Federal Court Cour fédérale

Date: 20190128

Docket: T-1460-18

Citation: 2019 FC 114

Ottawa, Ontario, January 28, 2019

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

RMI MARINE LIMITED

Plaintiff

and

THE SHIP "SCOTIA TIDE" AND THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "SCOTIA TIDE"AND OPENHYDRO TECHNOLOGY CANADA LIMITED

Defendant

ORDER AND REASONS

I. Overview

[1] This decision addresses two motions, argued together on January 15, 2019, in this action by the Plaintiff, RMI Marine Limited [RMI], against the Defendants, the vessel "Scotia Tide" [the Vessel] and its owner, OpenHydro Technology Canada Ltd. [OHTC]. The first motion is brought by RMI seeking default judgment against the Defendants, an order for sale of the Vessel through Federal Court process, and ancillary relief. The second motion is brought by OHTC,

seeking a stay of RMI's action *in rem* against the Vessel and the release of the Vessel from arrest; in the alternative seeking to strike RMI's pleading and to release the Vessel from arrest; or, in the further alternative, seeking an extension of time to file a Defence.

[2] OHTC's motion arises in the context of proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [CCAA] in the Supreme Court of Nova Scotia [NSSC] arising out of the insolvency of OHTC, in which the NSSC has issued a stay of other proceedings against OHTC.

[3] For the reasons explained below, my decision is to dismiss RMI's motion and to allow OHTC's motion on particular terms that I consider appropriate to the circumstances of this case. I will grant a stay of RMI's action, effective until the earlier of 90 days from the date of my Order or such time as the stay by the NSSC may in the meantime be lifted, with leave to RMI to apply to have the Federal Court stay lifted at an earlier time in the event of any material change in circumstances. I will also order the release the Vessel from arrest. In recognition of the caveats that have been filed against the release of the Vessel, such release will be delayed until ten days following the date of my Order.

II. **Background**

[4] The Plaintiff, RMI, is a corporation incorporated in Nova Scotia which operates as a marine contractor and provider of marine services and vessels.

[5] The *in personam* Defendant, OHTC, is a corporation, also incorporated in Nova Scotia, the parent company of which is OpenHydro Technology Ltd. of Ireland [OHT] and which is described as having a grandparent company named Naval Energies of France. OHTC was incorporated for the purpose of delivering services to Cape Sharpe Tidal Ventures Ltd. [CSTV], a joint venture between OHT and Emera Inc., for the completion of a tidal energy demonstration project to be operated from the Fundy Ocean Research Centre for Energy [FORCE] site in the Minas Basin of the Bay of Fundy [the Project].

[6] CSTV developed the Project under a Marine Renewable-Electricity License issued by the Province of Nova Scotia pursuant to the *Marine Renewable-energy Act*, SNS 2015, c 32. OHTC initially signed a sublease with FORCE for the use of a berth at the FORCE site referred to as Berth D, and, on December 22, 2014, the sublease was assigned to CSTV. CSTV thereby assumed the rights and obligations of OHTC under the sublease.

[7] OHTC is the owner of the Vessel, which is registered under the *Canada Shipping Act*, 2001, SC 2001, c 26 with port of registry Halifax, Nova Scotia. The Vessel is a rigid-hull catamaran which was purpose-built for the assembly, deployment, testing, maintenance, and retrieval of the underwater tidal turbine owned and used by OHTC in connection with the Project [the Turbine].

[8] The operation of the Vessel in connection with the Project required assistance from support vessels and dive teams. On or about August 18, 2015, OHTC and RMI entered into a charter agreement based on the Supplytime 2005 form [the Charterparty] for the charter of

RMI's vessel "Tidal Runner" and for ancillary services. The Charterparty provided that OHTC could issue supplemental purchase orders to "call up" the vessel and for ancillary services at previously agreed rates, which it did from time to time. RMI now claims $444,719.54 owing by the Defendants in respect of charter hire of RMI's vessels, repair and maintenance of the Vessel, and necessaries supplied by RMI to the Defendants.

[9] The Turbine was installed on the floor of the Minas Basin on July 22, 2018. However, on July 26, 2018, Naval Energies announced it would no longer fund tidal energy technology. As a result, the High Court of Ireland appointed Grant Thornton as the provisional liquidator of OHTC's parent company, OHT. That company is presently insolvent and in liquidation in Ireland.

[10] As a consequence, OHTC also became insolvent, and a number of its suppliers commenced actions in the Federal Court against the Vessel, the Turbine, or the Turbine's control centre. RMI commenced the within action on August 1, 2018, and caused the Vessel to be served and arrested at its berth in Saint John, New Brunswick, on August 2, 2018. Counsel for OHTC accepted service on behalf of OHTC on August 7, 2018. Several of the Vessel's other suppliers have filed caveats against its release in RMI's action, but RMI is the only claimant which has arrested the Vessel.

[11] Following service of its Statement of Claim upon the Defendants, RMI's counsel afforded OHTC an extension of time to September 14, 2018 to file a Statement of Defence. No Defence was filed, as a consequence of which RMI brought the present motion seeking default

judgment and an order for sale of the Vessel. As an alternative, if the Court is not prepared to grant default judgment, RMI seeks an order for sale of the ship *pendente lite*, to avoid deterioration in its value while this litigation proceeds.

[12] In September 2018, it was determined by former employees of OHTC that the Turbine was damaged beyond repair. It presently remains on the floor of the Minas Basin at Berth D.

[13] On September 24, 2018, OHTC filed a Notice of Intention [NOI] to make a proposal to creditors under s 50.4(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [BIA]. Subsequently, on October 23, 2018, OHTC filed a motion to convert the bankruptcy proceeding into a proceeding under s 11.6 of the CCAA in order to undertake a court-supervised orderly wind-down of the business. OHTC describes the main components of its plan for an orderly wind-down as follows:

A. Maintain compliance of the Turbine with environmental regulations until it can be removed;

B. Maintain and ensure the safety of the Vessel while a sales process is undertaken;

C. Plan for the retrieval of the Turbine from the Minas Basin; and

D. Realize upon or recover any other company assets for the benefit of stakeholders and creditors.

[14] OHTC's plan involves the use of the Vessel for the retrieval of the Turbine from the floor of the Minas Basin, which it believes will not be possible before May 2019 because of winter weather conditions. OHTC explains that it has provided the Province of Nova Scotia with a bond in the amount of $1,020,000.00 as security for compliance by CSTV with its environmental obligations, including removal of the Turbine. Once the Turbine is removed, OHTC can recover the bond, and OHTC then plans to sell its assets, including the Vessel, for the benefit of its creditors. It contemplates employing a sale process under the supervision of the monitor appointed under the CCAA and subject to the approval of the NSSC.

[15] On November 13, 2018, the Honourable Justice Michael Wood of the NSSC issued an Initial Order, granting the Defendant's motion to convert the bankruptcy proceeding into a proceeding under the CCAA [the Initial Order]. The Initial Order appointed Grant Thornton as the CCAA monitor [the Monitor] to manage the financial affairs of OHTC and prepare and supervise a process for the sale of OHTC's assets, subject to approval of the NSSC, and approved debtor-in-possession [DIP] financing by a company described as OpenHydro Group Limited [the DIP Lender] in the amount of $500,000.00 to support OHTC's operations during the wind-down. The Initial Order also stayed all proceedings against OHTC or its property, until December 7, 2018, but, in the following paragraph, exempted from the stay the *in rem* Federal Court proceedings:

> 11A. In recognition that *in rem* proceedings are before the Federal Court in respect of the vessel, Scotia Tide, the OTC03 Turbine Control Centre, and the Cape Sharp Tidal Turbine as described in Federal Court Proceeding T-1578-18, this order shall not apply to those proceedings (including caveators) unless and to the extent the Federal Court may determine in the exercise of its own unfettered jurisdiction and discretion. This Court specifically

> requests the aid and recognition of the Federal Court in carrying out the terms of this order as required.

[16] Justice Wood also issued a Charging Order dated November 13, 2018, *inter alia* granting the DIP Lender a charge on OHTC's assets in support of the DIP financing [the Charging Order].

[17] On December 6, 2018, OHTC appeared before the Honourable Justice C. Richard Coughlan of the NSSC to seek an order extending the stay of proceedings until the spring of 2019 and to increase the approved DIP financing from $500,000.00 to $750,000.00 to support its operations during the extended stay period. The Initial Order was continued by Justice Coughlan, such that it is now effective until March 6, 2019, and the increase in the DIP financing was approved. OHTC says that it has proceeded to arrange for securing, winterizing and maintaining the Vessel, in order to maintain its value, with a portion of the DIP financing to be used for this purpose.

