Court File No. CV-15-10832-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC

BRIEF OF AUTHORITIES OF THE CADILLAC FAIRVIEW CORPORATION LIMITED AND ITS AFFILIATES

(Motion for Process Approval and Stay Extension Orders)
(Returnable on February 4, 2015)

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TAB1

CITATION: Target Canada Co. (Re), 2015 ONSC 303
COURT FILE NO.: CV-15-10832-00CL
DATE: 2015-01-16

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C., 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC.

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *Tracy Sandler* and *Jeremy Dacks,* for the Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC (the "Applicants")

Jay Swartz, for the Target Corporation

Alan Mark, Melaney Wagner, and *Jesse Mighton*, for the Proposed Monitor, Alvarez and Marsal Canada ULC ("Alvarez")

Terry O'Sullivan, for The Honourable J. Ground, Trustee of the Proposed Employee Trust

Susan Philpott, for the Proposed Employee Representative Counsel for employees of the Applicants

HEARD and ENDORSED: January 15, 2015

REASONS: January 16, 2015

ENDORSEMENT

[1] Target Canada Co. ("TCC") and the other applicants listed above (the "Applicants") seek relief under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the "CCAA"). While the limited partnerships listed in Schedule "A" to the draft Order (the "Partnerships") are not applicants in this proceeding, the Applicants seek to have a stay of

proceedings and other benefits of an initial order under the CCAA extended to the Partnerships, which are related to or carry on operations that are integral to the business of the Applicants.

[2] TCC is a large Canadian retailer. It is the Canadian operating subsidiary of Target Corporation, one of the largest retailers in the United States. The other Applicants are either corporations or partners of the Partnerships formed to carry on specific aspects of TCC's Canadian retail business (such as the Canadian pharmacy operations) or finance leasehold improvements in leased Canadian stores operated by TCC. The Applicants, therefore, do not represent the entire Target enterprise; the Applicants consist solely of entities that are integral to the Canadian retail operations. Together, they are referred as the "Target Canada Entities".

[3] In early 2011, Target Corporation determined to expand its retail operations into Canada, undertaking a significant investment (in the form of both debt and equity) in TCC and certain of its affiliates in order to permit TCC to establish and operate Canadian retail stores. As of today, TCC operates 133 stores, with at least one store in every province of Canada. All but three of these stores are leased.

[4] Due to a number of factors, the expansion into Canada has proven to be substantially less successful than expected. Canadian operations have shown significant losses in every quarter since stores opened. Projections demonstrate little or no prospect of improvement within a reasonable time.

[5] After exploring multiple solutions over a number of months and engaging in extensive consultations with its professional advisors, Target Corporation concluded that, in the interest of all of its stakeholders, the responsible course of action is to cease funding the Canadian operations.

[6] Without ongoing investment from Target Corporation, TCC and the other Target Canada Entities cannot continue to operate and are clearly insolvent. Due to the magnitude and complexity of the operations of the Target Canada Entities, the Applicants are seeking a stay of proceedings under the CCAA in order to accomplish a fair, orderly and controlled wind-down of their operations. The Target Canada Entities have indicated that they intend to treat all of their stakeholders as fairly and equitably as the circumstances allow, particularly the approximately 17,600 employees of the Target Canada Entities.

[7] The Applicants are of the view that an orderly wind-down under Court supervision, with the benefit of inherent jurisdiction of the CCAA, and the oversight of the proposed monitor, provides a framework in which the Target Canada Entities can, among other things:

a) Pursue initiatives such as the sale of real estate portfolios and the sale of inventory;

b) Develop and implement support mechanisms for employees as vulnerable stakeholders affected by the wind-down, particularly (i) an employee trust (the "Employee Trust") funded by Target Corporation; (ii) an employee representative counsel to safeguard employee interests; and (iii) a key

employee retention plan (the "KERP") to provide essential employees who agree to continue their employment and to contribute their services and expertise to the Target Canada Entities during the orderly wind-down;

c) Create a level playing field to ensure that all affected stakeholders are treated as fairly and equitably as the circumstances allow; and

d) Avoid the significant maneuvering among creditors and other stakeholders that could be detrimental to all stakeholders, in the absence of a court-supervised proceeding.

[8] The Applicants are of the view that these factors are entirely consistent with the well-established purpose of a CCAA stay: to give a debtor the "breathing room" required to restructure with a view to maximizing recoveries, whether the restructuring takes place as a going concern or as an orderly liquidation or wind-down.

[9] TCC is an indirect, wholly-owned subsidiary of Target Corporation and is the operating company through which the Canadian retail operations are carried out. TCC is a Nova Scotia unlimited liability company. It is directly owned by Nicollet Enterprise 1 S. à r.l. ("NE1"), an entity organized under the laws of Luxembourg. Target Corporation (which is incorporated under the laws of the State of Minnesota) owns NE1 through several other entities.

[10] TCC operates from a corporate headquarters in Mississauga, Ontario. As of January 12, 2015, TCC employed approximately 17,600 people, almost all of whom work in Canada. TCC's employees are not represented by a union, and there is no registered pension plan for employees.

[11] The other Target Canada Entities are all either: (i) direct or indirect subsidiaries of TCC with responsibilities for specific aspects of the Canadian retail operation; or (ii) affiliates of TCC that have been involved in the financing of certain leasehold improvements.

[12] A typical TCC store has a footprint in the range of 80,000 to 125,000 total retail square feet and is located in a shopping mall or large strip mall. TCC is usually the anchor tenant. Each TCC store typically contains an in-store Target brand pharmacy, Target Mobile kiosk and a Starbucks café. Each store typically employs approximately 100 – 150 people, described as "Team Members" and "Team Leaders", with a total of approximately 16,700 employed at the "store level" of TCC's retail operations.

[13] TCC owns three distribution centres (two in Ontario and one in Alberta) to support its retail operations. These centres are operated by a third party service provider. TCC also leases a variety of warehouse and office spaces.

[14] In every quarter since TCC opened its first store, TCC has faced lower than expected sales and greater than expected losses. As reported in Target Corporation's Consolidated Financial Statements, the Canadian segment of the Target business has suffered a significant loss in every quarter since TCC opened stores in Canada.

[15] TCC is completely operationally funded by its ultimate parent, Target Corporation, and related entities. It is projected that TCC's cumulative pre-tax losses from the date of its entry into the Canadian market to the end of the 2014 fiscal year (ending January 31, 2015) will be more than $2.5 billion. In his affidavit, Mr. Mark Wong, General Counsel and Secretary of TCC, states that this is more than triple the loss originally expected for this period. Further, if TCC's operations are not wound down, it is projected that they would remain unprofitable for at least 5 years and would require significant and continued funding from Target Corporation during that period.

[16] TCC attributes its failure to achieve expected profitability to a number of principal factors, including: issues of scale; supply chain difficulties; pricing and product mix issues; and the absence of a Canadian online retail presence.

[17] Following a detailed review of TCC's operations, the Board of Directors of Target Corporation decided that it is in the best interests of the business of Target Corporation and its subsidiaries to discontinue Canadian operations.

[18] Based on the stand-alone financial statements prepared for TCC as of November 1, 2014 (which consolidated financial results of TCC and its subsidiaries), TCC had total assets of approximately $5.408 billion and total liabilities of approximately $5.118 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC's financial situation.

[19] Mr. Wong states that TCC's operational funding is provided by Target Corporation. As of November 1, 2014, NE1 (TCC's direct parent) had provided equity capital to TCC in the amount of approximately $2.5 billon. As a result of continuing and significant losses in TCC's operations, NE1 has been required to make an additional equity investment of $62 million since November 1, 2014.

[20] NE1 has also lent funds to TCC under a Loan Facility with a maximum amount of $4 billion. TCC owed NE1 approximately $3.1 billion under this Facility as of January 2, 2015. The Loan Facility is unsecured. On January 14, 2015, NE1 agreed to subordinate all amounts owing by TCC to NE1 under this Loan Facility to payment in full of proven claims against TCC.

[21] As at November 1, 2014, Target Canada Property LLC ("TCC Propco") had assets of approximately $1.632 billion and total liabilities of approximately $1.643 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC Propco's financial situation. TCC Propco has also borrowed approximately $1.5 billion from Target Canada Property LP and TCC Propco also owes U.S. $89 million to Target Corporation under a Demand Promissory Note.

[22] TCC has subleased almost all the retail store leases to TCC Propco, which then made real estate improvements and sub-sub leased the properties back to TCC. Under this arrangement, upon termination of any of these sub-leases, a "make whole" payment becomes owing from TCC to TCC Propco.

[23] Mr. Wong states that without further funding and financial support from Target Corporation, the Target Canada Entities are unable to meet their liabilities as they become due, including TCC's next payroll (due January 16, 2015). The Target Canada Entities, therefore state that they are insolvent.

[24] Mr. Wong also states that given the size and complexity of TCC's operations and the numerous stakeholders involved in the business, including employees, suppliers, landlords, franchisees and others, the Target Canada Entities have determined that a controlled wind-down of their operations and liquidation under the protection of the CCAA, under Court supervision and with the assistance of the proposed monitor, is the only practical method available to ensure a fair and orderly process for all stakeholders. Further, Mr. Wong states that TCC and Target Corporation seek to benefit from the framework and the flexibility provided by the CCAA in effecting a controlled and orderly wind-down of the Canadian operations, in a manner that treats stakeholders as fairly and as equitably as the circumstances allow.

[25] On this initial hearing, the issues are as follows:

a) Does this court have jurisdiction to grant the CCAA relief requested?

   a) Should the stay be extended to the Partnerships?

   b) Should the stay be extended to "Co-tenants" and rights of third party tenants?

   c) Should the stay extend to Target Corporation and its U.S. subsidiaries in relation to claims that are derivative of claims against the Target Canada Entities?

   d) Should the Court approve protections for employees?

   e) Is it appropriate to allow payment of certain pre-filing amounts?

   f) Does this court have the jurisdiction to authorize pre-filing claims to "critical" suppliers;

   g) Should the court should exercise its discretion to authorize the Applicants to seek proposals from liquidators and approve the financial advisor and real estate advisor engagement?

   h) Should the court exercise its discretion to approve the Court-ordered charges?

[26] "Insolvent" is not expressly defined in the CCAA. However, for the purposes of the CCAA, a debtor is insolvent if it meets the definition of an "insolvent person" in section 2 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("BIA") or if it is "insolvent" as described in *Stelco Inc. (Re)*, [2004] O.J. No. 1257, [*Stelco*], leave to appeal refused, [2004] O.J. No. 1903, leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336, where Farley, J. found that "insolvency" includes a corporation "reasonably expected to run out of liquidity within [a]

reasonable proximity of time as compared with the time reasonably required to implement a restructuring" (at para 26). The decision of Farley, J. in *Stelco* was followed in *Priszm Income Fund (Re)*, [2011] O.J. No. 1491 (SCJ), 2011 and *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4286, (SCJ) [*Canwest*].

[27] Having reviewed the record and hearing submissions, I am satisfied that the Target Canada Entities are all insolvent and are debtor companies to which the CCAA applies, either by reference to the definition of "insolvent person" under the *Bankruptcy and Insolvency Act* (the "BIA") or under the test developed by Farley J. in *Stelco*.

[28] I also accept the submission of counsel to the Applicants that without the continued financial support of Target Corporation, the Target Canada Entities face too many legal and business impediments and too much uncertainty to wind-down their operations without the "breathing space" afforded by a stay of proceedings or other available relief under the CCAA.

[29] I am also satisfied that this Court has jurisdiction over the proceeding. Section 9(1) of the CCAA provides that an application may be made to the court that has jurisdiction in (a) the province in which the head office or chief place of business of the company in Canada is situated; or (b) any province in which the company's assets are situated, if there is no place of business in Canada.

[30] In this case, the head office and corporate headquarters of TCC is located in Mississauga, Ontario, where approximately 800 employees work. Moreover, the chief place of business of the Target Canada Entities is Ontario. A number of office locations are in Ontario; 2 of TCC's 3 primary distribution centres are located in Ontario; 55 of the TCC retail stores operate in Ontario; and almost half the employees that support TCC's operations work in Ontario.

[31] The Target Canada Entities state that the purpose for seeking the proposed initial order in these proceedings is to effect a fair, controlled and orderly wind-down of their Canadian retail business with a view to developing a plan of compromise or arrangement to present to their creditors as part of these proceedings. I accept the submissions of counsel to the Applicants that although there is no prospect that a restructured "going concern" solution involving the Target Canada Entities will result, the use of the protections and flexibility afforded by the CCAA is entirely appropriate in these circumstances. In arriving at this conclusion, I have noted the comments of the Supreme Court of Canada in *Century Services Inc.* v. *Canada (Attorney General)*, [2010] SCC 50 ("*Century Services*") that "courts frequently observe that the CCAA is skeletal in nature", and does not "contain a comprehensive code that lays out all that is permitted or barred". The flexibility of the CCAA, particularly in the context of large and complex restructurings, allows for innovation and creativity, in contrast to the more "rules-based" approach of the BIA.

