganization of certain entities, in particular, real estate companies and construction companies. . . . With respect to construction companies, creditors, including construction lien trust claimants, vary on a project-by-project basis and the assets or trust funds will also vary on a project-by-project basis. The legal rights of these creditors vary to such a degree that quite often they cannot be grouped in one class. **The community of interest is often lacking, resulting in fragmented interests.**



# WHAT IS THERE FOR A SUBCONTRACTOR NOT TO LIKE?

- Stayed from filing/perfecting liens
- CLA trust claims are essentially ignored
- rights to holdbacks are primed
- no way to collect pre-filing claims
- payments of post filing claims typically delayed during the process
- little or no assurance that there will ultimately be a plan or what pre- or post-filing claims will be paid
- expensive to engage in the process but there is a risk in not doing so
- overall the process is expensive, leaving less for the creditors



# RECENT CASE: COMSTOCK

- Proceedings commenced 03 July 2013
- Bulk of remaining assets sold 13 December 2013
- Acrimonious (see the next slide)
- Jury is out on whether it was a success
- Two “innovations”:
  - Cost Reimbursement Agreement
    - mechanism by which owner could ensure that the subcontractors would be paid
  - Lien Regularization Order
    - lien claimants granted charges over owner’s property with rights akin to those under CLA
    - existing liens vacated
    - owners and others protected in making payments in accordance with the Order
    - Lien Charge still behind Administrative Charge, DIP Lender’s Charge and Director’s Charge

# COMSTOCK: WHY CAN'T WE ALL PLAY NICE?

Extracts from Comstock's 26 July 2013 Motion Record to have liens vacated:

"The sub-trades in registering the Post-Filing Liens have not done so in order to preserve their rights in order to avoid the imminent expiry of a limitation period, but instead have sought to "lien for leverage" with a view to enhancing their negotiating position vis-à-vis Comstock and with the various other parties to the applicable contracts"

"The sub-trades are not entitled to ignore the Initial Order or the applicable provisions of the CCAA, much less flout the Initial Order or the CCAA, simply because they do not like its effect on them or because they wish to use the current financial difficulties encountered by Comstock and their willful non-compliance with the Initial Order and the CCAA as a lever to enhance their bargaining position with Comstock and its contracting parties"

"The sub-trades actions in connection with the registration and/or threatened registration of liens is not in compliance with the Initial Order and the CCAA and such actions cannot be sanctioned"

"The registration of liens is frustrating the purposes of the CCAA, prejudicing the restructuring, and may jeopardize the Comstock Group's effects at reorganization"

# WHAT TO EXPECT IN THE NEXT ONE

- Cost Reimbursement Arrangements will become more common place
- Lien regularization process will find its way into the Initial Order
- Representative counsel for lien claimants?

# TIPS

Retain Blaneys, and until you do:

- Go to the Monitor's website and read the Initial Order to see how you are affected
- do not assume that you are protected by your CLA lien, trust and holdback rights
- move quickly, keeping your eye on the lien periods
- keep in mind that you have the right to insist on immediate payment for goods and services supplied post-filing
- being declared a Critical Supplier is not necessarily a good thing
- being on an "in-the-money" project doesn't necessarily mean you are safe
- do not assume that positions taken and orders obtained by other subcontractors will adequately protect your interests