[18] OHTC's principal position in response to RMI's motion for default judgment and sale of the Vessel is that the Court should exercise its discretion under s 50(1)(a) of the *Federal Courts Act*, RSC 1985, c F-7 to stay RMI's *in rem* action against the Vessel and release it from arrest, in response to the request for assistance by the NSSC, as the use of the Vessel to retrieve the Turbine is essential to the viability of OHTC's CCAA plan and it is in the interests of all creditors and other OHTC stakeholders to achieve an orderly wind-down and distribution of OHTC's assets in accordance with that plan.

[19] In the alternative, OHTC takes the position that RMI's Statement of Claim should be struck, and the Vessel released from arrest, on the basis that the Federal Court is without jurisdiction. It bases this position on a choice of jurisdiction clause in the Charterparty, which OHTC argues affords exclusive jurisdiction to the NSSC.

[20] Finally, in the event that it is unsuccessful in staying or striking RMI's action, OHTC seeks an extension of time to file a Defence.

[21] While several claimants have filed caveats against the release of the Vessel in this action, only one caveator, DP World Saint John Inc. [DP World] filed written submissions and appeared at the hearing of these motions. DP World is the operator of the terminal in Saint John, New Brunswick at which the Vessel is presently berthed and at which it has been berthed since its arrest. DP World is claiming amounts owing to it for berthage and other services provided to the Vessel. DP World is also the plaintiff in Federal Court proceeding T-1480-18, in which it asserts its claims against OHTC and the Vessel *in rem*.

[22] DP World supports RMI's motion for default judgment and sale of the vessel, although it proposes some modifications to the form of Order suggested by RMI, which modifications RMI has endorsed. DP World opposes the motions brought by OHTC.

III. **Issues**

[23] RMI submits that the issues to be determined on its motion for default judgment and sale of the Vessel are as follows:

A. Are the Defendants in default?

B. Should the Court grant default judgment against the Defendants and in what amount?

C. Should the Court grant an order for the sale of the Vessel?

D. Should RMI have its costs of this motion and, if so, on what basis?

[24] OHTC submits that the issues to be determined on its motion are as follows:

A. Should RMI's action be stayed and the Vessel released?

B. In the alternative, should RMI's claim be struck and the Vessel released?

C. In the alternative, should the Defendants be granted an extension of time to file a Defence?

[25] RMI's written representations filed in response to OHTC's motion raise an additional preliminary issue, whether certain affidavits included in OHTC's Motion Record are admissible.

IV. **Analysis**

A. *Preliminary Issue*

[26] OHTC's motion relies principally upon the affidavit of Peter Wedlake, a Senior Vice President at Grant Thornton Limited, the Monitor. However, Mr. Wedlake's affidavit attaches

two other affidavits, the first sworn on October 23, 2018 by Laurent Schneider-Manoury, the sole director of OHTC [the Schneider-Manoury Affidavit], and the second sworn on November 28, 2018 by Michael MacAteer, a partner at Grant Thornton in Dublin, Ireland [the MacAteer Affidavit]. The Schneider-Manoury Affidavit was filed in the CCAA proceeding in the NSSC in support of the motion which resulted in the Initial Order and Charging Order. The MacAteer Affidavit was filed in that proceeding in support of the request for extension of the stay to March 6, 2019 and the increased DIP financing.

[27] However, both RMI and DP World take issue with the fact that neither the Schneider-Manoury Affidavit nor the MacAteer Affidavit has been independently filed as an affidavit in the present proceeding, as well as the fact that Mr. Wedlake does not in his own affidavit depose to his belief in the contents of the two affidavits he has attached.

[28] At the hearing of these motions, counsel for RMI and DP World advanced somewhat different positions in relation to that these affidavits. RMI took the position that they were inadmissible, while DP World took the position that they could be admitted but should be afforded little or no weight. However, OHTC's counsel advised that OHTC was not intending to rely upon the Schneider-Manoury Affidavit or the MacAteer Affidavit for the truth of their contents. Rather, they were being introduced into evidence in order to demonstrate to the Federal Court the record that was before the NSSC when it made its decisions in the CCAA proceeding. OHTC referred the Court to *AB Hassle v Apotex Inc.*, 2002 FCT 222 at para 29, in which the Federal Court, Trial Division declined to strike from evidence materials in an affidavit tendered not for the proof of the truth of their contents but rather to demonstrate the context in which a

proceeding had developed. The Court noted that it was for the hearing judge to determine what weight to be given to this evidence.

[29] I understood counsel for RMI and DP World to acknowledge at the hearing that the Schneider-Manoury Affidavit and the MacAteer Affidavit were admissible for the purpose explained by the OHTC's counsel, although also raising concern that components of OHTC's written representations did rely upon the contents of those affidavits for their truth and maintaining the position that the Court should afford little or no weight to the evidence in those affidavits to the extent they were being relied upon in that manner. I advised the parties at the hearing that I would consider this concern in analysing the evidence to arrive at my decision in this matter. I identify in my Analysis below circumstances where I consider this concern to arise.

B. *Jurisprudential Framework*

[30] OHTC's response to RMI's motion relies entirely upon OHTC's own motion, seeking to stay or strike RMI's action or to obtain an extension of time to file a Defence. As such, the outcome of both motions before the Court turns significantly on whether OHTC succeeds in obtaining any of the relief it has requested.

[31] Turning therefore to OHTC's principal position, that RMI's action should be stayed and the Vessel released, I note first that all parties rely heavily on the decision of the Supreme Court of Canada in *Holt Cargo Systems Inc. v ABC Containerline N.V. (Trustees of)*, 2001 SCC 90 [*Holt*] and the companion decision in *Antwerp Bulkcarriers, N.V. (Re)*, 2001 SCC 91 [*Antwerp*]. These decisions arose in the context of the bankruptcy of a Belgian container line, which resulted

in the arrest of one of its vessels, the “Brussel”, at the Port of Halifax through an *in rem* action in the Federal Court.

[32] Following the arrest, the shipowner was declared bankrupt by the Belgian bankruptcy court, and the trustees in bankruptcy obtained from the Québec Superior Court an order recognizing the judgment of the Belgian court and subsequently an order that the proceeds of sale of the vessel or the vessel itself be provided to the trustees for distribution through the Belgian bankruptcy [the Québec Superior Court Order]. This order was contrary to the ongoing procedural framework developed in the Federal Court for sale of the vessel and distribution of its proceeds. Relying in part on the Québec Superior Court Order, the trustees applied to the Federal Court for a stay of its proceedings and to have the proceeds of sale paid out to them. The Honourable Justice MacKay of the Federal Court ruled against the trustees [the Federal Court Order].

[33] Both the Québec Superior Court Order and the Federal Court Order were appealed, and the resulting appellate decisions were in turn considered by the Supreme Court of Canada. In *Antwerp,* which considered the appeal from the Québec Superior Court Order, the Supreme Court concluded (at paragraphs 37 and 40) that the Federal Court’s maritime jurisdiction, once properly engaged by the commencement of the *in rem* action and the arrest of the ship, was not lost as a result of the subsequent bankruptcy of the shipowner. The Supreme Court also explained (at paragraphs 37 and 45 to 47) that the bankruptcy court had no power to deal with the vessel, which had already been captured by a competent order of the Federal Court, and further concluded (at paragraphs 48 to 53) that the bankruptcy court’s issuance of what amounted

to an anti-suit injunction improperly attempted to restrict the Federal Court's ability to exercise its jurisdiction. The Supreme Court noted in conclusion (at paragraphs 54 to 55) that it was open to the Federal Court judge to enter a stay if he considered it appropriate to do so, or to decline to accede to the request of the trustees as he did, and that the circumstances would have been the same had the bankruptcy occurred in Canada rather than in Belgium.

[34] In *Holt*, which considered the appeal from the Federal Court Order, the Supreme Court held (at paragraphs 41 to 44) that, pursuant to applicable Canadian conflict of laws principles, the plaintiff, which had arrested the vessel in the Federal Court, was entitled to have its maritime lien status, conferred under the law of the United States where the plaintiff provided stevedoring services to the vessel, recognized in the Federal Court proceeding. It further concluded (at paragraphs 46 to 50) that, by virtue of its maritime lien, the plaintiff enjoyed a juridical advantage in Canada that would be in jeopardy if the Federal Court proceedings were stayed in deference to the Belgian bankruptcy court. This was because Belgian law would not recognize the plaintiff's maritime lien status under US law. At paragraphs 51 to 53, the Supreme Court concluded that the plaintiff's maritime lien conferred upon it status as a secured creditor for purposes of the bankruptcy and that Justice MacKay was justified in putting considerable weight on this factor in making his discretionary decision under s 50 of the *Federal Courts Act* whether to stay the Federal Court proceeding at the request of the trustees.