[32] Prior to the 2009 amendments to the CCAA, Canadian courts accepted that, in appropriate circumstances, debtor companies were entitled to seek the protection of the CCAA where the outcome was not going to be a going concern restructuring, but instead, a "liquidation" or wind-down of the debtor companies' assets or business.

[33] The 2009 amendments did not expressly address whether the CCAA could be used generally to wind-down the business of a debtor company. However, I am satisfied that the enactment of section 36 of the CCAA, which establishes a process for a debtor company to sell assets outside the ordinary course of business while under CCAA protection, is consistent with the principle that the CCAA can be a vehicle to downsize or wind-down a debtor company's business.

[34] In this case, the sheer magnitude and complexity of the Target Canada Entities business, including the number of stakeholders whose interests are affected, are, in my view, suited to the flexible framework and scope for innovation offered by this "skeletal" legislation.

[35] The required audited financial statements are contained in the record.

[36] The required cash flow statements are contained in the record.

[37] Pursuant to s. 11.02 of the CCAA, the court may make an order staying proceedings, restraining further proceedings, or prohibiting the commencement of proceedings, "on any terms that it may impose" and "effective for the period that the court considers necessary" provided the stay is no longer than 30 days. The Target Canada Entities, in this case, seek a stay of proceedings up to and including February 13, 2015.

[38] Certain of the corporate Target Canada Entities (TCC, TCC Health and TCC Mobile) act as general or limited partners in the partnerships. The Applicants submit that it is appropriate to extend the stay of proceedings to the Partnerships on the basis that each performs key functions in relation to the Target Canada Entities' businesses.

[39] The Applicants also seek to extend the stay to Target Canada Property LP which was formerly the sub-leasee/sub-sub lessor under the sub-sub lease back arrangement entered into by TCC to finance the leasehold improvements in its leased stores. The Applicants contend that the extension of the stay to Target Canada Property LP is necessary in order to safeguard it against any residual claims that may be asserted against it as a result of TCC Propco's insolvency and filing under the CCAA.

[40] I am satisfied that it is appropriate that an initial order extending the protection of a CCAA stay of proceedings under section 11.02(1) of the CCAA should be granted.

[41] Pursuant to section 11.7(1) of the CCAA, Alvarez & Marsal Inc. is appointed as Monitor.

[42] It is well established that the court has the jurisdiction to extend the protection of the stay of proceedings to Partnerships in order to ensure that the purposes of the CCAA can be achieved (see: *Lehndorff General Partner Ltd. (1993), 17 CBR (3d) 24 (Ont. Gen. Div.)*; *Re Priszm Income Fund,* 2011 ONSC 2061; *Re Canwest Publishing Inc.* 2010 ONSC 222 ("*Canwest Publishing*") and *Re Canwest Global Communications Corp.*, 2009 CarswellOnt 6184 ("*Canwest Global*").

[43] In these circumstances, I am also satisfied that it is appropriate to extend the stay to the Partnerships as requested.

[44] The Applicants also seek landlord protection in relation to third party tenants. Many retail leases of non-anchored tenants provide that tenants have certain rights against their landlords if the anchor tenant in a particular shopping mall or centre becomes insolvent or ceases operations. In order to alleviate the prejudice to TCC's landlords if any such non-anchored tenants attempt to exercise these rights, the Applicants request an extension of the stay of proceedings (the "Co-Tenancy Stay") to all rights of these third party tenants against the landlords that arise out of the insolvency of the Target Canada Entities or as a result of any steps taken by the Target Canada Entities pursuant to the Initial Order.

[45] The Applicants contend that the authority to grant the Co-Tenancy Stay derives from the broad jurisdiction under sections 11 and 11.02(1) of the CCAA to make an initial order on any terms that the court may impose. Counsel references *Re T. Eaton Co.*, 1997 CarswellOnt 1914 (Gen. Div.) as a precedent where a stay of proceedings of the same nature as the Co-Tenancy Stay was granted by the court in Eaton's second CCAA proceeding. The Court noted that, if tenants were permitted to exercise these "co-tenancy" rights during the stay, the claims of the landlord against the debtor company would greatly increase, with a potentially detrimental impact on the restructuring efforts of the debtor company.

[46] In these proceedings, the Target Canada Entities propose, as part of the orderly wind-down of their businesses, to engage a financial advisor and a real estate advisor with a view to implementing a sales process for some or all of its real estate portfolio. The Applicants submit that it is premature to determine whether this process will be successful, whether any leases will be conveyed to third party purchasers for value and whether the Target Canada Entities can successfully develop and implement a plan that their stakeholders, including their landlords, will accept. The Applicants further contend that while this process is being resolved and the orderly wind-down is underway, the Co-Tenancy Stay is required to postpone the contractual rights of these tenants for a finite period. The Applicants contend that any prejudice to the third party tenants' clients is significantly outweighed by the benefits of the Co-Tenancy Stay to all of the stakeholders of the Target Canada Entities during the wind-down period.

[47] The Applicants therefore submit that it is both necessary and appropriate to grant the Co-Tenancy Stay in these circumstances.

[48] I am satisfied the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time. To the extent that the affected parties wish to challenge the broad nature of this stay, the same can be addressed at the "comeback hearing".

[49] The Applicants also request that the benefit of the stay of proceedings be extended (subject to certain exceptions related to the cash management system) to Target Corporation and its U.S. subsidiaries in relation to claims against these entities that are derivative of the primary liability of the Target Canada Entities.

[50] I am satisfied that the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time and the stay is granted, again, subject to the proviso that affected parties can challenge the broad nature of the stay at a comeback hearing directed to this issue.

[51] With respect to the protection of employees, it is noted that TCC employs approximately 17,600 individuals.

[52] Mr. Wong contends that TCC and Target Corporation have always considered their employees to be integral to the Target brand and business. However, the orderly wind-down of the Target Canada Entities' business means that the vast majority of TCC employees will receive a notice immediately after the CCAA filing that their employment is to be terminated as part of the wind-down process.

[53] In order to provide a measure of financial security during the orderly wind-down and to diminish financial hardship that TCC employees may suffer, Target Corporation has agreed to fund an Employee Trust to a maximum of $70 million.

[54] The Applicants seek court approval of the Employee Trust which provides for payment to eligible employees of certain amounts, such as the balance of working notice following termination. Counsel contends that the Employee Trust was developed in consultation with the proposed monitor, who is the administrator of the trust, and is supported by the proposed Representative Counsel. The proposed trustee is The Honourable J. Ground. The Employee Trust is exclusively funded by Target Corporation and the costs associated with administering the Employee Trust will be borne by the Employee Trust, not the estate of Target Canada Entities. Target Corporation has agreed not to seek to recover from the Target Canada Entities estates any amounts paid out to employee beneficiaries under the Employee Trust.

[55] In my view, it is questionable as to whether court authorization is required to implement the provisions of the Employee Trust. It is the third party, Target Corporation, that is funding the expenses for the Employee Trust and not one of the debtor Applicants. However, I do recognize that the implementation of the Employee Trust is intertwined with this proceeding and is beneficial to the employees of the Applicants. To the extent that Target Corporation requires a court order authorizing the implementation of the employee trust, the same is granted.

[56] The Applicants seek the approval of a KERP and the granting of a court ordered charge up to the aggregate amount of $6.5 million as security for payments under the KERP. It is proposed that the KERP Charge will rank after the Administration Charge but before the Directors' Charge.

[57] The approval of a KERP and related KERP Charge is in the discretion of the Court. KERPs have been approved in numerous CCAA proceedings, including *Re Nortel Networks Corp.*, 2009 CarswellOnt 1330 (S.C.J.) [*Nortel Networks (KERP)]*, and *Re Grant Forest Products Inc.*, 2009 CarswellOnt 4699 (Ont. S.C.J.). In *U.S. Steel Canada Inc.*, 2014 ONSC 6145, I recently approved the KERP for employees whose continued services were critical to the stability of the business and for the implementation of the marketing process and whose services

could not easily be replaced due, in part, to the significant integration between the debtor company and its U.S. parent.

[58] In this case, the KERP was developed by the Target Canada Entities in consultation with the proposed monitor. The proposed KERP and KERP Charge benefits between 21 and 26 key management employees and approximately 520 store-level management employees.

[59] Having reviewed the record, I am of the view that it is appropriate to approve the KERP and the KERP Charge. In arriving at this conclusion, I have taken into account the submissions of counsel to the Applicants as to the importance of having stability among the key employees in the liquidation process that lies ahead.

[60] The Applicants also request the Court to appoint Koskie Minsky LLP as employee representative counsel (the "Employee Representative Counsel"), with Ms. Susan Philpott acting as senior counsel. The Applicants contend that the Employee Representative Counsel will ensure that employee interests are adequately protected throughout the proceeding, including by assisting with the Employee Trust. The Applicants contend that at this stage of the proceeding, the employees have a common interest in the CCAA proceedings and there appears to be no material conflict existing between individual or groups of employees. Moreover, employees will be entitled to opt out, if desired.

[61] I am satisfied that section 11 of the CCAA and the *Rules of Civil Procedure* confer broad jurisdiction on the court to appoint Representative Counsel for vulnerable stakeholder groups such as employee or investors (see *Re Nortel Networks Corp.*, 2009 CarswellOnt 3028 (S.C.J.) (Nortel Networks Representative Counsel)). In my view, it is appropriate to approve the appointment of Employee Representative Counsel and to provide for the payment of fees for such counsel by the Applicants. In arriving at this conclusion, I have taken into account:

(i) the vulnerability and resources of the groups sought to be represented;

(ii) the social benefit to be derived from the representation of the groups;

(iii) the avoidance of multiplicity of legal retainers; and

(iv) the balance of convenience and whether it is fair and just to creditors of the estate.

[62] The Applicants also seek authorization, if necessary, and with the consent of the Monitor, to make payments for pre-filing amounts owing and arrears to certain critical third parties that provide services integral to TCC's ability to operate during and implement its controlled and orderly wind-down process.

[63] Although the objective of the CCAA is to maintain the status quo while an insolvent company attempts to negotiate a plan of arrangement with its creditors, the courts have expressly acknowledged that preservation of the status quo does not necessarily entail the preservation of the relative pre-stay debt status of each creditor.

[64] The Target Canada Entities seek authorization to pay pre-filing amounts to certain specific categories of suppliers, if necessary and with the consent of the Monitor. These include:

a) Logistics and supply chain providers;

b) Providers of credit, debt and gift card processing related services; and

c) Other suppliers up to a maximum aggregate amount of $10 million, if, in the opinion of the Target Canada Entities, the supplier is critical to the orderly wind-down of the business.

[65] In my view, having reviewed the record, I am satisfied that it is appropriate to grant this requested relief in respect of critical suppliers.

[66] In order to maximize recovery for all stakeholders, TCC indicates that it intends to liquidate its inventory and attempt to sell the real estate portfolio, either en bloc, in groups, or on an individual property basis. The Applicants therefore seek authorization to solicit proposals from liquidators with a view to entering into an agreement for the liquidation of the Target Canada Entities inventory in a liquidation process.

[67] TCC's liquidity position continues to deteriorate. According to Mr. Wong, TCC and its subsidiaries have an immediate need for funding in order to satisfy obligations that are coming due, including payroll obligations that are due on January 16, 2015. Mr. Wong states that Target Corporation and its subsidiaries are no longer willing to provide continued funding to TCC and its subsidiaries outside of a CCAA proceeding. Target Corporation (the "DIP Lender") has agreed to provide TCC and its subsidiaries (collectively, the "Borrower") with an interim financing facility (the "DIP Facility") on terms advantageous to the Applicants in the form of a revolving credit facility in an amount up to U.S. $175 million. Counsel points out that no fees are payable under the DIP Facility and interest is to be charged at what they consider to be the favourable rate of 5%. Mr. Wong also states that it is anticipated that the amount of the DIP Facility will be sufficient to accommodate the anticipated liquidity requirements of the Borrower during the orderly wind-down process.

[68] The DIP Facility is to be secured by a security interest on all of the real and personal property owned, leased or hereafter acquired by the Borrower. The Applicants request a court-ordered charge on the property of the Borrower to secure the amount actually borrowed under the DIP Facility (the "DIP Lenders Charge"). The DIP Lenders Charge will rank in priority to all unsecured claims, but subordinate to the Administration Charge, the KERP Charge and the Directors' Charge.

[69] The authority to grant an interim financing charge is set out at section 11.2 of the CCAA. Section 11.2(4) sets out certain factors to be considered by the court in deciding whether to grant the DIP Financing Charge.

[70] The Target Canada Entities did not seek alternative DIP Financing proposals based on their belief that the DIP Facility was being offered on more favourable terms than any other

potentially available third party financing. The Target Canada Entities are of the view that the DIP Facility is in the best interests of the Target Canada Entities and their stakeholders. I accept this submission and grant the relief as requested.

[71] Accordingly, the DIP Lenders' Charge is granted in the amount up to U.S. $175 million and the DIP Facility is approved.

[72] Section 11 of the CCAA provides the court with the authority to allow the debtor company to enter into arrangements to facilitate a restructuring under the CCAA. The Target Canada Entities wish to retain Lazard and Northwest to assist them during the CCCA proceeding. Both the Target Canada Entities and the Monitor believe that the quantum and nature of the remuneration to be paid to Lazard and Northwest is fair and reasonable. In these circumstances, I am satisfied that it is appropriate to approve the engagement of Lazard and Northwest.

[73] With respect to the Administration Charge, the Applicants are requesting that the Monitor, along with its counsel, counsel to the Target Canada Entities, independent counsel to the Directors, the Employee Representative Counsel, Lazard and Northwest be protected by a court ordered charge and all the property of the Target Canada Entities up to a maximum amount of $6.75 million as security for their respective fees and disbursements (the "Administration Charge"). Certain fees that may be payable to Lazard are proposed to be protected by a Financial Advisor Subordinated Charge.

[74] In *Canwest Publishing Inc.*, 2010 ONSC 222, Pepall J. (as she then was) provided a non-exhaustive list of factors to be considered in approving an administration charge, including:

a. The size and complexity of the business being restructured;

b. The proposed role of the beneficiaries of the charge;

c. Whether there is an unwarranted duplication of roles;

d. Whether the quantum of the proposed Charge appears to be fair and reasonable;

e. The position of the secured creditors likely to be affected by the Charge; and

f. The position of the Monitor.

[75] Having reviewed the record, I am satisfied, that it is appropriate to approve the Administration Charge and the Financial Advisor Subordinated Charge.

[76] The Applicants seek a Directors' and Officers' charge in the amount of up to $64 million. The Directors Charge is proposed to be secured by the property of the Target Canada Entities and to rank behind the Administration Charge and the KERP Charge, but ahead of the DIP Lenders' Charge.

[77] Pursuant to section 11.51 of the CCAA, the court has specific authority to grant a "super priority" charge to the directors and officers of a company as security for the indemnity provided by the company in respect of certain obligations.

[78] I accept the submissions of counsel to the Applicants that the requested Directors' Charge is reasonable given the nature of the Target Canada Entities retail business, the number of employees in Canada and the corresponding potential exposure of the directors and officers to personal liability. Accordingly, the Directors' Charge is granted.

[79] In the result, I am satisfied that it is appropriate to grant the Initial Order in these proceedings.

[80] The stay of proceedings is in effect until February 13, 2015.

[81] A comeback hearing is to be scheduled on or prior to February 13, 2015. I recognize that there are many aspects of the Initial Order that go beyond the usual first day provisions. I have determined that it is appropriate to grant this broad relief at this time so as to ensure that the status quo is maintained.

[82] The comeback hearing is to be a "true" comeback hearing. In moving to set aside or vary any provisions of this order, moving parties do not have to overcome any onus of demonstrating that the order should be set aside or varied.

[83] Finally, a copy of Lazard's engagement letter (the "Lazard Engagement Letter") is attached as Confidential Appendix "A" to the Monitor's pre-filing report. The Applicants request that the Lazard Engagement Letter be sealed, as the fee structure contemplated in the Lazard Engagement Letter could potentially influence the structure of bids received in the sales process.

[84] Having considered the principles set out in *Sierra Club of Canada* v. *Canada (Minister of Finance)*, [2002] 211 D.L.R (4^{th}) 193 2 S.C.R. 522, I am satisfied that it is appropriate in the circumstances to seal Confidential Appendix "A" to the Monitor's pre-filing report.

[85] The Initial Order has been signed in the form presented.

Regional Senior Justice Morawetz

Date: January 16, 2015

TAB2

Canadian Contractual Interpretation Law

SECOND EDITION

contract which governs the tendering process) a term that the party seeking the tenders will enter into Contract B (the contract which governs the actual work) if an acceptable bid is presented.[30] The Ontario Court of Appeal found that it was not sufficiently obvious that a clause of a contract between a client and a stock broker allowing the broker to refuse to accept purchase or sale instructions from the client should include an implied term that it would be invoked only upon reasonable notice or the finding of an illegal act by the client.[31] The Alberta Court of Appeal rejected an argument that a term should be implied into a commission agreement that commissions would be payable on sales occurring after the expiry of the agreement on the basis that business efficacy did not require it since the transaction could work perfectly well without it.[32]

4.3 AN IMPLIED TERM CANNOT BE USED TO REWRITE A CONTRACT OR TO CONTRADICT THE EXPRESS TERMS OF THE CONTRACT

While the courts have a fairly broad scope to imply terms into a contract, since the exercise of contractual interpretation is centred on the words chosen by the parties there is an important limitation on the implication power. It may not be used either to rewrite the parties' agreement or to contradict the terms that the parties have expressly chosen. This restriction applies to all three branches of *Canadian Pacific Hotels/M.J.B.*

It is clear that the power to imply terms into a contract is to be used cautiously, and that this power cannot be used either to rewrite the parties' contract or to contradict the express wording they have chosen. These principles are encapsulated in the following statement made by Cory J.A. (as he then was) while on the Ontario Court of Appeal:

> When may a term be implied in a contract? A court faced with that question must first take cognizance of some important and time-honoured cautions. For example, the courts will be cautious in their approach to implying terms to contracts. Certainly a court will not rewrite a contract for the parties. As well, no term will be implied that is inconsistent with the contract. Implied terms are as a rule based upon the presumed intention of the parties and should be founded upon reason. The circumstances and background of the contract, together with its precise terms, should all be carefully regarded before a term is implied. As a result, it is clear that every case must be determined on its own particular facts.[33]

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30 *Wind Power Inc. v. Saskatchewan Power Corp.*, [2002] S.J. No. 287, [2002] 7 W.W.R. 73 at para. 56 (Sask. C.A.).

31 *Venture Capital USA Inc. v. Yorkton Securities Inc.*, [2005] O.J. No. 1885, 75 O.R. (3d) 325 at para. 32 (Ont. C.A.), leave to appeal to S.C.C. refused [2005] S.C.C.A. No. 334 (S.C.C.).

32 *Highwood Distillers Ltd. v. Panorama Public and Industrial Communications Ltd.*, [2005] A.J. No. 239, 363 A.R. 239 at para. 14 (Alta. C.A.).

33 *G. Ford Homes Ltd. v. Draft Masonry (York) Co.*, [1983] O.J. No. 3181, 43 O.R. (2d) 401 at 403 (Ont. C.A.). To the same effect, see *Sullivan v. Newsome*, [1987] A.J. No. 438, 78 A.R. 297 at 303-04 (Alta. C.A.), leave to appeal to S.C.C. refused [1988] S.C.C.A. No. 68 (S.C.C.); *Catre Industries Ltd. v. Alberta*, [1989] A.J. No. 903, 63 D.L.R. (4th) 74 at 85-86 (Alta. C.A.),

The Supreme Court of Canada has also made the point that an implied term may not contradict what the parties intended by their words: "Whatever may be implied in a case of ambiguity or absence of a provision, no term may be implied in a contract which is contrary to the clearly expressed intention of the parties."[34]

The prohibition against rewriting the parties' contract is very consistent with the overarching approach to the interpretation of contracts in Canada. Any implication of a term necessarily goes beyond the words expressly chosen by the parties. This endeavour is legitimate to the extent that it gives context and interpretive accuracy to the words selected, but it is illegitimate when it goes so far as to alter what the parties agreed as evidenced by the words they have chosen. This is particularly the case where the implication in question would improve the bargain for one party at the expense of the other. An implied term may not have that effect.[35]

The prohibition against rewriting the parties' contract goes so far as to preclude the implication of terms that would have been reasonable if the parties had turned their minds to them, if in fact there is no reason to believe that the parties did in fact intend those terms to be included within their bargain. The point was made in *Alpine Veneers Ltd. v. Reed Lumbers Co.*,[36] quoting the decision of the House of Lords in *Trollope & Colls v. Northwest Metropolitan Regional Hospital Board*:

> The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, formed part of the contract which the parties made for themselves.[37]

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leave to appeal to S.C.C. refused [1989] S.C.C.A. No. 447 (S.C.C.); and *Gainers Inc. v. Pocklington Financial Corp.*, [2000] A.J. No. 626, 81 Alta. L.R. (3d) 17 at paras. 18-20 (Alta. C.A.).

34 *Vorvis v. Insurance Corp. of British Columbia*, [1989] S.C.J. No. 46, [1989] 1 S.C.R. 1085 at para. 13 (S.C.C.).

35 See *Toronto (City) v. Toronto Terminals Railway Co.*, [1999] O.J. No. 3734, 45 O.R. (3d) 481 at para. 29 (Ont. C.A.), in which the court refused to imply into a lease a term providing for interest for the period between the beginning of a renewal term and the date on which the new rent was set by arbitration.

36 [1983] B.C.J. No. 2289 at para. 33 (B.C.C.A.).

37 [1973] 2 All E.R. 250 at 267-68 (H.L.).

Put another way, since a court will not imply a term simply because it is reasonable to do so, the officious bystander test must employ a bystander who is observing what is necessary rather than that which is simply reasonable.[38]

On the other hand, the cautious approach which prevents the rewriting of contracts does not preclude some fairly serious judicial surgery to the words chosen by the parties if the exercise is a legitimate one of filling gaps. *Townsgate 1 Ltd. v. Klein*[39] illustrates the point. At issue was the interpretation of an agreement of purchase and sale in respect of a new residential condominium. The provision in question stated:

> "If the Unit is substantially completed, sufficient to permit occupancy on Closing, and the Purchaser has been approved by the Mortgagee, but the declaration and description have not been registered, then the Purchaser shall occupy the Unit on that date (the 'Occupancy Date') on the following terms and conditions; ..."[40]

The purchaser argued that the words "but the declaration and description have not been registered" were a condition precedent, and that because registration had occurred before the date on which the purchaser was to take possession, the purchaser could not be compelled to go into possession. The court noted that the problem was that the contract did not clearly distinguish between the possession closing date (on which the purchaser of a new condominium takes possession of the unit even though title usually cannot yet be conveyed) and the title closing date (on which title is conveyed after all necessary registrations have been made and all necessary approvals have been obtained). To solve the problem, a term was implied to "cover the unforeseen circumstance that the declaration and description are registered shortly before the possession closing date". After the implication of the term, the provision in question read as follows, with the words implied by the court shown in italics:

> "If the Unit is substantially completed, sufficient to permit occupancy on Closing, and the Purchaser has been approved by the Mortgagee, *even though the declaration and description have been registered but it is uncertain whether the declarant can in good faith deliver a transfer of the unit acceptable for registration on Closing*, the Purchaser shall *nevertheless* occupy the Unit on that date (the 'Occupancy Date') on the following terms and conditions: ...."[41] [Emphasis added.]

Another example is *Zeitler v. Zeitler Estate*,[42] in which an agreement by a wife to convey real property to her husband was found to include an implied term that the husband would pay future capital gains tax and indemnify the wife

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38 *Charles P. Rowen & Associates Inc. v. Ciba-Geigy Canada Inc.*, [1994] O.J. No. 1233, 19 O.R. (3d) 205 at 232 (Ont. C.A.), *per* Carthy J.A., dissenting, leave to appeal to S.C.C. refused [1994] S.C.C.A. No. 400 (S.C.C.).

39 [1998] O.J. No. 396, 107 O.A.C. 58 (Ont. C.A.), leave to appeal to S.C.C. refused [1998] S.C.C.A. No. 135 (S.C.C.).

40 *Ibid.*, at para. 3.

41 *Ibid.*, at para. 27, and see paras. 19-27.

42 [2010] B.C.J. No. 794, 3 B.C.L.R. (5th) 315 at paras. 25 and 36 (B.C.C.A.).

against such tax liability. While emphasizing the principle that courts must be cautious not to rewrite contracts for the parties, the court held that without the implied term, the wife would have contractually divested herself of all interest in the property but would have retained a contingent tax liability that was entirely outside her control and for which she would receive no benefit. Such an outcome would, according to the court, destroy the business efficacy of the contract and frustrate its objects.

Thus, the gap-filling implication can go quite far, despite the courts' cautions about implying terms at all and their admonitions against rewriting the parties' bargain.

4.4 THE PRINCIPLE IN QUÉBEC

Like the common law, Québec law also recognizes implied terms, and often applies them when a contract is interpreted.

As always, the *Civil Code of Québec* is the starting point. Article 1434 makes it clear that what is to be enforced by a court goes beyond the text of a written agreement:

> 1434. A contract validly formed binds the parties who have entered into it not only as to what they have expressed in it but also as to what is incident to it according to its nature and in conformity with *usage*, equity or law.[43] [Emphasis added.]