[35] Consistent with the decision in *Antwerp*, the Supreme Court noted in *Holt* (at paragraphs 60 to 66) that the Federal Court did not lose jurisdiction as a result of orders issued by the Québec Superior Court sitting in bankruptcy. The Supreme Court then considered whether the

Federal Court should nevertheless have deferred to the Belgian bankruptcy court on the basis of international comity, concluding (at paragraphs 85 to 87) that international coordination was an important, but not necessarily a controlling, factor. The Federal Court was required to be mindful of the difficulties presented by international bankruptcies, including the desirability of minimizing the multiplicity of proceedings and potentially inconsistent decisions, as well as the need to do justice to the particular litigants before it. No single consideration was to be elevated to a controlling position in the exercise of the Federal Court Court's discretion whether to stay its own proceedings.

[36] Finally, in considering (at paragraphs 80 to 98) whether the Federal Court erred in the exercise of its discretion to deny the trustees' motion for a stay of proceedings, the Supreme Court noted that the principles on which the discretion should be exercised in this type of matter were authoritatively settled in *Amchem Products Inc. v British Columbia (Workers' Compensation Board)*, [1993] 1 SCR 897. That case explained that the relevant question was whether there was a more appropriate jurisdiction based on the relevant factors and that the existence of a more appropriate forum must be clearly established to displace the forum selected by the plaintiff. After noting the public policy considerations applicable in the context of an international bankruptcy, the Supreme Court described (at paragraph 91 of *Holt*) the factors to be considered in making a discretionary decision as follows:

> The "natural forum" is the one to which the action has the most real and substantial connection (*Amchem*, at pp. 916 and 935). Relevant circumstances include not only issues of public policy (as in this case) but also the potential loss to the plaintiff of a juridical advantage sufficient to work an injustice if the proceedings were stayed, the place or places where the parties carry on their business, the convenience and expense of litigating in one forum or the other, and the discouragement of forum shopping. In short,

> within the overall framework of public policy, any injustice to the plaintiff in having its action stayed must be weighed against any injustice to the defendant if the action is allowed to proceed. What is required is that these factors be carefully weighed in the balance.

[37] The Supreme Court concluded that the Federal Court had considered the relevant factors in arriving at its decision. Justice MacKay had acknowledged the importance of comity and international coordination in a proper case but placed primary emphasis on the fact that he was dealing with an *in rem* action by secured creditors against the vessel which, at the time of the bankruptcy, the Federal Court had already arrested and, at the time of the interventions of the Canadian bankruptcy court, he had already ordered appraised and sold. The Supreme Court rejected the trustees' argument that the plaintiff was forum shopping by arresting the vessel in Canada and acknowledged that Justice MacKay had appropriately given weight to the juridical advantage afforded to the plaintiff in Canada through recognition of the secured status of its maritime lien.

[38] As will be explained in the course of these Reasons, there are factors that distinguish the "Brussel" litigation from the circumstances in the case at hand. However, as I understand the parties to agree, *Holt* and *Antwerp* provide in significant measure the framework that governs the exercise of my discretion in considering OHTC's motion for a stay under s 50 of the *Federal Courts Act*.

[39] One obvious factual difference is that the bankruptcy in the present case, at least insofar as it relates to OHTC, arises in a domestic context, not an international one. However, as in the "Brussel" litigation, this Court must consider the effect of an order of a provincial superior court

issued in the context of an insolvency, which is an important but not necessarily a controlling factor. In that respect, I am also conscious of the decision issued by the Federal Court, in the context of a CCAA proceeding in a provincial superior court, in *Always Travel Inc. v Air Canada*, 2003 FCT 707 [*Always Travel*]. That case involved a proposed class action in the Federal Court against a number of airlines, including Air Canada, which, at the time, was the subject of an order from the Ontario Superior Court of Justice under the CCAA, protecting it against legal proceedings in the context of an intended restructuring. On that basis, Air Canada moved to have the Federal Court stay its proceedings.

[40] In *Always Travel*, the order of the Ontario Superior Court of Justice stayed all proceedings against Air Canada and expressly requested the aid and recognition of any Canadian court, including the Federal Court, in carrying out the terms of the order. Justice Hugessen of the Federal Court granted a stay of proceedings for three months, or until such earlier time as the stay by the Ontario Superior Court of Justice was lifted. In addressing the role of the Federal Court in considering a CCAA order from a provincial superior court, Justice Hugessen relied in part on the decisions in *Holt* and *Antwerp* in providing, at paragraphs 10 to 12, the following explanation:

> [10] Superior courts do not order each other about or make orders interfering with each other's process. Rather, it is essential that they should cooperate. Conflicts between courts, or other bodies having ultimate judicial power, may well have serious results, including perhaps even loss of liberty. In Canada, superior courts do not compete with one another. They accord to one another "full faith and credit," as was said in *Morguard Investments Ltd. v. De Savoye*, and repeated in the Brussel decisions. Justice Farley's order specifically requests that this Court, in comity, and more than that, in recognition of the fact that both courts are engaged in a single legal system in the

> administration of Canadian justice, should lend its aid to the order of the Ontario Superior Court of Justice staying proceedings.
>
> [11] It has been said to me this morning that I should not grant a stay order based on Justice Farley's orders first because I have no evidence before me and second because there has been no attempt to justify a stay in the terms of the classic three part test originally enunciated by the Supreme Court in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, and subsequently in *RJR MacDonald Inc. v. Canada (Attorney General)*. To that I say that this is not an ordinary stay and that a stay granted in comity does not need to meet the requirements of that test and does not need evidence; it is my view that the proper attitude of respectful cooperation which this Court should have and does have to judgments of the Ontario Superior Court of Justice will require that, as a matter of course, in virtually every case where an order is given by a provincial superior court in the exercise of its CCAA jurisdiction, and that order requests this Court's aid, this Court will give such aid on proper application being made.
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> [12] That is not the end of the matter. If a party to proceedings in this Court thinks that a stay should not be granted in comity and in aid of a provincial superior court order, it is at liberty to oppose the stay or, if the stay is granted, apply to this Court to have it lifted. The plaintiffs would thus have been free to bring evidence today and make representations to me that for some reasons or other these proceedings ought not to be stayed, but matters did not develop in that way. Let me be quite clear. The burden is on a person seeking in this Court to avoid the consequences of this Court acting in aid of a provincial superior court exercising its jurisdiction under the CCAA. The burden is on that person to show this Court that it should not act in aid. Nothing that I say or do today forecloses the plaintiffs from making an application if they so wish. I say that simply because in the way in which these proceedings developed, it was agreed between counsel and the Court that we should deal with this matter today strictly on issues of law, matters of fact being left to another day, if necessary.
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> [Emphasis added]

[41] RMI seeks to distinguish *Always Travel* from the present case on the basis that the order of the Ontario Superior Court in *Always Travel* did not carve out any proceedings from the stay,

in contrast with Justice Wood's Initial Order which expressly carved out the Federal Court *in rem* proceedings.

[42] Before considering this argument, I observe that I find the proper attitude of respectful cooperation between courts described by Justice Hugessen to be consistent with the guidance of the Supreme Court of Canada in the "Brussel" litigation as to the importance of comity and cooperation, albeit applied by Justice Hugessen in a domestic rather than an international context. Noting Justice Hugessen's reliance on the "Brussel" decisions, I am also conscious that *Always Travel* should not be interpreted as detracting from the discretion to be exercised by the Federal Court in considering a motion to stay its proceedings or from the requirement to consider the other guidance and factors identified in *Holt*.

C. *Interpretation of the NSSC Initial Order*

[43] Having identified above the governing jurisprudential principles, I turn next to the particular terms of the Initial Order issued by Justice Wood. RMI argues, both in attempting to distinguish *Always Travel* and more generally, that the carve-out of the Federal Court proceedings contained in the Initial Order supports its position that the stay requested by OHTC should be denied. It is apparent from the respective written and oral submissions of the parties to the motion that RMI and DP World adopt an interpretation of the terms of the Initial Order that differs significantly from the interpretation advanced by OHTC. RMI and DP World argue that the intended effect of the Initial Order, evidenced by paragraph 11A (reproduced earlier in these reasons), was to allow RMI's Federal Court action and the other Federal Court proceedings involving OHTC's assets to proceed without being affected by the Initial Order or the CCAA

proceeding. They explained that they advocated for such a result when they appeared before Justice Wood on OHTC's initial CCAA motion.

[44] In contrast, OHTC takes the position that the intended effect of the Initial Order is to leave OHTC fully in possession and control of its assets including the Vessel, subject to the supervision of the Monitor and the NSSC, and therefore to achieve a stay of all proceedings against OHTC and its assets, including the Federal Court proceedings. OHTC submits that the carve-out language in paragraph 11A of the Initial Order is intended to recognize the principles governing the relationship between different Canadian courts, pursuant to which a court should ask for the assistance of another court with respect to matters within the latter court's jurisdiction, rather than purporting to apply its own order to such matters. OHTC argues that the Initial Order is intended to give effect to the plan that OHTC presented to the NSSC when seeking that order, involving in particular the use of the Vessel to retrieve the Turbine from the floor of the Minas Basin, and that it would be entirely inconsistent with that intention for the Federal Court actions to proceed and effect sale of the Vessel prior to such plan been achieved.

[45] In my view, for the reasons explained below, the Initial Order can be understood only in the manner described by OHTC. In determining which interpretation of the Initial Order is to be preferred, it is helpful to consider the terms of the Initial Order itself, the nature of the motion that gave rise to issuance of the Initial Order, and the Decision of Justice Wood dated November 7, 2018, providing reasons in relation to the issuance of the Initial Order (see *OpenHydro Technology Canada Ltd. (Re)*, 2018 NSSC 283) [Justice Wood's Decision].

[46] Considering first the terms of the Initial Order, I note that paragraph 4 states as follows:

> 4. The Applicant shall remain in possession and control of its current and future assets, undertakings, and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "Property"). Subject to further order of this Court, the Applicant shall continue to carry on business in a manner consistent with the preservation of its business (the "Business") and Property. …

[47] Paragraph 11 of the Initial Order, which effects the stay of proceedings, applies to any proceeding against OHTC or the Monitor or affecting the Business or Property (as defined in paragraph 4). Of course, both paragraphs 4 and 11 are subject to paragraph 11A, which, for ease of reference, reads as follows:

> 11A. In recognition that *in rem* proceedings are before the Federal Court in respect of the vessel, Scotia Tide, the OTC03 Turbine Control Centre, and the Cape Sharp Tidal Turbine as described in Federal Court Proceeding T-1578-18, this order shall not apply to those proceedings (including caveators) unless and to the extent the Federal Court may determine in the exercise of its own unfettered jurisdiction and discretion. This Court specifically requests the aid and recognition of the Federal Court in carrying out the terms of this order as required.

[48] I appreciate the argument of RMI and DP World that paragraph 11A states that the Initial Order shall not apply to in the *in rem* proceedings before the Federal Court, and I agree that the effect of this paragraph is that the Initial Order does not itself stay the Federal Court proceedings. However, that paragraph also contemplates that the Initial Order may apply to the Federal Court proceedings, if the Federal Court were to exercise its discretion in that manner, and specifically requests the aid and recognition of the Federal Court in carrying out the terms of the Initial Order as required. In my view, that request can only be understood as an intention on the part of the

NSSC that all proceedings cease, including those in the Federal Court, while recognizing that such a result could not be achieved without the assistance of the Federal Court by staying the proceedings within its own jurisdiction.

[49] This interpretation is supported by the contents of the materials which OHTC submitted to Justice Wood in the motion seeking the Initial Order. It is evident from the Schneider-Manoury Affidavit and a Grant Thornton report dated October 23, 2018 (which forms an exhibit to Mr. Wedlake's affidavit) that, while OHTC requested CCAA protection to pursue several objectives, including recovery of various categories of tax credits, one of its principal objectives was to allow it to use the Vessel to retrieve the Turbine from the Minas Basin before proceeding with sale of the Vessel. I find nothing in the terms of the Initial Order which indicates that, in granting the motion, the NSSC did not intend that the Initial Order facilitate that objective or, more accurately, afford OHTC the time contemplated by the Initial Order to pursue the development of a plan which included that objective.

[50] In my view, this interpretation is further supported by Justice Wood's Decision. At paragraph 10, Justice Wood stated that he had reviewed the materials filed and was prepared to grant the Initial Order and Charging Order on the terms proposed, subject to his decision on the scope of the temporary stay. He stated that a stay of proceedings was appropriate, because OHTC had satisfied him that it should have a short period of time to consider whether a reasonable plan of arrangement might be developed. Justice Wood concluded that a 30 day stay would allow OHTC and the Monitor time to carry out an initial feasibility assessment and stated

that whether the stay should be extended beyond that would require a further motion and evidentiary basis.

[51] In considering the positions of parties wishing to proceed in the Federal Court, and in arriving at the decision to include paragraph 11A in the Initial Order, Justice Wood analyzed the issue as follows:

> [11] The respondents say that the Court should not issue an order which purports to stay the Federal Court *in rem* proceedings. If there is to be such a stay, they argue that it should be decided by the Federal Court on the motion of OpenHydro and not the Nova Scotia Supreme Court.
>
> [12] The respondents rely on the companion decisions of the Supreme Court of Canada in *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustee of)*, 2001 SCC 90 (CanLII), and *Antwerp Bulkcarriers, N.V. (Re)*, 2001 SCC 91 (CanLII). Those decisions arose out of the bankruptcy of a Belgian ship owner, whose vessels were arrested and subject to *in rem* proceedings in the Federal Court of Canada. In *Holt* the issue was whether the Federal Court should have deferred to the Quebec Superior Court (in Bankruptcy) and stayed the Federal Court proceedings. The Supreme Court held that Federal Court had jurisdiction to deal with the claims and, after carrying out a *forum non conveniens* analysis, concluded that the Federal Court was correct in not issuing the stay.
>
> [13] In the *Antwerp* case, the Quebec Court issued an injunction restraining the Federal Court from proceeding *in rem* against the vessels. The Supreme Court concluded that the Quebec Court had no power to issue the order because the Federal Court had jurisdiction over the claims and the asset in question (i.e. the vessel) had been captured by the Federal Court orders.
>
> [14] Although those cases dealt with the relationship between superior courts exercising bankruptcy jurisdiction and the Federal Court's maritime law jurisdiction, I am satisfied that the principles apply to some extent in proceedings under the CCAA. On the basis of these decisions, it is clear that the Federal Court continues to have jurisdiction over the *in rem* claims advanced by the respondents. On the basis of the *Antwerp* decision, I am also

satisfied that this Court should not issue the equivalent of an anti-suit injunction preventing the Federal Court from dealing with those claims.

[15] In deciding how to address the interaction between the CCAA proceeding and the Federal Court actions, I would take the approach found in two recent British Columbia Supreme Court decisions. In *Sargeant III v. Worldspan Marine Inc.*, 2011 BCSC 767 (CanLII), the circumstances were virtually identical to those before me. The Court was dealing with a request for an Initial Order under the CCAA and the accompanying temporary stay. Creditors had started proceedings in the Federal Court and obtained *in rem* judgements against the company's vessel. The Court concluded that it should not issue an order directing the Federal Court to take any particular action, but rather the courts should exercise their respective jurisdictions cooperatively. The Court explained the issue this way:

> 40 In my view, as a matter of comity between two Canadian superior courts each exercising its own jurisdiction, an order by this court directing the Federal Court to stay its proceedings is neither appropriate nor necessary.
>
> 41 In *Antwerp Bulkcarriers, N.V. (Re)*, 2001 SCC 91 (CanLII), [2001] 3 S.C.R. 951 at para. 51, the Court referred to the faith and credit owed by Canadian courts to each other when acting appropriately within their respective jurisdictions.
>
> 42 In *Always Travel Inc. v. Air Canada*, 2003 FCT 707 (CanLII), 2003 F.C.J. No. 933, a case decided subsequent to Antwerp and its companion case, *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustee of)*, 2001 SCC 90 (CanLII), Mr. Justice Hugessen of the Federal Court Trial Division granted an application for a stay of proceedings in the Federal Court brought by Air Canada, which had previously obtained an order for protection under the CCAA in the Ontario Superior Court of Justice.
>
> 43 Mr. Justice Hugessen expressed the view that an order made under sections 11.3 and 11.4 of the CCAA does not have the effect of automatically staying proceedings in the Federal Court. In reaching that conclusion, he referred to the relevant provisions of the CCAA, including those provisions defining courts to include the superior courts of each province, and s. 16 of the CCAA, which provides:

> Every order made by the court in any province in the exercise of jurisdiction conferred by this Act in respect of any compromise or arrangement shall have full force and effect in all the other provinces and shall be enforced in the court of each of the other provinces in the same manner in all respects as if the order had been made by the court enforcing it.

44 At para. 9 Mr. Justice Hugessen said this:

> It seems to me to be quite clear from the statutory provisions that Parliament did not intend that orders made by the superior courts of the provinces in the exercise of their CCAA jurisdiction should extend so as to oblige this Court to suspend its proceedings in any matter properly belonging to its jurisdiction. There are examples, and section 16 of the CCAA is one of them, where Parliament has given specific jurisdiction to one superior court to stay proceedings in another superior court. In my view, such a disposition requires express language.

45 Mr. Justice Hugessen continued at para. 10:

> Superior courts do not order each other about or make orders interfering with each other's process. Rather, it is essential that they should cooperate. Conflicts between courts, or other bodies having ultimate judicial power, may well have serious results, including perhaps even loss of liberty. In Canada, superior courts do not compete with one another. They accord to one another "full faith and credit," as was said in *Morguard Investments Ltd. v. De Savoye*, 1990 CanLII 29 (SCC), [1990] 3 S.C.R. 1077, and repeated in the Brussel decisions. Justice Farley's order specifically requests that this Court, in comity, and more than that, in recognition of the fact that both courts are engaged in a single legal system in the administration of Canadian justice,

> should lend its aid to the order of the Ontario Superior Court of Justice staying proceedings.