The Québec Court of Appeal, citing the work of Professor Paul-André Crépeau, has described the use of implied terms in the following way:

> Very often, in fact, the agreement reached addresses only a few essential aspects of a matter. Perhaps the parties forgot or neglected to specify the obligations they intended to assume. Perhaps they failed to foresee the consequences, the natural after-effects of the agreement. Or, perhaps they did not take into account the setting in which the agreement was reached.
>
> In all of these cases, it is incumbent on the interpreter and the courts to comply with the order of the legislature and compensate for the silence or brevity of the parties by "unpacking" the contract, examining it thoroughly to determine the implicit obligations that arise from its very nature or that flow from equity, usage, or law.[44]

However, in Québec there is no general test for implication. Instead, implication is left to the discretion of judges in individual cases.[45]

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[43] *Civil Code of Québec*, S.Q. 1991, c. 64, art. 1434.

[44] *Coderre v. Coderre*, [2008] Q.J. No. 3930 at para. 96 (Qué. C.A.), quoting Professor Paul-André Crépeau, "Le contenu obligationnel d'un contrat" (1965) 43 Can. Bar Rev. 1 at 6 (translation by the Québec Court of Appeal).

[45] Sébastien Grammond, Anne-Françoise Debruche and Yan Campagnolo, *Quebec Contract Law* (Montréal: Wilson & Lafleur, 2011) at para. 316.

TAB3

G. Ford Homes Ltd. v. Draft Masonry (York) Co. Ltd.

[1983] O.J. No. 3181

43 O.R. (2d) 401

1 D.L.R. (4th) 262

2 O.A.C. 231

2 C.L.R. 210

22 A.C.W.S. (2d) 232

Ontario
Court of Appeal

Blair, Morden and Cory JJ.A.

September 29, 1983.

D. J. McGhee, for appellant.

D. H. Creighton, for respondent.

The judgment of the court was delivered orally by

1 CORY J.A.:-- The respondent, G. Ford Homes, orally agreed to supply and install two circular staircases for two homes which the appellant, Draft Masonry, was building. The point in issue on this appeal is whether there was an implied term of the contract for the supply and installation of the staircases that they would comply with the requirements of the Ontario Building Code, R.R.O. 1980, Reg. 87.

Factual background

2 Something must be said of the facts of this case to understand the problem.

3 The appellant was building two single-family two-storey homes on adjacent lots in the Township of Scugog. These were large homes having a floor area of approximately 3,000 sq. ft.; they were priced at $239,900 and they were described by both parties as luxury homes. The appellant contractor had earlier built a number of homes following the same plans. In none of these homes had there been any problem with the stairs. The architect's plans for the home were available on the site.

4 The respondent fabricates and installs residential staircases. Mr. Di Donato, an officer of the appellant company, called Mr. Ford, an officer of the respondent (Ford) to see if it could provide and install circular staircases in the homes. Mr. Ford attended at the homes. At that time they had reached a stage of the construction where they were framed in. Di Donato offered to show the architectural plans for the homes to Ford. He declined to see those plans. It is significant that the plans clearly indicate the required headroom at the top of the stairs, which would comply with the Ontario Building Code requirements. Mr. Ford did, however, make some measurements. He offered a selection of three types of staircases to Mr. Di Donato. Mr. Di Donato selected one of the three. The price was agreed upon as were certain minor structural changes necessary to permit the stairs to be installed.

5 The stairs were, in due course, delivered and installed. There is no fault found with the material used in the stairways. Unfortunately they did not comply with the Ontario Building Code regulation for the headroom was one and one-half inches short of the specified minimum. As a result, the appellant was required by the building inspector to take out the staircases and install others which complied with the Ontario Building Code. The removal of the staircases and the installation of new ones gave rise to this claim.

Result at trial and in the Divisional Court

6 Ford brought an action to recover the cost for the supply and installation of the services. At trial the Ford claim for the two circular staircases was dismissed.

7 Ford then appealed the result to the Divisional Court. That court gave effect to Ford's contentions and allowed it the full amount of its claim together with interest. It held that there could be no obligation upon the respondent Ford unless the appellant placed reliance upon it with regard to the staircases and made Ford aware of that reliance. On the facts the Divisional Court found that "this record is almost completely bereft of any evidence that would support either inference".

8 With deference, we cannot agree with either of the conclusions of the Divisional Court.

Implied terms of contracts

9 When may a term be implied in a contract? A court faced with that question must first take cognizance of some important and time-honoured cautions. For example, the courts will be cautious in their approach to implying terms to contracts. Certainly a court will not rewrite a contract for the

parties. As well, no term will be implied that is inconsistent with the contract. Implied terms are as a rule based upon the presumed intention of the parties and should be founded upon reason. The circumstances and background of the contract, together with its precise terms, should all be carefully regarded before a term is implied. As a result, it is clear that every case must be determined on its own particular facts. With these principles firmly in mind it is appropriate to consider some texts and recent cases dealing with the issue.

10 For almost a century it has been recognized that a term will be implied in a contract in order to give it business efficacy:

> see The "Moorcock" (1889), 14 P.D. 64. The basis upon which a term of a contract will be implied has been extended by decisions of the English Court of Appeal and the House of Lords. Hudson's Building and Engineering Contracts, 10th ed. (1970), pp. 274-5, gives us a useful summary of the law pertaining to when terms will be implied in a contract:
>
> It is submitted that a contractor undertaking to do work and supply materials impliedly undertakes:
>
> (a) to do the work undertaken with care and skill or, as sometimes expressed, in a workmanlike manner;
>
> (b) to use materials of good quality. In the case of materials described expressly this will mean good of their expressed kind. (In the case of goods not described, or not described in sufficient detail, it is submitted that there will be reliance on the contractor to that extent, and the warranty in (c) below will apply);
>
> (c) that both the work and materials will be reasonably fit for the purpose for which they are required, unless the circumstances of the contract are such as to exclude any such obligation (this obligation is additional to that in (a) and (b), and only becomes relevant, for practical purposes, if the contractor has fulfilled his obligations under (a) and (b)).

(Emphasis added.)

11 Young & Marten, Ltd. v. McManus Childs, Ltd., [1968] 2 All E.R. 1169, is a decision of the House of Lords. Two principles emerge from the speeches given in the course of that case. The first is that the common law principles codified in the Sale of Goods Act apply to contracts for the provision of work and materials sometimes referred to as contracts for work and services. Thus, the

provisions pertaining to the Sale of Goods Act and codified in that Act are equally applicable to contracts for the provision of work and materials. Secondly, it is determined that unless the circumstances of a particular case are sufficient to specifically exclude it, there will be implied into a contract for the supply of work and materials a term that the materials used will be of merchantable quality and that those materials will be reasonably fit for the purposes for which they were intended.

12 Independent Broadcasting Authority v. EMI Electronics Ltd. et al. (1980), 14 B.L.R. 1, was a further decision of the House of Lords. That decision followed Young & Marten, supra, and added something further [at p. 8]. It was to the effect that in the absence of any term (express or implied) negativing the obligation, one who contracts to design an article for a purpose made known to him undertakes that the design is reasonably fit for the purpose. Such a design obligation was said to be consistent with the statutory law regulating the sale of goods.

13 The principle enunciated in Young & Marten Ltd., supra, has been considered and adopted in appellate courts in Canada: In Ontario, in Hart v. Bell Telephone Co. of Canada Ltd. (1976), 26 O.R. (2d) 218, 102 D.L.R. (3d) 465, 10 C.C.L.T. 335 (on the general issue of when warranties will be implied). In Laliberte v. Blanchard (1980), 31 N.B.R. (2d) 275, Chief Justice Hughes specifically followed Young & Marten Ltd. and relied upon a quotation from Lord Justice du Parcq, which was favourably referred to in that case. The words of Lord Justice du Parcq appear in G. H. Myers & Co. v. Brent Cross Service Co., [1934] 1 K.B. 46 [at p. 55]:

> ... the true view is that a person contracting to do work and supply materials warrants that the materials which he uses will be of good quality and reasonably fit for the purpose for which he is using them, unless the circumstances of the contract are such as to exclude any such warranty.

The foregoing principles are most attractive and compelling.

14 On behalf of the respondent reliance was placed on CCH Canadian Ltd. v. Mollenhauer Contracting Co. Ltd. et al.; United Ceramics Ltd., Third Party, [1976] 1 S.C.R. 49, 51 D.L.R. (3d) 638. The reasons given by the Supreme Court of Canada do not include a reference to the Young & Marten decision. In our view, the scope of the decision in the CCH case is narrow. It determined that the contract under consideration by the court, by its terms and its reference to the use of a specific type of brick, excluded an implied term that those bricks would be fit for the purposes intended. In the case before us it cannot be said that the appellant specified a particular staircase, but rather, he was simply offered a choice of three by the respondent, one of which he chose. In our opinion, the CCH case is not applicable to the facts presently before us.

Application of principles to this case

15 In applying the principles to this case it is important to bear in mind the following. In this case the appellant contractor acquired material and services from Ford, the respondent subcontractor. It

was the subcontractor that was "expert" in the manufacture and installation of stairs. When the contract was negotiated the house plans were offered to Ford who chose to ignore them. The houses were framed in so that measurements could be taken to ensure that the stairs complied with the provisions of the Ontario Building Code. The respondent was, as it should have been, fully aware of the requirements of the Building Code. No one would have a better knowledge of the dimensions of its products than Ford. No one else could better appreciate whether they could be installed in the house and comply with the code. It would be natural and reasonable in the circumstances of this case for the appellant to rely upon Ford to supply and install the staircases in compliance with the Ontario Building Code. It would be unrealistic to come to any other conclusion. The trial judge inferentially found that there was such a reliance. That can be ascertained from the following excerpts from his reasons. At p. 230 of the transcript he said:

> It is a most unfortunate situation but I place the fault on the plaintiff [Ford] for failing to have the stairs installed in such a manner that they do not contravene the Building Code.

Further, the following appears at p. 231:

> The houses in question were luxury type homes of approximately three thousand square feet and the selling price was two hundred and thirty nine thousand dollars odd if I recollect correctly; two hundred and thirty nine thousand nine hundred dollars. This being so I am of the opinion that the defendants were entitled to have the staircase installed which was satisfactory and which would not interfere or would not contravene the structural requirements of the Building Code and also that any structural change that was required might interfere with the proper installation of a railing or bannister on the upper floor and over all the visual or cosmetic effect of this defect.

And lastly, at p. 231:

> ... in my view the defendants were entitled to insist on strict compliance ... that is their entitlement ...

16 These findings were well substantiated by the evidence. In those circumstances the Divisional Court, sitting as an appellate court, was not justified in ignoring those findings; rather, it was bound to accept them: see, for example, Lewis v. Todd et al.; Canadian Provincial Ins. Co., Third Party, [1980] 2 S.C.R. 694, 115 D.L.R. (3d) 257, 14 C.C.L.T. 294.

17 On the facts of this case there must of necessity be an implied term that the staircase could be and would be installed so as to comply with the Ontario Building Code. There could be no business efficacy to the contract without such a term. It is no contract to have stairs installed that must, by requirements of the law, be taken out for failure to comply with the code. To sanction the installation of such a staircase in contravention of the code would be tantamount to sanctioning an

illegal contract. On the basis of the principle enunciated in the Moorcock case, supra, the term should be implied in the contract that the stairs would comply with the code.

18 Alternatively or additionally a term should be implied that both the work and materials will be reasonably fit for the purpose for which they were required. Such a term must be implied unless the circumstances of the contract are such as to exclude any such obligation: see Young & Marten, supra. No such exclusion appears, from the circumstances of the contract, in this case. The work and materials supplied could not be reasonably fit for the purpose for which they were required unless they complied with the provisions of the Ontario Building Code.

19 In the circumstances, the appeal will be allowed with costs here and in the Divisional Court. The order of the Divisional Court will be set aside and the judgment at trial restored.

Appeal allowed.

TAB4

Pacific National Investments Ltd. *Appellant*

v.

Corporation of the City of Victoria *Respondent*

INDEXED AS: PACIFIC NATIONAL INVESTMENTS LTD. *v.* VICTORIA (CITY)

Neutral citation: 2004 SCC 75.

File No.: 29759.

2004: June 15; 2004: November 19.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps and Fish JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Municipal law — Zoning — Land development — Unjust enrichment — Developer suing municipality for unjust enrichment following "down-zoning" of lots — Whether municipality entitled to retain improvements made by developer on these lots without paying.

Unjust enrichment — Land development — Municipalities — Developer suing municipality for unjust enrichment following "down-zoning" of lots — Whether municipality entitled to retain improvements made by developer on these lots without paying — Whether conditions for unjust enrichment met.

In the 1980s, the provincial government and the respondent City agreed on the desirability of redeveloping, for residential and commercial uses, approximately 200 acres of provincial Crown land on the City's inner harbour. With respect to Phase II of the project, once the rights and obligations of the provincial Crown agency that owned the land had been assigned to the appellant real estate developer, the City and the developer entered into an agreement which provided, amongst other things, that the developer would build roads, parkland, walkways and a new seawall. These works and improvements were completed at a cost of about $1.08 million. It was a condition precedent to the developer's obligations that the City would re-zone the 22 acres from the existing industrial designation to permit residential and

Pacific National Investments Ltd. *Appelante*

c.