> 46 Mr. Justice Hugessen went on to discuss what he described as the proper attitude of respectful cooperation which the Federal Court should have, and does have, to judgments of a provincial superior court, and stated that:
>
> > ... as a matter of course, in virtually every case where an order is given by a provincial superior court in the exercise of its CCAA jurisdiction, and that order requests the Federal Court's aid, the Federal Court will give such aid on proper application being made.
>
> 47 I respectively agree with Mr. Justice Hugessen's statement of the principles of comity which should apply between a provincial superior court exercising jurisdiction under the CCAA and a Federal Court exercising its jurisdiction, in this case, its maritime law jurisdiction. In my view, for reasons I shall shortly explain, this court and the Federal Court of Canada, working cooperatively and each exercising its own jurisdiction, should be able to avoid any insuperable conflicts between their respective jurisdictions.

[16] The Court summarized its conclusion on the issue as follows:

> 58 Here, again at this preliminary stage in the proceedings, in my view the appropriate course is that this court, as a matter of comity, requests the recognition and aid of the Federal Court with respect to an initial order under the CCAA. The Federal Court, of course, has jurisdiction under s. 50 of the Federal Courts Act to grant a stay.
>
> …
>
> 60 The petitioners should have the opportunity to present a viable plan for restructuring and for the orderly payment of their creditors. I am satisfied that this is an appropriate case for the court to make an initial order containing terms for a temporary stay to June 23, 2011 in the standard terms of the model order and a request which specifically requests the assistance of the Federal Court to recognize the initial stay. Questions of priority will arise, including the priority of any financial charge for monies that may be advanced to complete

> the construction of the vessel, as well as the priorities of the maritime lien claimants. Again, none of those are matters which I am required to resolve, or which require resolution at this stage. All of those matters are, in my view, capable of resolution by the two courts working cooperatively.

[17] In *Hanjin Shipping Co. (Re)*, 2016 BCSC 2213 (CanLII), the Court was asked to recognize a foreign proceeding under ss. 46-49 of the CCAA, which included a request for a stay of proceedings. As here, there were existing *in rem* proceedings in the Federal Court. The Court adopted the comments of Justice Pearlman in *Sargeant III* quoted above, and included an additional clause in the order to address the Federal Court proceedings. That clause read as follows:

> 19. …
>
> In recognition that in rem proceedings are before the Federal Court in respect of the vessels, *Hanjin Vienna, Hanjin Scarlet, and Hanjin Marine*, this order shall not apply to those proceedings (including caveators) unless and to the extent the Federal Court of Canada may determine in the exercise of its own unfettered jurisdiction and discretion.

[18] Six weeks after the Initial Order, the Court issued another order setting out a claims procedure. It specifically exempted the *in rem* claims from that process, which were to be determined through the Federal Court. The order included a clause requesting the aid and recognition of that Court.

[19] These decisions make it clear to me that the proper outcome is to exempt the *in rem* claims of the respondents being advanced in Federal Court from the stay created by the Initial Order with a request to the Federal Court for aid and recognition. It would be up to that Court to determine whether it should stay the *in rem* claims and, if so, on what terms. To give effect to this decision, I direct that the Initial Order include a clause as follows:

> In recognition that *in rem* proceedings are before the Federal Court in respect of the vessel, Scotia Tide, and the OTC03 Turbine Control Centre, this order shall not apply to those proceedings (including caveators) unless and to the extent the Federal Court of Canada may determine in the exercise of its own unfettered jurisdiction and direction. This Court specifically requests the aid and recognition of the Federal Court in carrying out the terms of this order as required.

[52] I do not read Justice Wood's Decision as supporting the interpretation of the Initial Order now advocated by RMI and DP World. Justice Wood was being careful to recognize that the Federal Court retains its *in rem* jurisdiction and that it would not be appropriate to issue the equivalent of an anti-suit injunction applicable to the Federal Court proceedings. However, he explained that the proper outcome was therefore to exempt the *in rem* claims from the stay and to include a request to the Federal Court for aid and recognition. As with the terms of the Initial Order itself, this can only be understood as a request that the Federal Court assist in achieving the objectives of the Initial Order, i.e. the cessation of all proceedings while the OHTC was afforded a short period to consider whether a reasonable plan of arrangement might be developed.

[53] RMI and DP World argue that Justice Wood's reliance upon the analyses in *Sargeant III v Worldspan Marine Inc.*, 2011 BCSC 767 [*Sargeant III*], and *Hanjin Shipping Co. (Re)*, 2016 BCSC 2213 [*Hanjin*], and indeed the adoption of the language employed in the order resulting from *Hanjin* in order to craft paragraph 11A of the Initial Order, support of their interpretation of paragraph 11A. They refer the Court to subsequent interlocutory decisions and orders in those proceedings as demonstrating that, in both matters, *in rem* claimants were ultimately permitted to present their claims for adjudication by the Federal Court. I agree that those proceedings appear to have developed in that manner. However, this was at a later stage in those proceedings, when the CCAA court was developing processes for the submission and adjudication of claims. This approach had not been predetermined at the earlier stage when the CCAA court was issuing the equivalent of the Initial Order, granting the insolvent company a stay to afford it an opportunity to pursue a viable plan of arrangement.

[54] This is particularly apparent from comparing the reasons in *Sargeant III,* issued by Justice Pearlman on June 6, 2011 in support of the order granting the stay (which were cited in Justice Wood's Decision), with the CCAA court's subsequent decision on the claims process, as explained in paragraphs 25 to 27 of Justice Pearlman's Oral Reasons for Judgment dated July 22, 2011:

> [25] Similarly, in my view, the assertion by this Court of its jurisdiction under the *CCAA* does not oust the maritime law jurisdiction of the Federal Court. We are now at a stage of these proceedings which has brought into much sharper focus the problem identified at the beginning of these proceedings of ensuring that this Court and the Federal Court are each able to exercise their respective jurisdictions and do so in a way in which it is consistent with the comity which applies between superior courts of this country exercising different jurisdictions.
>
> [26] I remain of the view that that objective can be accomplished and that a process order which provides for the identification in the *CCAA* process of those claimants who are asserting an *in rem* claim under Canadian maritime law with respect to the vessel will not intrude upon or offend the jurisdiction of the Federal Court. However, the determination of the maritime claims against the vessel and the determination of the priorities of those claims are matters which, on the authority of both *Nanaimo Harbour Link* and *Splash Holdings* decisions, which I am bound to follow, are properly matters to be dealt with in the Federal Court of Canada.
>
> [27] In my initial Reasons for Judgment, I suggested that it might well be necessary for this Court and the Federal Court of Canada to communicate in order to coordinate their respective processes. I am certainly of the view that such communication will be necessary. At this stage, in the interests of moving the *CCAA* proceedings forward and initiating the claims process, I am prepared to approve the claims process order. However, it will be necessary to modify paragraphs 18(a) and 19 to clearly state that the claims that will be determined in the Federal Court of Canada are the *in rem* claims of claimants under Canadian maritime law. I have not framed that particularly elegantly and I am prepared to receive further submissions from counsel now about the rewording of those particular paragraphs.

[55] In these paragraphs, in referencing the problem identified at the beginning of the proceeding, Justice Pearlman is referring to paragraphs 53 and 54 of his earlier decision in *Sargeant III*, in which he stated as follows:

> [53] In *Nanaimo Harbour Link Corporation* at para. 53, the court summarized its conclusions by stating that secured claims of maritime lien holders are secured claims within the meaning of s. 136 and s. 2 of the *Bankruptcy and Insolvency Act* and, therefore, the scheme of distribution under that *Act* would not apply to the secured lien claims if proven in the Federal Court. The Court also concluded that the ranking of the priorities and the proof of the maritime claims is a matter for the Federal Court of Canada to determine pursuant to the principles of Canadian maritime law.
>
> [54] At this stage, the Court is simply being asked to make a time-limited stay and initial order. The priorities between and among the various creditors will have to be determined. It may be that those priorities as they relate to the claims of the maritime lien claimants will have to be determined in the Federal Court of Canada. However, that is a matter which, in my view, may be resolved at a later stage, and it is also a matter which may require some communication between the two courts in order to assure that the matter is resolved in a manner which enables both courts to exercise their jurisdictions and perform their functions. However, at this stage, the fact that the priorities issue will have to be determined is not, in my view, a bar to this court making the initial order.

[56] I also note that, in one of the concluding paragraphs of *Sargeant III*, Justice Pearlman stated as follows:

> [62] The application of Offshore for an order specifically exempting its Federal Court action from the stay and for an order that no further orders be made against the vessel in the *CCAA* proceedings is denied.

[57] Later in these Reasons, when addressing the duration of the stay requested by OHTC, I will return to the issue of the process for adjudication of claims against the Vessel. However, for

present purposes, my conclusion from reviewing *Sargeant III* and Justice Pearlman's subsequent decision surrounding the claims process is that, while Justice Pearlman anticipated when issuing *Sargeant III* that it may later prove to be appropriate for the Federal Court to remain involved in adjudication of the *in rem* claims, his intention when issuing the order resulting from *Sargeant III* was that proceedings against the insolvent company be stayed, including the proceedings in the Federal Court. While paragraph 62 of *Sargeant III* indicates that the resulting order did not expressly exempt the Federal Court proceedings from the application of the stay, paragraphs 58 and 60 (which were reproduced in Justice Wood's Decision) indicate that Justice Pearlman's intention was that the application of the stay to the Federal Court actions be achieved by a request for the assistance of the Federal Court to recognize the stay.

[58] *Hanjin* expressly relied on *Sargeant III* but also included in the resulting stay order language that had been proposed by counsel, which language was in turn adopted in Justice Wood's Decision for inclusion as paragraph 11A of the Initial Order. In conclusion on this point, I regard *Sargeant III*, *Hanjin*, and Justice Wood's Decision as all demonstrating the same intention by the applicable CCAA court, i.e. that all proceedings against the insolvent company be subjected to a short-term stay, to permit development of a proposed plan of arrangement, although recognizing that a stay of the Federal Court proceedings could be achieved only through a motion by the insolvent company to the Federal Court, supported by the CCAA court's request that the Federal Court exercise its discretion in that manner in aid of the objectives being pursued under the CCAA. I regard that request by the NSSC as an important factor to be taken into account in exercising my discretion whether to stay the Federal Court proceeding.

D. *Other Factors for Consideration*

[59] Having reached this conclusion with respect to the correct interpretation to be given to the Initial Order, I return to other factors to be considered by the Court in considering a motion of this nature under s 50 of the *Federal Courts Act*, in accordance with the guidance in *Holt*, and arguments advanced by the parties in connection with such factors.

[60] As in *Holt*, I consider there to be issues of public policy at play in the present case. In addition to the importance of comity and cooperation between courts, although very much related thereto, there is the issue of achieving the purpose of the CCAA. DP World notes that the British Columbia Court of Appeal explained this purpose as follows in *Cliffs Over Maple Bay Investments Ltd. v Fisgard Capital Corp.,* 2008 BCCA 327:

> [27] The fundamental purpose of the CCAA is expressed in the long title of the statute:
>
> > "An Act to facilitate compromises and arrangements between companies and their creditors".
>
> [28] This fundamental purpose was articulated in, among others, two decisions quoted with approval by this Court in *Re United Used Auto & Trucks Parts Ltd.*, 2000 BCCA 146, 16 C.B.R. (4th) 141. The first is *A.G. Can. v. A.G. Que.* (sub. nom. *Reference Companies' Creditors Arrangement Act*), [1934] S.C.R. 659, 16 C.B.R. 1 at 2, [1934] 4 D.L.R. 75, where the following was stated:
>
> > … the aim of the Act is to deal with the existing condition of insolvency in itself to enable arrangements to be made in view of the insolvent condition of the Company under judicial authority which, otherwise, might not be valid prior to the initiation of proceedings in bankruptcy. *Ex facie*, it would appear that such a scheme in principle does not radically depart from the normal character of bankruptcy legislation.
> >
> > The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed

> arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors.

[61] While the Federal Court does not have jurisdiction under the CCAA, in my view it is appropriate for the Court to take into account the objectives of the legislation as a public policy consideration in making the decision whether to grant a s 50 stay. To the extent that a superior court, exercising its jurisdiction under the CCAA, has determined that it is appropriate to request the assistance of the Federal Court in order to achieve the objectives of the CCAA, this favours acceding to that request as a matter of public policy in addition to considerations of comity.

[62] I note the arguments by both RMI and DP World to the effect that such public policy considerations do not apply on the particular facts of this case, because OHTC has not invoked the CCAA to find a means to refinance and restructure and therefore carry forward as a going concern. Rather, its intention is liquidate its assets, and it has sought CCAA protection only to afford it an opportunity to carry on business temporarily, to collect tax credits and employ the Vessel to recover the Turbine. In response, OHTC argues that the CCAA does not preclude seeking protection to carry on business operations on a temporary basis. OHTC submits that, while it does intend to liquidate its assets, it requires the benefit of the CCAA in order to carry on business prior thereto in the pursuit of the objectives that were presented to the NSSC in seeking the Initial Order.

[63] I have considered this argument. However, as previously noted, Justice Wood's Decision in support of the Initial Order states that a stay of proceedings was appropriate because OHTC had satisfied the NSSC that it should have a short period to consider whether a reasonable plan

of arrangement might be developed. To the extent RMI, DP World or other creditors may take the position that OHTC's objectives are not consistent with the purpose of the CCAA, particularly once OHTC has developed a more detailed plan in pursuit of those objectives, such arguments should be presented to the NSSC, exercising its jurisdiction under the CCAA to consider whether to extend the stay.

[64] I also note that RMI takes issue with OHTC's submissions to the effect that it is seeking relief from the Federal Court in support of a plan that has been approved by the NSSC. RMI submits that it is clear from the record that, while OHTC intends to pursue a course of action which can broadly be defined as a plan, namely to remove the Turbine and subsequently to liquidate its assets, no plan of arrangement has been either presented by OHTC to the NSSC or approved by the NSSC to date.

[65] I agree with RMI's characterization of the status of the CCAA proceeding. It is clear from the Initial Order and Justice Wood's Decision that, to date, the stay issued by the NSSC has been intended to afford OHTC an opportunity to prepare and present to the NSSC a detailed plan of arrangement. It does not represent approval of such a plan. However, it remains the case that the NSSC was prepared to grant the stay to afford that opportunity. OHTC's "plan", as presented to and approved by the NSSC to date, represents an intention to develop a detailed plan involving use of the Vessel to retrieve the Turbine, recover the related bond and various tax credits, and subsequently liquidate its assets. The NSSC was prepared to grant OHTC protection under the CCAA for a short period of time, to allow it to assemble and present more information in support of those objectives.

[66] It may be that, once OHTC presents the NSSC with a detailed proposed plan of arrangement, it will not find favour with the NSSC and the stay represented by the Initial Order will not continue. However, it is impossible at this stage to speculate on what the result will be at that stage of the CCAA proceeding. Therein lies the difficulty in addressing certain arguments (explained below) currently advanced by RMI against the merits of OHTC's plan.

[67] In support of its opposition to OHTC's motion, RMI has filed an affidavit by its Commercial Manager, Kim Gregg, who deposes that, based on her experience in the marine services sector, including with the installation of the Turbine, it is her view that the cost for removal of the Turbine will far exceed the amount of the approximately $1 million bond that OHTC wishes to recover by using the Vessel to retrieve the Turbine. Ms. Gregg has not been cross-examined on her affidavit, and RMI notes that OHTC has presented no evidence as to what the cost of the turbine retrieval operation will be. I agree with RMI's position that, at this stage in the proceeding, the only evidence before the Court on this point is that of Ms. Gregg, which suggests that retrieving the Turbine is not in the best financial interests of OHTC's creditors.

[68] However, it is difficult to place much weight on Ms. Gregg's evidence, as she provides no support for her opinion other than a reference to her experience. More significantly, it is perhaps not surprising that OHTC has not presented the Court with evidence on this issue, given that the Initial Order is premised at least in part on OHTC requiring a period of time, currently contemplated to be up to March 6, 2019, to develop and presumably cost its Turbine retrieval plan. In my view, whether OHTC should be permitted to employ the Vessel to retrieve the

Turbine must be influenced, at least in part, by consideration of whether that would be of financial benefit to its creditors, and it is presently premature to make that determination.

[69] RMI also argues that OHTC's plan should be rejected, because the obligation to retrieve the Turbine is that of CSTV, not OHTC. In response, OHTC notes that it, and therefore its creditors, will benefit from the retrieval, because it is the obligor under the bond. Again, the merits of this position turn at least in part on the cost that will be incurred in connection with the retrieval, which it is premature to assess.

[70] I now turn to other arguments advanced by RMI and DP World, concerning prejudice they submit they will suffer if the Federal Court proceedings are stayed. RMI argues that it and other *in rem* claimants would lose access to the Federal Court *in rem* jurisdiction and procedures for sale of the Vessel and adjudication of maritime claims and their competing priorities, including the possible benefit of equitable ranking of priorities. It relies on the conclusions, in *Nanaimo Harbour Link Corp. v Abakhan & Associates Inc.*, 2007 BCSC 109 at paragraph 53 and *Sargeant III* at paragraph 53, that the proof of maritime claims and the ranking of their priorities are matters for the Federal Court to determine pursuant to the principles of Canadian maritime law.