Corporation de la ville de Victoria *Intimée*

RÉPERTORIÉ : PACIFIC NATIONAL INVESTMENTS LTD. *c.* VICTORIA (VILLE)

Référence neutre : 2004 CSC 75.

N° du greffe : 29759.

2004 : 15 juin; 2004 : 19 novembre.

Présents : La juge en chef McLachlin et les juges Major, Bastarache, Binnie, LeBel, Deschamps et Fish.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit municipal — Zonage — Aménagement foncier — Enrichissement sans cause — Poursuite du promoteur immobilier contre la municipalité pour enrichissement sans cause à la suite d'une modification du zonage des lots — La municipalité peut-elle conserver sans en payer le prix les améliorations que le promoteur a apportées à ces lots?

Enrichissement sans cause — Aménagement foncier — Municipalités — Poursuite du promoteur immobilier contre la municipalité pour enrichissement sans cause à la suite d'une modification du zonage des lots — La municipalité peut-elle conserver sans en payer le prix les améliorations que le promoteur a apportées à ces lots? — Les conditions de l'enrichissement sans cause sont-elles réunies?

Dans les années 80, le gouvernement provincial et la Ville intimée ont convenu de l'opportunité du réaménagement, à des fins résidentielles et commerciales, d'environ 200 acres d'un bien-fonds de la Couronne provinciale situé dans le port intérieur de la municipalité. Relativement à la phase II du projet, après que la société d'État provinciale propriétaire des terrains eut cédé ses droits et ses obligations au promoteur immobilier appelant, la Ville et le promoteur ont conclu un accord prévoyant notamment que ce dernier construirait des routes et une nouvelle digue et aménagerait des espaces verts et des sentiers. Ces travaux et améliorations ont été menés à terme et leur coût est estimé à 1,08 million de dollars. La prise en charge des obligations de la société d'État par le promoteur était subordonnée à ce que la Ville modifie

commercial uses appropriate to carrying out the agreed upon project. However, when the developer applied for building permits to develop its two water lots, the City Council down-zoned these lots to permit only one-storey commercial buildings, thereby eliminating the two stories of residential condominiums. The developer sued the City for breach of contract and, in the alternative, for unjust enrichment. Ultimately, this Court rejected the contractual claim on the basis that, under the provincial law governing municipalities at the relevant time, the City lacked the statutory authority to make and be bound by an implied term to keep the zoning in place for a reasonable time to allow for completion of the project, and that its breach therefore could not give rise to an action for damages. The matter was remitted to the trial court to deal with the alternative claim. The trial judge, on that basis, for unjust enrichment, awarded $1.08 million to the developer. The Court of Appeal set aside the trial judge's decision.

Held: The appeal should be allowed and the trial judgment restored. The City had no right in equity to retain the benefit of the extra works and improvements carried out by the developer without paying for them.

The doctrine of unjust enrichment provides an equitable cause of action that retains a large measure of remedial flexibility to deal with different circumstances according to principles rooted in fairness and good conscience. In this case, the City obtained $1.08 million worth of roads, parkland and walkways and a new seawall, wholly at the developer's expense. These works and improvements were in excess of what the City could lawfully demand under the *Municipal Act*. The developer, having lost its earlier claim against the City for breach of contract, no longer attacks the validity of the down-zoning. It no longer seeks damages for breach of contract that included loss of profits on a project it was unable to build. The Court is now dealing simply with the cost of extra works and improvements. The focus is not on the developer's loss but on the City's enrichment. The power to down-zone in the public interest does not immunize the City against claims for unjust enrichment.

The test for unjust enrichment has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of

au préalable le zonage industriel des 22 acres pour permettre l'aménagement résidentiel et commercial projeté. Cependant, lorsque l'appelante a demandé les permis de construction nécessaires à l'aménagement de ses deux plans d'eau, le conseil municipal a modifié le zonage de ceux-ci afin que seuls des immeubles commerciaux d'un étage puissent y être construits, éliminant ainsi les deux étages supérieurs destinés aux condominiums résidentiels. Le promoteur a poursuivi la Ville en responsabilité contractuelle et, subsidiairement, pour enrichissement sans cause. Finalement, notre Cour a rejeté l'action contractuelle au motif que, sous le régime du droit provincial régissant les municipalités à l'époque considérée, la Ville n'avait pas le pouvoir de s'engager tacitement à maintenir le zonage pendant une période raisonnable afin que le projet puisse être mené à terme, et que l'inexécution ne pouvait donc fonder une action en dommages-intérêts. L'affaire a été renvoyée en première instance pour qu'il soit statué sur l'argument subsidiaire. Le juge de première instance a accueilli l'action fondée sur l'enrichissement sans cause et ordonné à la Ville de payer 1,08 million de dollars au promoteur. La Cour d'appel a infirmé cette décision.

Arrêt : Le pourvoi est accueilli et le jugement de première instance est rétabli. La Ville ne pouvait, suivant l'equity, bénéficier des travaux et des améliorations supplémentaires réalisés par le promoteur sans en payer le prix.

L'enrichissement sans cause est une cause d'action en equity qui offre une grande souplesse dans les réparations susceptibles d'être accordées dans différentes circonstances selon des principes fondés sur l'équité et la bonne conscience. En l'espèce, la Ville a obtenu, entièrement aux frais du promoteur, des routes, des espaces verts, des sentiers et une nouvelle digue d'une valeur de 1,08 million de dollars. Ces travaux et améliorations allaient au-delà de ce que la Ville pouvait légalement exiger en application de la *Municipal Act*. Le promoteur, qui a été débouté dans sa poursuite pour rupture de contrat, ne conteste plus la validité de la modification du zonage. Il ne demande plus de dommages-intérêts pour inexécution de contrat, notamment pour le manque à gagner afférent au projet qu'il n'a pu mener à terme. Seul le coût des travaux et des améliorations supplémentaires est en cause. L'accent est mis non pas sur la perte du promoteur, mais bien sur l'enrichissement de la Ville. Le pouvoir de modifier le zonage dans l'intérêt public ne met pas la Ville à l'abri d'une action fondée sur l'enrichissement sans cause.

Pour qu'il y ait enrichissement sans cause, trois conditions doivent être réunies : (1) l'enrichissement du défendeur; (2) l'appauvrissement corrélatif

juristic reasons for the enrichment. There are two stages to the juristic reason inquiry. At the first stage, a claimant must show that there is no juristic reason within the established categories that would deny it recovery. At this time, the established categories are the existence of a contract, disposition of law, donative intent and "other valid common law, equitable or statutory obligatio[n]". At the second stage, the focus shifts to the defendant, who must rebut the *prima facie* case by showing that there is some other valid reason to deny recovery. Here, the developer has a valid claim for unjust enrichment: the City obtained, on the basis of its *ultra vires* demand, additional roads, parkland and walkways and a new seawall, wholly at the developer's expense; the developer suffered a corresponding deprivation of $1.08 million; and there was no juristic reason for the enrichment.

The trial judge found the extra works and undertakings given in exchange for the *ultra vires* zoning commitment to be clearly separate and identifiable. The cost was $1.08 million. There is no difficulty on the facts in distinguishing between the City's lawful entitlement and the *ultra vires* extras. It is not necessary for the developer in this action to try and set aside the entirety of its contractual arrangements with the City. It need only isolate the provisions related to the *ultra vires* demand, and show why the City ought not to be allowed to rely on them as a defence to a claim in unjust enrichment. Moreover, the trial judge found that the *ultra vires* arrangements rested on a common mistake. Both the City and the developer assumed the City had the legal authority to make zoning commitments the City did not possess. The finding of common mistake is important to the developer's claim to recover the cost of the extra works and improvements. If there had been just the *ultra vires* transaction without the added element of common mistake, it would have been a different case and the outcome would not necessarily be the same.

Equity looks to substance rather than to form. A characteristic of the doctrine of unjust enrichment is the flexibility of remedies. Here the substance of the problem to be remedied is clearly identified. The City is sitting on $1.08 million worth of improvements which have been found to be the fruits of an *ultra vires* demand. The remedy sought is simply to reverse the wrongful transfer of wealth by ordering reimbursement of that amount to the developer.

du demandeur; (3) l'absence de tout motif juridique justifiant l'enrichissement. L'examen relatif au motif juridique comporte deux étapes. Dans un premier temps, le demandeur doit démontrer qu'aucun motif juridique appartenant à une catégorie établie ne justifie le refus de l'indemniser. Pour l'heure, les catégories établies sont le contrat, la disposition légale, l'intention libérale et « les autres obligations valides imposées par la common law, l'equity ou la loi ». Dans un deuxième temps, il appartient au défendeur de réfuter la preuve *prima facie* en avançant un autre motif valable de refuser l'indemnisation. En l'espèce, le promoteur allègue à juste titre l'enrichissement sans cause. En raison de ses exigences *ultra vires*, la Ville a obtenu aux frais du promoteur des routes, des espaces verts et des sentiers supplémentaires, ainsi qu'une nouvelle digue, le promoteur s'est appauvri corrélativement de 1,08 million de dollars et aucun motif juridique ne justifiait l'enrichissement.

Le juge de première instance a conclu que les travaux et les améliorations supplémentaires en contrepartie desquels avait été pris l'engagement *ultra vires* relatif au zonage étaient clairement distincts et identifiables. Leur coût s'élevait à 1,08 million de dollars. Il n'est pas difficile de distinguer entre ce à quoi la Ville avait légitimement droit et ce qui était *ultra vires*. Le promoteur n'a pas à écarter toutes les conventions conclues avec la Ville. Il lui suffit d'isoler les dispositions liées à la demande *ultra vires* et de montrer pourquoi la Ville ne devrait pas être admise à les invoquer pour réfuter l'enrichissement sans cause. De plus, le juge de première instance a conclu que les accords *ultra vires* reposaient sur une erreur commune aux deux parties. Tout comme le promoteur, la Ville a supposé qu'elle était légalement habilitée à prendre un engagement en matière de zonage, ce qui n'était pas le cas. L'erreur commune est importante pour ce qui est du recouvrement du coût des travaux et des améliorations supplémentaires par le promoteur. La situation aurait été différente si nous avions été uniquement en présence d'une opération *ultra vires*, sans que ne s'y ajoute l'erreur commune, et l'issue n'aurait pas nécessairement été la même.

L'equity s'intéresse au fond et non à la forme. L'une des caractéristiques de la doctrine de l'enrichissement sans cause est la souplesse dans les réparations susceptibles d'être accordées. En l'espèce, les données du problème qui appelle réparation sont clairement établies. La Ville bénéficie d'améliorations d'une valeur de 1,08 million de dollars, et il a été statué qu'elles résultaient d'exigences *ultra vires*. La réparation demandée consiste simplement à annuler le transfert de richesse injustifié en ordonnant le paiement du prix des améliorations au promoteur.

Section 914 of the *Local Government Act* and s. 215(3) of the *Land Title Act* do not authorize the City's retention without payment of the extra works and improvements. The claim here is not based on "the adoption of an official community plan or [zoning] bylaw". While the earlier appeal alleged that the down-zoning of the water lots breached an implied term of the contract, that claim was rejected, and the developer's losses flowing from the down-zoning are no longer in issue. The developer's cause of action for unjust enrichment was complete when it put in place the extra works and improvements on the basis of a mutual mistake that its contract with the City in respect thereto was enforceable.

Neither the City nor the developer expected the extra works and improvements to be donated. The developer did not offer a "sweetener" for something it got. It offered consideration for an implied undertaking it turned out the City was able to repudiate. The reasonable expectation was that the works and improvements would be paid for out of the profits from those parts of the Phase II project the developer was prevented by the City from building. The City now owns the works, and it is consistent with the parties' reasonable expectations that the appellant be reimbursed for their cost.

The grant of an equitable remedy in this case would not frustrate the legislature's purpose in making such zoning commitments unenforceable. In fact, the City did down-zone the lots in question and was held able to do so without having to pay damages for breach of contract. Whether or not it should pay the actual cost of benefits it actually demanded and received is a different question.

The City has not shown that it would be good public policy to allow municipalities to make development commitments, then not only to attack those commitments as illegal and beyond their own powers, but to scoop the resulting financial windfall at the expense of those who contracted with them in good faith.

Cases Cited

Applied: *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762; *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, 2004 SCC 25; *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436; *Pettkus v. Becker*, [1980] 2 S.C.R. 834; *Peter v. Beblow*, [1993] 1 S.C.R. 980; **referred to:** *Pacific National Investments Ltd. v. Victoria (City)*, [2000] 2 S.C.R. 919, 2000 SCC 64; *Burrow v. Scammell* (1881), 19 Ch. D. 175; *Air Canada v. British Columbia*,

L'article 914 de la *Local Government Act* et le par. 215(3) de la *Land Title Act* n'autorisent pas la Ville à conserver les travaux et les améliorations supplémentaires sans les payer. L'allégation considérée en l'espèce ne s'appuie pas sur « l'adoption d'un plan d'urbanisme ou d'un règlement [de zonage] ». Même si, dans le premier pourvoi, le promoteur a allégué que la modification du zonage des plans d'eau avait contrevenu à une clause implicite du contrat, cette prétention a été rejetée, et les pertes que lui a infligées cette modification ne sont désormais plus en cause. Les éléments constitutifs de l'enrichissement sans cause ont été réunis une fois que le promoteur a réalisé les travaux et les améliorations supplémentaires, les parties croyant à tort que le contrat conclu avec la Ville à cet égard était exécutoire.