[71] I note that RMI does not argue that the substantive law, which would be applied by the NSSC if it were adjudicating the claims and priorities of the maritime creditors, would differ from that which would be applied by the Federal Court. DP World does take such a position, but it is not able to identify any supporting authority. In my view, this point represents a factor which

significantly distinguishes this case from the circumstances in *Holt*. As previously noted, the plaintiff in *Holt* had the benefit of a maritime lien for the supply necessaries under US law, which lien was available to it under the Canadian conflict of laws principles applied by the Federal Court, but it would have been deprived of that lien if its claim were adjudicated by the Belgian bankruptcy court. The parties have not identified any basis for a similar concern in the present case.

[72] I should also note that I have considered the fact that both RMI and DP World assert that they are entitled to liens against the Vessel. RMI relies on the following clause in the Charterparty, which it argues confers upon it a lien created by contract:

> 19 Lien
>
> The Owners shall have a lien upon all cargoes and equipment for all claims against the Charterers under this Charter Party and the Charterers shall have a lien on the Vessel for all monies paid in advance and not earned. …

[73] In this clause, the "Owners" are RMI, the owners of the vessel "Tidal Runner", and the "Charterers" are OHTC. RMI's argument is that the reference to "equipment" in this clause includes the Vessel, i.e. the "Scotia Tide", as it forms part of OHTC's equipment to which RMI rendered services under the Charterparty. OHTC disputes this interpretation, taking the position that "equipment", as used in this clause, refers to equipment that, like cargo, was carried or transferred by the "Tidal Runner".

[74] DP World takes the position that it is entitled to a possessory lien in support of its claim which, as described in the Statement of Claim it filed in Federal Court, relates to the provision of

a layby berth, lines services, security, stevedoring and other necessaries to the Vessel. It relies on the decision in *Verreault Navigation Inc. v 662901 N.B. Ltd.*, 2016 FC 1281.

[75] Whether either of these claimants is entitled to the lien it claims should be determined by whichever court ultimately adjudicates the competing claims against the Vessel, with the benefit of whatever evidence and argument is presented by the parties at that stage of the relevant proceeding. It is unnecessary for the Court to make any findings on these issues at this juncture, as they do not have a material effect on the s 50 analysis.

[76] In reaching that conclusion, I am conscious that, in *Holt*, the availability to the plaintiff of a maritime lien, giving the plaintiff status as a secured creditor, was a significant factor. The Supreme Court of Canada referred to the public policy considerations evident from the fact that, in the context of a Canadian bankruptcy, proceedings by secured creditors to realize on their security were exempted from the statutory stay under the BIA (see *Holt* at paragragh 35). In that respect, the present case is distinguishable both from *Holt* and from the recent decision in *BBC Chartering Carriers GMBH & Co. KG v OpenHydro Technology Canada Limited*, 2018 FC 1098 [*BBC Chartering*], in which the Federal Court granted default judgment in an *in rem* action, against the control centre for the Turbine, in favour of the operator of the vessel that transported the control centre from Ireland to Saint John, New Brunswick, and claimed a contractual lien against the control centre under the terms of the applicable charterparty. In *BBC Chartering*, Justice McDonald considered that OHTC had by that time filed an NOI, resulting in a statutory stay under s 69(1) of the BIA. However, Justice McDonald reviewed *Holt* and *Antwerp* and relied on the fact that the plaintiff claimed status as a secured creditor, as a result of

the contractual lien, and s 69(2)(a) of the BIA which exempted secured creditors from the statutory stay.

[77] In the case at hand, the protection afforded to OHTC arises under the CCAA rather than the BIA, and the CCAA contains no comparable exemption for secured creditors. In addition and perhaps more significantly, as explained above, the parties have provided the Court with no basis to conclude that any secured or priority status that may be available to RMI, DP World, or any other maritime claimant would be different if adjudicated by the NSSC rather than the Federal Court.

[78] RMI also argues that the Vessel will deteriorate in value if it is not granted default judgment and an order initiating the process for selling the vessel at this juncture. It refers to the ongoing cost that would be incurred in maintaining the Vessel, pending its use to retrieve the Turbine, which OHTC says cannot be performed earlier than May 2019 and which RMI suggests is likely to be delayed even further. On this point, I note that, while there is no evidence before the Court on the issue, counsel for DP World acknowledged at the hearing that, as a result of the Initial Order and the DIP financing, DP World's charges of approximately $20,000.00 per month for berthage of the vessel are now being paid by OHTC. However, RMI submits that, even if this is so, these costs (and possibly more, as the budget submitted by OHTC to the NSSC indicated a projected cost for "berthing/security" of approximately $28,000.00 monthly, which may include both DP World's charges and harbour dues) continue to accrue as a charge against the Vessel under the Charging Order. OHTC's counsel refers to that budget, and the timing of individual

costs itemized therein, in support of a submission that most of the winterization costs have already been incurred.

[79] I am conscious of the difficulty relying on OHTC's budget for the truth of its contents, both because of the evidentiary limitations associated with OHTC's affidavits, as canvassed earlier in these Reasons, and because the budget represents a projection rather than confirmation of a past payment. However, taking into account the acknowledgement by DP World's counsel, that it is receiving berthage payments contemplated in the budget, there is no basis for the Court to conclude that the Vessel is not being attended to or that it continues to accrue debts. On the other hand, I accept RMI's argument that, if the Vessel's ongoing costs are being paid through the DIP financing, this represents a growing claim which the DIP Lender will be asserting against OHTC's assets, including potentially the Vessel, under the Charging Order. In this respect, it is fair to characterize the Vessel as potentially experiencing some ongoing deterioration in value. This factor favours the maritime claimants' opposition to OHTC's motion for a stay.

[80] RMI also submits that the Vessel should be sold quickly, and in any event before being employed by OHTC to raise the Turbine, because it will have more value while it is still needed to perform that operation. OHTC relies upon the affidavit of Ms. Gregg who states that, since commencing proceedings in the Federal Court, RMI and its counsel have received inquiries from two prospective buyers for the Vessel, both of which have stated they wish to purchase the Vessel with a view to a participating in the removal of the Turbine. Ms. Gregg deposes that those parties have stated, and she believes, that the Vessel would be of far less value to them after the

Turbine is removed, as it would require extensive and costly conversion work to be useful for any other purpose.

[81] The only evidence provided by OHTC with respect to prospects for sale of the Vessel, is contained in the McAteer Affidavit, dated November 28, 2018. Mr. McAteer states that:

A. an appraiser has been retained to perform an independent valuation of the Vessel, with that work expected to be completed during the week ending December 7, 2018;

B. with the assistance of the Monitor, OHTC has contacted twelve marine brokerages to discuss the sale of the Vessel, seven of which have expressed an interest in listing the Vessel for sale;

C. OHTC intends to request listing proposals from three of the brokerages for review, with the Vessel to be listed for sale once OHTC receives the results of the valuation.

[82] Again, Mr. McAteer's evidence is entitled to little weight, both because of the evidentiary limitations of OHTC's affidavits and because there is little substantive information in this evidence as to the prospects for sale of the Vessel, its likely value, or any effect the timing of the sale may have thereon. Ms. Gregg's evidence is entitled to somewhat more weight. However, her evidence represents only the professed intentions and views of two prospective buyers, expressed

in general terms, and therefore provides little basis for the Court to make an informed decision as to prospects, process, or timing for sale of the Vessel. Subject to those limitations, that evidence represents a factor supporting RMI's opposition to the stay.

[83] I have also considered the parties' respective arguments surrounding the maritime claimants' choice of the Federal Court as the forum for adjudication of the *in rem* claims. This is not a circumstance which amounts to forum shopping by those claimants. As with the plaintiff in the "Brussel" litigation, RMI employed the *in rem* jurisdiction of the Federal Court to arrest the Vessel where it lay, when it became apparent that its invoices were not being paid. I also note that RMI had invoked the jurisdiction of the Federal Court before OHTC filed its NOA under the BIA or moved for protection under the CCAA.

[84] DP World argues that the timing of the steps in the present litigation is comparable to that in "Brussel" and therefore similarly favours the dismissal of the request for a stay. I agree that there are similarities. However, there is also a significant difference, as evidenced by the sequence of events set out in *Holt* and *Antwerp*. By the time the bankruptcy trustees applied to the Federal Court for a stay of its proceedings in the "Brussel" matter, the Federal Court had already granted default judgment to the plaintiff and granted an order for appraisal and sale of the ship. While no sale had been approved by the Federal Court or completed by that time, as I read the decisions, the Federal Court proceeding was more advanced in the "Brussel" matter, when Justice MacKay was presented with a stay motion, than are the present proceedings.

[85] Finally, it is important to focus upon the duration of the stay that OHTC is requesting, as well as possible alternatives which the Court might consider in the exercise of its discretion. OHTC seeks a stay which would continue in effect as long as the stay implemented by the Initial Order is renewed by the NSSC. While the NSSC stay is currently effective only until March 6, 2019, OHTC intends to return to the NSSC prior to that date, present evidence as to its proposed plan of arrangement or the status thereof, and seek an extension of that stay. OHTC asks that the Federal Court issue a stay which would currently be effective only until March 6, 2019, but which would automatically mirror any extension of the NSSC stay, without OHTC having to return to Federal Court to seek an extension. OHTC of course notes that RMI would be at liberty to bring a motion to the Federal Court at any time, based on a material change in circumstances, seeking to have the stay lifted. OHTC also acknowledges that the Court has discretion to grant a stay on terms which it considers appropriate, which might include a stay of more limited duration.

E. *Conclusion on Stay Motion*

[86] As noted in *Holt* at paragraph 89, the party seeking a stay under s 50 of the *Federal Courts Act*, after a plaintiff has properly invoked the Federal Court's jurisdiction, is required to clearly establish the existence of a more appropriate forum. At this stage of the Federal Court and NSSC proceedings, I find that OHTC has met the burden to obtain a stay of RMI's Federal Court action, but only for a limited duration. As explained earlier in these Reasons, I consider comity and cooperation with the NSSC to be an important factor, complemented by the public policy considerations associated with the purpose of the CCAA. The NSSC has issued a stay to

afford OHTC time to prepare a proposed plan of arrangement, which contemplates the possibility of the Vessel being employed to retrieve the Turbine, and the Federal Court should facilitate that.

[87] However, as RMI submits, the NSSC has not yet considered or approved a detailed plan for employment of the Vessel to raise the Turbine or the costs or logistics associated with that operation. Whether the stay will be extended by the NSSC to the stage where the Vessel is employed to raise the Turbine will presumably depend on the NSSC's assessment of the merits of that plan once presented. As is clear from all the jurisprudence canvassed above, the Federal Court is required to make its own decision whether to stay its own proceedings, and in my view it would not be appropriate to issue a stay which would automatically extend to a stage that has not yet been analyzed by the NSSC and which cannot yet be analyzed by this Court.

[88] My decision is therefore to issue a stay which extends for 90 days from the date of my Order (or until the NSSC stay is lifted, if that should occur at an earlier date). This is intended to cover the period of the current NSSC stay to March 6, 2019, and a further period to afford the parties time to return to the Federal Court after they know the outcome of OHTC's motion to extend the NSSC stay. As OHTC's counsel submitted at the hearing of these motions, if the NSSC decides on or before March 6, 2019, to extend the stay, there may be some period before it issues reasons for that decision, and the parties may then require some time to prepare their respective positions for a further motion to the Federal Court and to obtain a date for the hearing of that motion. However, as the Federal Court stay will expire before the end of April 2019 and the Turbine retrieval operation is not intended to take place prior to May 2019, OHTC will be required to return to the Federal Court, with the benefit of the outcome in the NSSC proceeding,

in order to proceed with that operation. RMI may also apply to have the stay lifted at an earlier time in the event of any material change in circumstances.

[89] Of the various considerations canvassed above, in connection with the factors relevant to deciding whether to grant this stay, only one factor operates to the potential prejudice of RMI, DP World, and other maritime creditors during a stay of this limited duration prior to the intended use of the Vessel to retrieve the Turbine. Ongoing berthage and maintenance costs will be incurred and presumably subject to the Charging Order over the 90 days duration of the stay. However, there is no evidence before me to support a conclusion that the order of magnitude of these costs over this period of time would outweigh the interests of comity and the public policy interest in facilitating the objectives of the CCAA.

[90] One effect of this outcome is that, as was the case when Justice Pearlman issued the decision in *Sargeant III*, it is not necessary at this stage to resolve the question whether the claims of maritime creditors should be adjudicated by the NSSC or the Federal Court. At this stage, OHTC's counsel has indicated its resistance to a bifurcation of the claims process in the manner that took place in the proceedings that followed *Sargeant III* and *Hanjin.* However, I note the argument raised in this motion that, in *Antwerp* at paragraph 47, the Supreme Court of Canada stated that, as the ship had been "captured" by the processes of the Federal Court in that matter, neither it nor its proceeds of sale were available to be sent back to Belgium by a Canadian bankruptcy court. At paragraph 37 of *Antwerp*, this principle is stated somewhat differently, that the Canadian bankruptcy court had no power to deal with the ship which had already been captured by the competent order of the Federal Court. It may therefore be

significant that, in the “Brussel” litigation, the ship had not only been arrested but was also the subject of the Federal Court’s order for appraisal and sale when the Québec Superior Court Order was issued. This point is left to be addressed at a later stage of these proceedings, with the benefit of further submissions to the NSSC or this Court.

F. *Release of the Vessel from Arrest*

[91] Dealing now with release of the Vessel from arrest, my view is that a decision to release the vessel flows from the decision to stay RMI’s action, as the stay is granted in aid of the NSSC and paragraph 4 of the Initial Order contemplates OHTC remaining in the possession and control of its property. I also note that this is not a case where there is an obvious risk of the Vessel fleeing the jurisdiction after it is released from arrest, given that it is a Canadian vessel owned by a Nova Scotia corporation, particularly given that the owner’s objective is to use it for the Turbine retrieval operation in Canadian waters.

[92] However, DP World raised concern about the effect upon caveators of the Court releasing the Vessel from arrest. DP World notes that the notion of the caveat is to afford notice to the caveator, before a vessel is released from arrest, to give it an opportunity to take further steps if it wishes to do so. DP World submitted at the hearing of these motions that, if the Court were to decide to release the Vessel from arrest, it would be appropriate to provide that the release would not be effective for a short period, perhaps 10 days, to afford caveators an opportunity to consider further steps.

[93] OHTC's counsel agreed that a short period of time would be appropriate for consideration but argued that the opportunity to take further steps should be afforded only to caveators who had already commenced separate *in rem* actions in support of their claims. He argued that for this opportunity to apply more broadly would be contrary to the intention of the Initial Order and inconsistent with the attention that *Holt* indicates should be given to how far a Federal Court proceeding has advanced.

[94] Given OHTC's acknowledgement of the potential merits of DP World's position, I will adopt this point for inclusion in my Order. However, I do not find a rational basis at this stage to distinguish between the different categories of caveators as advocated by OHTC. The carve-out language in paragraph 11A of the Initial Order is expressly stated to apply to the proceedings before the Federal Court, including caveators. I do not consider it inconsistent with the intention of the Initial Order to treat all caveators in RMI's action in the same manner. If any of the caveators choose to take further steps, and those steps are opposed by OHTC, the relevance, if any, of the fact that certain caveators are presently less advanced in their procedural steps would be a point for consideration at that time.

[95] Having decided to grant OHTC's motion for a stay and to release the Vessel, it is not necessary to consider its alternative requests for relief. This conclusion is also dispositive of RMI's motion for default judgment and sale of the Vessel, which must be dismissed.

V. **Costs**

[96] RMI has not been successful in its motion. OHTC has been successful in its motion, except that I have granted a stay of more limited duration than it would have preferred. OHTC should therefore receive costs, payable by RMI and DP World. At the hearing of these motions, counsel agreed that costs should be quantified in the lump sum amount of $3,500.00, which, in the event of success by OHTC, would be paid $1,750.00 by RMI and $1,750.00 by DP World. My Order will so reflect.

ORDER IN T-1460-18

THIS COURT'S ORDER is that:

1. The Plaintiff's action is stayed, effective until the earlier of:

    a. 90 days from the date of this Order; or

    b. such time as the stay issued by the Supreme Court of Nova Scotia, in the proceeding styled "In the Matter of the Proposal of OpenHydro Technology Canada Ltd.", may be lifted.

2. The Plaintiff shall have leave to apply to have the stay of its action lifted at an earlier time in the event of any material change in circumstances.

3. The Vessel shall be released from arrest, provided that, in recognition of the caveats filed in this action against the release of the Vessel, such release shall be effective on the 10th day following the date of this Order.

4. The Defendant, OpenHydro Technology Canada Ltd., is awarded costs in the all-inclusive amount of $3,500.00, with $1,750.00 to be paid by the Plaintiff and $1,750.00 to be paid by the caveator, DP World Saint John Inc.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1460-18
STYLE OF CAUSE:	RMI MARINE LIMITED V THE SHIP "SCOTIA TIDE"AND THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "SCOTIA TIDE" AND OPENHYDRO TECHNOLOGY CANADA LIMITED
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	JANUARY 15, 2019
ORDER AND REASONS	SOUTHCOTT, J.
DATED:	JANUARY 28, 2019

APPEARANCES:

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Jakub Vodsedalek	FOR THE CAVEATOR, DP WORLD SAINT JOHN INC.

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