En ce qui concerne les travaux et les améliorations supplémentaires, ni la Ville ni le promoteur ne s'attendaient à ce qu'il s'agisse d'un don. Le promoteur n'a pas offert de « rallonge » pour obtenir une chose qu'il avait déjà. Il l'a fait en contrepartie d'un engagement tacite que la Ville a pu en fin de compte répudier. Les parties s'attendaient raisonnablement à ce que le coût des travaux et des améliorations soit prélevé sur les profits tirés des volets du projet de la phase II que le promoteur n'a pu mener à terme à cause de la municipalité. La Ville est maintenant propriétaire des infrastructures, et il est compatible avec les attentes raisonnables des parties qu'elle en paie le coût au promoteur.

En l'espèce, une réparation fondée sur l'equity ne serait pas contraire à l'intention du législateur de rendre inexécutoire un engagement relatif au zonage. En effet, la Ville a modifié le zonage des lots en question et il a été décidé qu'elle pouvait le faire sans verser de dommages-intérêts pour rupture de contrat. C'est une autre question que de savoir si elle devrait supporter le coût des avantages qu'elle a demandés et qui lui ont été conférés.

La Ville n'a pas démontré qu'il serait dans l'intérêt public de permettre à une municipalité de prendre un engagement relatif à l'aménagement, puis non seulement de le contester au motif qu'il est illégal et outrepasse ses pouvoirs, mais de profiter d'un avantage financier aux dépens d'un cocontractant de bonne foi.

Jurisprudence

Arrêts appliqués : *Peel (Municipalité régionale) c. Canada*, [1992] 3 R.C.S. 762; *Garland c. Consumers' Gas Co.*, [2004] 1 R.C.S. 629, 2004 CSC 25; *Rathwell c. Rathwell*, [1978] 2 R.C.S. 436; *Pettkus c. Becker*, [1980] 2 R.C.S. 834; *Peter c. Beblow*, [1993] 1 R.C.S. 980; **arrêts mentionnés :** *Pacific National Investments Ltd. c. Victoria (Ville)*, [2000] 2 R.C.S. 919, 2000 CSC 64; *Burrow c. Scammell* (1881), 19 Ch. D. 175; *Air*

[1989] 1 S.C.R. 1161; *Canadian Pacific Air Lines Ltd. v. British Columbia*, [1989] 1 S.C.R. 1133; *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445.

Statutes and Regulations Cited

Land Title Act, R.S.B.C. 1979, c. 219, s. 215.
Local Government Act, R.S.B.C. 1996, c. 323, s. 914.
Municipal Act, R.S.B.C. 1979, c. 290, s. 989 [ad. 1985, c. 79, s. 8].

Authors Cited

American Law Institute. *Restatement of the Law of Restitution: Quasi Contracts and Constructive Trusts, as Adopted and Promulgated by the American Law Institute, at Washington, D.C., May 8, 1936*. St. Paul, Minn.: American Law Institute Publishers, 1937.
Smith, Lionel. "The Mystery of 'Juristic Reason'" (2000), 12 *S.C.L.R.* (2d) 211.

APPEAL from a judgment of the British Columbia Court of Appeal (2003), 223 D.L.R. (4th) 617, 11 B.C.L.R. (4th) 234, 23 C.L.R. (3d) 181, 36 M.P.L.R. (3d) 222, 180 B.C.A.C. 104, 297 W.A.C. 104, [2003] B.C.J. No. 537 (QL), 2003 BCCA 162, reversing decisions of the British Columbia Supreme Court, [2002] B.C.J. No. 1379 (QL), 2002 BCSC 41, and (2002), 217 D.L.R. (4th) 248, 20 C.L.R. (3d) 251, 32 M.P.L.R. (3d) 235, [2002] B.C.J. No. 1847 (QL), 2002 BCSC 1185. Appeal allowed.

L. John Alexander, for the appellant.

Guy E. McDannold, for the respondent.

The judgment of the Court was delivered by

BINNIE J. — This case arrives in our Court for the second time. On the first occasion, the appellant real estate developer Pacific National Investments Ltd. ("PNI") sought to make the respondent municipality liable for breach of contract because it down-zoned in mid-project part of the appellant's 22-acre development on the Victoria waterfront. As a result of the down-zoning, a substantial amount of approved retail, residential and commercial space on the waterfront could not be built. The appellant sued the City on the basis that when PNI accepted an obligation to install $1.08 million in extra works

Canada c. Colombie-Britannique, [1989] 1 R.C.S. 1161; *Lignes aériennes Canadien Pacifique Ltée c. Colombie-Britannique*, [1989] 1 R.C.S. 1133; *Renvoi relatif à la taxe sur les produits et services*, [1992] 2 R.C.S. 445.

Lois et règlements cités

Land Title Act, R.S.B.C. 1979, ch. 219, art. 215.
Local Government Act, R.S.B.C. 1996, ch. 323, art. 914.
Municipal Act, R.S.B.C. 1979, ch. 290, art. 989 [aj. 1985, ch. 79, art. 8].

Doctrine citée

American Law Institute. *Restatement of the Law of Restitution : Quasi Contracts and Constructive Trusts, as Adopted and Promulgated by the American Law Institute, at Washington, D.C., May 8, 1936*. St. Paul, Minn. : American Law Institute Publishers, 1937.
Smith, Lionel. « The Mystery of "Juristic Reason" » (2000), 12 *S.C.L.R.* (2d) 211.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (2003), 223 D.L.R. (4th) 617, 11 B.C.L.R. (4th) 234, 23 C.L.R. (3d) 181, 36 M.P.L.R. (3d) 222, 180 B.C.A.C. 104, 297 W.A.C. 104, [2003] B.C.J. No. 537 (QL), 2003 BCCA 162, qui a infirmé des jugements de la Cour suprême de la Colombie-Britannique, [2002] B.C.J. No. 1379 (QL), 2002 BCSC 41, et (2002), 217 D.L.R. (4th) 248, 20 C.L.R. (3d) 251, 32 M.P.L.R. (3d) 235, [2002] B.C.J. No. 1847 (QL), 2002 BCSC 1185. Pourvoi accueilli.

L. John Alexander, pour l'appelante.

Guy E. McDannold, pour l'intimée.

Version française du jugement de la Cour rendu par

LE JUGE BINNIE — C'est la deuxième fois que nous sommes saisis de cette affaire. La première fois, le promoteur immobilier appelant, Pacific National Investments Ltd. (« PNI »), recherchait la municipalité intimée en responsabilité contractuelle au motif que celle-ci avait rompu le contrat qui les liait en modifiant, à mi-parcours des travaux, le zonage d'une partie de son bien-fonds d'une superficie de 22 acres situé dans le secteur riverain de Victoria. Par suite de cette modification, un grand nombre d'immeubles résidentiels et de locaux commerciaux, y compris des commerces de détail,

and improvements, it had done so in exchange for an implied undertaking by the City to keep the zoning in place for a reasonable time to allow for completion of its project. By its down-zoning, the City had broken an implied term of the contract that went to the root of the arrangement between the parties. This Court, in a majority judgment, rejected the contractual claim on the basis that the municipality lacked the statutory authority to provide such an implied undertaking, which was *ultra vires*, and that its breach therefore could not give rise to an action for damages (see *Pacific National Investments Ltd. v. Victoria (City)*, [2000] 2 S.C.R. 919, 2000 SCC 64). The matter was remitted to the trial court to deal with the appellant's alternative claim of unjust enrichment. This lesser claim required proof of a different set of facts and offered a much reduced level of compensation because it viewed the dispute from the perspective of the City's *gain* rather than (as in the contract claim) the appellant's *loss*. The claim for unjust enrichment was upheld by the second trial judge, Wilson J., but was reversed by the British Columbia Court of Appeal. I would allow the appeal, set aside the judgment of the Court of Appeal and restore the trial judgment. In my view, with respect, the municipality in these circumstances has no right in equity to retain the benefit of the extra works and improvements without paying for them.

dont l'aménagement dans le secteur riverain avait été autorisé, n'avaient pu être construits. Dans l'action qu'elle a intentée contre la Ville, l'appelante a soutenu qu'elle avait contracté l'obligation de réaliser des travaux et des améliorations supplémentaires d'une valeur de 1,08 million de dollars en contrepartie de l'engagement tacite de la Ville à maintenir le zonage pendant une période raisonnable afin que le projet puisse être mené à terme. Selon l'appelante, en modifiant le zonage, la Ville a contrevenu à une clause implicite du contrat qui était à la base même de l'accord intervenu entre elles. Les juges majoritaires de notre Cour ont rejeté l'action contractuelle au motif que la municipalité n'avait pas le pouvoir légal de prendre un tel engagement tacite, jugé *ultra vires*, et que l'inexécution ne pouvait donc fonder une action en dommages-intérêts (voir *Pacific National Investments Ltd. c. Victoria (Ville)*, [2000] 2 R.C.S. 919, 2000 CSC 64). L'affaire a été renvoyée en première instance pour qu'il soit statué sur l'argument subsidiaire fondé sur l'enrichissement sans cause. La preuve requise était différente, et l'appelante ne pouvait espérer toucher qu'une indemnité de beaucoup inférieure, le facteur déterminant étant le *gain* de la Ville, et non la *perte* de l'appelante (comme pour l'action contractuelle). Le juge du second procès, le juge Wilson, a accueilli l'action fondée sur l'enrichissement sans cause, mais sa décision a été infirmée par la Cour d'appel de la Colombie-Britannique. Je suis d'avis d'accueillir le pourvoi, d'annuler le jugement de la Cour d'appel et de rétablir la décision du juge de première instance. En toute déférence, j'estime que, en l'espèce, la municipalité ne peut, suivant l'equity, bénéficier des travaux et des améliorations supplémentaires sans en payer le prix.

I. Facts

2 In the 1980s, the provincial government and the City of Victoria agreed on the desirability of redeveloping, for residential and commercial uses, approximately 200 acres of provincial Crown land located on Victoria's inner harbour. The area was known as the Songhees lands (named after the First Nation displaced for the railway and industry). The first trial judge, Mackenzie J., found that "[t]he City had an intense interest in planning the redevelopment of such a large, strategically located site in the

I. Faits

Dans les années 80, le gouvernement provincial et la ville de Victoria ont convenu de l'opportunité du réaménagement, à des fins résidentielles et commerciales, d'environ 200 acres d'un bien-fonds de la Couronne provinciale situé dans le port intérieur de Victoria. Il s'agissait des terres Songhees, qui devaient leur nom à la Première nation déplacée pour la construction du chemin de fer et le développement industriel. Le juge du premier procès, le juge Mackenzie, a conclu que [TRADUCTION] « [l]a

harbour area close to downtown" ([1996] B.C.J. No. 2523 (QL), at para. 3). Amongst other things, the City wanted to obtain additional parkland (closer to 30 percent of the project instead of the 5 percent ordinarily required), road improvements, walkways and a new seawall, which were not necessitated by the PNI project itself, but which would serve to make the whole area more efficient and attractive.

Ville avait grand intérêt à planifier le réaménagement d'un site aussi vaste, stratégiquement situé dans le secteur portuaire, près du centre-ville » ([1996] B.C.J. No. 2523 (QL), par. 3). La Ville désirait notamment obtenir une plus grande superficie d'espaces verts (près de 30 pour 100 au lieu des 5 pour 100 habituellement exigés), l'aménagement de routes et de sentiers et la construction d'une nouvelle digue. Ces éléments n'étaient pas nécessaires en soi au projet de PNI, mais ils devaient rendre le secteur plus fonctionnel et attrayant.

The province was sympathetic to the City's concerns, as was the appellant, who first became involved in the planning exercise in 1984 as a party interested in eventually undertaking Phase II of the project (22 acres) as a private development. It was the appellant's architect who contributed what became the conceptual plan for the waterfront development in 1985, long before any agreements had been signed between the City and the provincial Crown agency that owned the lands, British Columbia Enterprise Corporation ("BCEC"). The respondent argued that the appellant was a stranger to the negotiations between the City and BCEC, and that on a true interpretation of events, the Province had volunteered the extra amenities to the City and PNI had simply stepped into the shoes of BCEC. This theory was rejected by Mackenzie J., who concluded that the appellant was not a volunteer but a profit-oriented developer who had been a full participant in planning the project, including the efforts to accommodate the City's demand for extra amenities (at para. 23):

3 La province a accueilli favorablement les demandes de la Ville, tout comme l'appelante, qui a pris part pour la première fois à l'exercice de planification en 1984 en tant que partie intéressée à entreprendre un jour l'aménagement privé de la phase II du projet (22 acres). C'est l'architecte de l'appelante qui a établi ce qui devint en 1985 le plan conceptuel de l'aménagement du secteur riverain, soit bien avant que n'intervienne un accord entre la Ville et la société d'État provinciale propriétaire des terrains, British Columbia Enterprise Corporation (« BCEC »). L'intimée fait valoir que l'appelante n'a pas été partie aux négociations entre la Ville et BCEC et que, suivant une juste interprétation des faits, la province a offert les infrastructures supplémentaires à la Ville, et PNI a simplement succédé à BCEC. Le juge Mackenzie a rejeté cette thèse. Selon lui, l'appelante n'était pas une partie désintéressée, mais un promoteur immobilier désireux de réaliser un profit et ayant participé pleinement à la planification de l'aménagement, y compris aux efforts visant à intégrer les infrastructures supplémentaires demandées par la Ville (par. 23) :

> . . . I am satisfied that at all material times both the City and BCEC expected that BCEC would sell phase 2 to PNI, and that PNI would assume BCEC's rights and obligations with respect to phase 2 on the purchase.

> [TRADUCTION] . . . je suis convaincu que, pendant toute la période considérée, la Ville et BCEC s'attendaient toutes deux à ce que BCEC vende la phase II à PNI et que, dès l'acquisition, PNI acquière les droits de BCEC et assume ses obligations relativement à la phase II.

The development of the Songhees lands proceeded in the following steps:

4 Voici quelles ont été les mesures prises en vue de l'aménagement des terres Songhees :

1. The City and BCEC entered into the Songhees Master Agreement dated August 28, 1987. BCEC itself proceeded with Phase I of the project.

1. La Ville et BCEC ont conclu le « Songhees Master Agreement » (« accord-cadre ») en date du 28 août 1987. BCEC a entrepris pour sa part l'aménagement de la phase I du projet.

2. A restrictive covenant was registered against title to the lands to prohibit building until appropriate servicing agreements had been entered into between the appellant and the City and subdivision plans had received City approval.

3. The appellant purchased the Phase II lands from BCEC conditional on zoning, park dedication, a service agreement between the appellant and the City, and formal subdivision approval.

4. The City enacted zoning bylaws to permit the appellant's plans for the whole of Phase II to be carried out, including the two water lots where three-storey structures were to be built resting on piles driven into the harbour bed, or possibly free floating, with retail and commercial use on the first floor, and residential condominiums on the upper two floors.

5. Once BCEC's rights and obligations had been assigned to the appellant, the appellant and the City entered into the Songhees Phase II Subdivision Servicing Agreement, dated January 29, 1988 which dealt with, amongst other things, the extra works and improvements which the parties have agreed cost about $1.08 million of the $2.5 million total service costs. It was a condition precedent to the appellant's obligations that the City would re-zone the 22 acres from the existing (industrial) designation to permit residential and commercial uses appropriate to carrying out the agreed upon project.

6. The City registered a statutory right-of-way for a public walkway around the perimeter of the structures to be built on the water lots.

5 After reviewing the evidence, Wilson J. concluded that the provision of the extra works and

2. Un engagement de ne pas faire a été enregistré contre le titre de propriété pour empêcher toute construction sur le bien-fonds jusqu'à la conclusion entre l'appelante et la Ville de contrats de viabilisation appropriés et l'approbation par la Ville des plans de lotissement.

3. L'appelante a acheté à BCEC le bien-fonds de la phase II, l'acquisition étant subordonnée à l'adoption et au maintien du zonage, à l'aménagement d'espaces verts, à la conclusion d'un contrat de viabilisation entre l'appelante et la Ville, ainsi qu'à l'approbation officielle du lotissement.

4. La Ville a adopté un règlement de zonage permettant la réalisation des travaux projetés par l'appelante pour l'ensemble de la phase II, y compris les deux plans d'eau sur lesquels devaient être construites des structures de trois étages reposant sur des pieux enfoncés dans le lit du port, ou peut-être sur une plate-forme flottante, le premier étage étant réservé aux commerces de détail et aux locaux commerciaux, et les deuxième et troisième étages, aux condominiums résidentiels.

5. Dès la cession à l'appelante des droits et des obligations de BCEC, l'appelante et la Ville ont conclu, le 29 janvier 1988, le « Songhees Phase II Subdivision Servicing Agreement » (« contrat de viabilisation des lots de la phase II ») prévoyant notamment les travaux et les améliorations supplémentaires dont les parties estiment le coût à 1,08 million de dollars sur les 2,5 millions de dollars prévus au total pour la viabilisation. La prise en charge des obligations de BCEC par l'appelante était subordonnée à ce que la Ville modifie au préalable le zonage (industriel) des 22 acres pour permettre l'aménagement résidentiel et commercial projeté.

6. La Ville a enregistré un droit de passage légal contre un sentier public longeant le périmètre des ouvrages devant être construits sur les plans d'eau.

Après examen de la preuve, le juge du second procès, le juge Wilson, a conclu que, pour les *trois*

improvements, in the view of *all* three parties, was inextricably bound up with retention of the zoning to permit construction of the PNI project as planned:

> . . . the provision that the plaintiff was to supply and install certain works, commensurate with the development contemplated, was inextricably bound up with the provision that the development anticipated construction of improvements pursuant to the defining by-laws. And in this case, that meant two, three-storey improvements on the water.

((2002), 217 D.L.R. (4th) 248, at para. 5)

By 1993, the condominium residences on dry land had been built, or were under development or at least in contemplation and the appellant had already earned a very substantial profit on its investment with still other lands left to sell. The new residents and others from the municipality were also pleased. They had started to enjoy their new parks, cleaned up vistas and walkways around the new seawall, which had all been put in at the appellant's expense. As Mackenzie J. observed (at para. 16):

> The City had allowed the developer to come in and provide substantial tangible benefits to the City in terms of parks and other services at the developer's cost in the expectation that the development of the water lots as then contemplated by the City, BCEC and PNI would be allowed to proceed.

However, when the appellant applied for building permits to develop the two water lots, including a marina, restaurants, shops, other commercial uses, and two stories of residential condominiums on the harbour, the local community objected, and the matter became an issue in the pending municipal election. Following the election, the new City Council, with one dissent, voted to down-zone the two water lots to permit only one-storey commercial buildings, thereby eliminating the two stories of residential condominiums above. The appellant complained that the down-zoning rendered development of its water lots uneconomical.

parties, la réalisation des travaux et des améliorations supplémentaires était inextricablement liée au maintien du zonage permettant la construction projetée par PNI :

> [TRADUCTION] . . . la clause selon laquelle la demanderesse devait fournir et mettre en place certaines infrastructures, en rapport avec l'aménagement projeté, était inextricablement liée à celle prévoyant la construction d'améliorations suivant le règlement pertinent, soit, en l'occurrence, deux immeubles de trois étages sur les plans d'eau.

((2002), 217 D.L.R. (4th) 248, par. 5)

En 1993, les condominiums sur terre ferme avaient été construits, étaient en voie de l'être ou étaient à tout le moins projetés. L'appelante avait déjà réalisé un profit assez considérable et elle disposait encore de terrains à vendre. Les nouveaux résidants et les autres habitants de la municipalité y trouvaient également leur compte. Ils avaient commencé à profiter de leurs nouveaux parcs, des vues dégagées et des sentiers bordant la nouvelle digue, et ce, grâce aux dépenses engagées par l'appelante à cet égard. Comme l'a fait remarquer le juge Mackenzie (par. 16) :

> [TRADUCTION] La Ville avait laissé le promoteur immobilier aller de l'avant, et ce dernier lui avait conféré des avantages tangibles importants — parcs et autres aménagements — à ses frais, s'attendant à ce que l'aménagement des plans d'eau alors projeté par la Ville, BCEC et lui-même puisse se concrétiser.

Cependant, lorsque l'appelante a demandé les permis de construction nécessaires à l'aménagement des deux plans d'eau — construction d'une marina, de restaurants, de boutiques, d'autres locaux commerciaux et de deux étages de condominiums résidentiels dans le port —, la collectivité locale s'est opposée à leur délivrance et le dossier est devenu un enjeu de la campagne électorale municipale alors en cours. Le nouveau conseil municipal élu a voté (sauf une voix dissidente) la modification du zonage des deux plans d'eau afin que seuls des immeubles commerciaux d'un étage puissent y être construits, éliminant ainsi les deux étages supérieurs destinés aux condominiums résidentiels. L'appelante a fait valoir que, dans ces circonstances, l'aménagement des plans d'eau n'était plus rentable.

8 In its Statement of Claim filed on October 8, 1993, the appellant alleged causes of action at common law (breach of contract) and equity (unjust enrichment). With respect to its contractual claim, the appellant alleged that the Songhees Master Agreement was subject to an implied term that the zoning permitting the contemplated development to proceed would be left in place for a reasonable period of time. The City's solicitor had expressed the view that the project would proceed "in several stages over a period of 10 to 12 years". The common law cause of action was allowed by Mackenzie J. He therefore found it unnecessary to address the claim for unjust enrichment. His judgment in the appellant's favour was reversed by the British Columbia Court of Appeal. The reversal was affirmed as correct by a majority judgment of this Court on December 14, 2000. Under the provincial law governing municipalities at the relevant time, the City did not have the capacity to make and be bound by an implied term to keep the zoning in place for a number of years or to pay damages if it modified it. Our Court then remitted the case "to trial on any unjust enrichment argument that may exist" (para. 75).

II. Relevant Statutory Provisions

9 *Local Government Act*, R.S.B.C. 1996, c. 323

914 (1) Compensation is not payable to any person for any reduction in the value of that person's interest in land, or for any loss or damages that result from the adoption of an official community plan or a bylaw under this Division or the issue of a permit under Division 9 of this Part.

(2) Subsection (1) does not apply where the bylaw under this Division restricts the use of land to a public use.

Land Title Act, R.S.B.C. 1979, c. 219

215. . . .

(3) Where an instrument contains a covenant registrable under this section, the covenantee is binding on

Dans la déclaration qu'elle a déposée le 8 octobre 1993, l'appelante a invoqué des causes d'action en common law (rupture de contrat) et en equity (enrichissement sans cause). En ce qui concerne l'action contractuelle, elle a plaidé que l'accord-cadre comportait une clause implicite selon laquelle le zonage autorisant l'aménagement projeté serait maintenu pendant une période raisonnable. L'avocat de la Ville avait opiné que la réalisation du projet [TRADUCTION] « se ferait en plusieurs étapes sur une période de 10 à 12 ans ». Le juge Mackenzie a fait droit à la cause d'action en common law et conclu de ce fait qu'il n'était pas nécessaire de statuer sur l'allégation d'enrichissement sans cause. Cette décision a été infirmée par la Cour d'appel de la Colombie-Britannique, puis par les juges majoritaires de notre Cour le 14 décembre 2000. Sous le régime du droit provincial régissant les municipalités à l'époque considérée, la Ville ne pouvait s'engager tacitement à maintenir le zonage pendant un certain nombre d'années et à payer des dommages-intérêts si elle le modifiait. Notre Cour a ensuite renvoyé l'affaire « en première instance pour [qu'elle soit] examinée relativement à tout argument éventuel d'enrichissement sans cause » (par. 75).

II. Dispositions législatives pertinentes

Local Government Act, R.S.B.C. 1996, ch. 323

[TRADUCTION]

914 (1) Nul n'a droit à une indemnité pour la diminution de la valeur d'un bien-fonds ou pour tout préjudice ou perte résultant de l'adoption d'un plan d'urbanisme ou d'un règlement en vertu de la présente section ou de la délivrance d'un permis en application de la section 9 de la présente partie.

(2) Le paragraphe (1) ne s'applique pas lorsque le règlement pris en vertu de la présente section prévoit qu'un bien-fonds ne peut être utilisé qu'à des fins publiques.

Land Title Act, R.S.B.C. 1979, ch. 219

[TRADUCTION]

215. . . .

(3) Lorsqu'un acte renferme un engagement susceptible d'enregistrement en application du présent article,

the covenantee and his successors in title, notwithstanding that the instrument or other disposition has not been signed by the covenantee.

III. Judicial History

A. *Supreme Court of British Columbia* ((2002), 217 D.L.R. (4th) 248)

Wilson J. adopted the findings of fact from the earlier trial. Then, having regard to the outcome of the appeal to this Court, he found that the parties had proceeded on a mistaken assumption that the zoning would not change in a manner that would substantially and adversely affect the development before the plaintiff developer had a reasonable opportunity to implement the whole of Phase II, and a parallel mistake of law, i.e., that the City had the capacity to make such a contractual commitment. The extra works and improvements carried out by the appellant were in excess of works which the respondent could lawfully have demanded. He accepted the evidence that the excess work the appellant did as a result of the mistake was worth $1.08 million.

Wilson J. found that the City had been enriched by the extra works and improvements which, but for the mistake, it would not have received. The appellant had suffered a corresponding deprivation. He then found there was no juristic reason for the City to retain the benefit without accounting to the appellant. He therefore gave judgment for the appellant for $1.08 million with interest at registrar's rates from time to time commencing October 1, 1993 to the date of his judgment, being May 7, 2002.

B. *Court of Appeal of British Columbia (Southin, Braidwood and Hall JJ.A.)* ((2003), 223 D.L.R. (4th) 617)

Southin J.A. for the court found the claim concerning unjust enrichment to be misconceived. She agreed that the criteria for a finding of unjust enrichment were the enrichment of the person claimed against, a corresponding deprivation of the claimant and the absence of any juristic reason for retaining the enrichment. Applying these criteria to the

celui-ci lie le bénéficiaire de l'engagement et ses successeurs même s'il n'a pas signé l'acte ni aucun autre acte d'aliénation.

III. Historique des procédures judiciaires

A. *Cour suprême de la Colombie-Britannique* ((2002), 217 D.L.R. (4th) 248)

10 Le juge Wilson a fait siennes les conclusions de fait tirées lors du premier procès. Puis, compte tenu de l'issue du pourvoi interjeté devant notre Cour, il a estimé que les parties avaient agi en supposant à tort que le zonage ne serait pas modifié de façon à compromettre sensiblement le projet avant que l'appelante n'ait eu la possibilité raisonnable de mener à terme l'aménagement de la phase II en entier et, sur le plan du droit, que la Ville était légalement habilitée à prendre un engagement contractuel en ce sens. L'intimée n'aurait pu légalement exiger les travaux et les améliorations supplémentaires effectués par l'appelante. Le juge a ajouté foi à la preuve selon laquelle la valeur des travaux et des améliorations réalisés sur le fondement de l'hypothèse erronée s'élevait à 1,08 million de dollars.

11 Le juge Wilson a conclu que la Ville s'était enrichie à proportion des travaux et des améliorations supplémentaires que, n'eût été l'erreur commise, elle n'aurait jamais obtenus, l'appelante s'étant appauvrie corrélativement. Il a ensuite estimé qu'aucun motif juridique ne justifiait la Ville de conserver l'avantage sans indemniser l'appelante. Il a donc accueilli la demande et ordonné le versement à l'appelante de 1,08 million de dollars, plus l'intérêt calculé aux taux établis périodiquement par le registraire, du 1er octobre 1993 à la date du jugement, soit le 7 mai 2002.

B. *Cour d'appel de la Colombie-Britannique (les juges Southin, Braidwood et Hall)* ((2003), 223 D.L.R. (4th) 617)

12 S'exprimant au nom de la Cour d'appel, la juge Southin a conclu que l'allégation d'enrichissement sans cause n'était pas fondée. Elle a convenu que les critères applicables à l'enrichissement sans cause étaient l'enrichissement du défendeur, l'appauvrissement corrélatif du demandeur et l'absence de tout motif juridique de conserver l'avantage. Après les

facts, Southin J.A. concluded that there was no deprivation. The extra works were "part and parcel of the consideration [the appellant] gave for the benefit which it received under the agreements. There is no true correspondence between the asserted enrichment and the asserted deprivation, that is to say, the downzoning of the two water lots" (para. 25). Not only was there no deprivation, but even if there was, "the juristic reason for what the appellant did in 1993 is that the Legislature had conferred upon it the power to do the act of downzoning. The by-law is of the same force and effect as if it had been enacted by the Legislature itself and provides a complete answer to any and all claims arising out of it" (para. 26). Accordingly, the appeal was allowed and the action was dismissed.

IV. Analysis

13 The doctrine of unjust enrichment provides an equitable cause of action that retains a large measure of remedial flexibility to deal with different circumstances according to principles rooted in fairness and good conscience. This is not to say that it is a form of "'palm tree' justice" (*Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, at p. 802) that varies with the temperament of the sitting judges. On the contrary, as the Court recently reaffirmed in *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, 2004 SCC 25, a court is to follow an established approach to unjust enrichment predicated on clearly defined principles. However, their application should not be mechanical. Iacobucci J. observed that "this is an equitable remedy that will necessarily involve discretion and questions of fairness" (para. 44).

14 As accepted by the courts in British Columbia, the test for unjust enrichment has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment (*Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, at p. 455; *Pettkus v. Becker*, [1980] 2 S.C.R. 834, at p. 848;

avoir appliqués aux fait de l'espèce, la juge Southin a conclu à l'absence d'appauvrissement : les travaux supplémentaires [TRADUCTION] « faisaient partie intégrante de la contrepartie versée par l'appelante pour obtenir l'avantage que lui conféraient les accords. Il n'y avait pas de véritable corrélation entre l'enrichissement et l'appauvrissement allégués, soit, dans ce dernier cas, la modification du zonage des deux plans d'eau » (par. 25). Non seulement il n'y avait pas eu d'appauvrissement, mais même s'il y en avait eu un, [TRADUCTION] « le motif juridique pour lequel l'appelante avait agi comme elle l'avait fait en 1993 résidait dans le pouvoir de modifier le zonage que lui avait conféré le législateur. Le règlement était tout aussi exécutoire que s'il avait été pris par le législateur lui-même et il permettait de régler entièrement tout litige découlant de son application » (par. 26). En conséquence, l'appel a été accueilli, et l'action rejetée.

IV. Analyse

L'enrichissement sans cause est une cause d'action en equity qui offre une grande souplesse dans les réparations susceptibles d'être accordées dans différentes circonstances selon des principes fondés sur l'équité et la bonne conscience. Il ne s'agit pas pour autant d'une forme de « justice au cas par cas » (*Peel (Municipalité régionale) c. Canada*, [1992] 3 R.C.S. 762, p. 802) dépendante de l'humeur des juges appelés à se prononcer. Au contraire, comme notre Cour l'a rappelé récemment dans *Garland c. Consumers' Gas Co.*, [2004] 1 R.C.S. 629, 2004 CSC 25, en matière d'enrichissement sans cause, le tribunal doit suivre une méthode établie s'appuyant sur des principes clairs. Cependant, l'application de ces principes ne doit pas être machinale. Le juge Iacobucci a signalé qu'« il s'agit d'un recours en equity qui fait nécessairement intervenir un pouvoir discrétionnaire et des questions d'équité » (par. 44).

Les tribunaux de la Colombie-Britannique ont statué que pour qu'il y ait enrichissement sans cause, trois conditions doivent être réunies : (1) enrichissement du défendeur; (2) appauvrissement corrélatif du demandeur; (3) absence de tout motif juridique justifiant l'enrichissement (*Rathwell c. Rathwell*, [1978] 2 R.C.S. 436, p. 455; *Pettkus c. Becker*,

Peter v. Beblow, [1993] 1 S.C.R. 980, at p. 987; *Peel*, *supra*, at p. 784; *Garland*, *supra*, at para. 30).

A. *Was There Enrichment of the City?*

The existence of an enrichment to the defendant is governed by "a straightforward economic approach" (*Peter*, *supra*, at p. 990). An enrichment may "connot[e] a tangible benefit" (*Peel*, *supra*, at p. 790), or it can be relief from a "negative", such as saving the defendant from an expense he or she would otherwise have been *required* to make.

In this case, the City obtained $1.08 million worth of roads, parkland and walkways and a new seawall, wholly at the appellant's expense. These works and improvements were in excess of what the City could lawfully demand under s. 989 of the *Municipal Act*, R.S.B.C. 1979, c. 290. Mr. Clive Timms, the principal witness on behalf of the City, acknowledged that it was "beyond the authority of the approving officer to require [the extra works] under what we have characterized as a simple subdivision".

The City now argues that these extra works and improvements are not really a benefit because they were built on what was then provincial Crown land, and their upkeep by the City costs about $40,000 per year. The City's portrayal of itself as a victim of the appellant's generosity is not credible. The trial judge at the original trial, Mackenzie J., found as a fact that the City had pushed hard to obtain the extra amenities whose cost of upkeep it now grumbles about. Mackenzie J. noted, at para. 20, that "[t]he City wanted planned development with services, parks and other amenities at no cost to the City taxpayers." The City insisted on a restrictive covenant that prevented any construction until the subdivision plans had been approved and servicing agreements entered into, and it was the City that required the appellant as successor in title to assume BCEC's commitments for services, works and improvements beyond those it could lawfully have demanded (para. 23, *per* Mackenzie J.). On this point the *Restatement of the Law of Restitution: Quasi Contracts and Constructive Trusts* (1937), at p. 12,

[1980] 2 R.C.S. 834, p. 848; *Peter c. Beblow*, [1993] 1 R.C.S. 980, p. 987; *Peel*, précité, p. 784; *Garland*, précité, par. 30).

A. *Y a-t-il eu enrichissement de la Ville?*

Une « analyse économique simple » s'applique pour déterminer s'il y a eu enrichissement du défendeur (*Peter*, précité, p. 990). L'enrichissement peut « connote[r] un avantage tangible » (*Peel*, précité, p. 790) ou être « négatif », par exemple en épargnant au défendeur une dépense à laquelle il aurait été *tenu*. 15

En l'espèce, la Ville a obtenu, entièrement aux frais de l'appelante, des routes, des espaces verts, des sentiers et une nouvelle digue d'une valeur de 1,08 million de dollars. Ces travaux et améliorations allaient au-delà de ce que la Ville pouvait légalement exiger en application de l'art. 989 de la *Municipal Act*, R.S.B.C. 1979, ch. 290. Principal témoin de la Ville, M. Clive Timms a reconnu que [TRADUCTION] « le responsable de l'autorisation ne pouvait exiger [les travaux supplémentaires] dans le cadre de ce que nous avons considéré comme un simple lotissement ». 16

La Ville prétend aujourd'hui que ces travaux et améliorations supplémentaires ne constituent pas véritablement un avantage puisqu'ils ont été réalisés sur des terres qui appartenaient alors à la Couronne provinciale et que l'entretien de ces infrastructures lui coûte chaque année environ 40 000 $. La Ville ne peut sérieusement prétendre être victime de la générosité de l'appelante. Le juge du premier procès, le juge Mackenzie, a tiré la conclusion de fait que la Ville avait beaucoup insisté pour obtenir les infrastructures supplémentaires dont elle déplore aujourd'hui le coût d'entretien. Au par. 20 de ses motifs, il a relevé que [TRADUCTION] « [l]a Ville voulait un aménagement planifié avec services, parcs et autres infrastructures dont bénéficieraient gratuitement les contribuables. » La Ville avait exigé un engagement de ne pas faire empêchant toute construction jusqu'à l'approbation des plans de lotissement et la conclusion de contrats de viabilisation. C'est elle qui a insisté pour que l'appelante, en succédant à BCEC, prenne à sa charge les obligations de celle-ci relatives à la viabilisation ainsi qu'aux 17

makes the useful comment that "[a] person confers a benefit upon another if he . . . performs services beneficial to or at the request of the other" (emphasis added).

18 The City argues that while the extra works and improvements "may benefit either PNI as a developer or the neighbourhood and the community, it does not benefit the Corporation of the City of Victoria" (emphasis in original). However, it was the City that contracted with the appellant for ownership of "the Works", wherever built, under clause 11(c) of the Songhees Phase II Subdivision Servicing Agreement, dated January 29, 1988, which provides:

> Save and except those works installed for public utility companies, the Works shall be and remain the absolute property of the City when accepted in writing by the City Engineer. [Emphasis added.]

19 The City's present argument that the extra works and improvements it demanded are not an enrichment but something of a burden should be rejected.

B. *Did the Appellant Suffer a Corresponding Deprivation?*

20 Using the straightforward economic approach, the appellant suffered a corresponding deprivation of $1.08 million. The appellant was required to spend funds to provide the amenities and had to give up the extra parkland out of the lands they had purchased. No other person or entity contributed to the enrichment. In these circumstances, as Cory J. put it in *Peter*, *supra*, at p. 1012, "I would have thought that if there is enrichment, that it would almost invariably follow that there is a corresponding deprivation suffered by the person who provided the enrichment."

travaux et aux améliorations qui étaient en sus de ce qu'elle pouvait légalement exiger (le juge Mackenzie, par. 23). À cet égard, un commentaire pertinent figure à la p. 12 de l'ouvrage intitulé *Restatement of the Law of Restitution : Quasi Contracts and Constructive Trusts* (1937) : [TRADUCTION] « [u]ne personne confère un avantage à une autre lorsqu'elle [. . .] fournit des services qui sont utiles à l'autre personne ou dont celle-ci a fait la demande » (je souligne).

La Ville prétend que les travaux et les améliorations supplémentaires [TRADUCTION] « peuvent bénéficier à PNI à titre de promoteur immobilier ou à la collectivité, mais qu'ils ne bénéficient pas à la Corporation de la ville de Victoria » (souligné dans l'original). Or, c'est la Ville qui, dans l'accord conclu avec l'appelante, s'est attribué la propriété des « infrastructures » où qu'elles soient construites. L'alinéa 11c) du contrat de viabilisation des lots de la phase II en date du 29 janvier 1988 prévoit en effet :

> [TRADUCTION] À l'exception de celles qui sont destinées aux services publics, les infrastructures sont et demeurent l'entière propriété de la Ville dès leur acceptation écrite par l'ingénieur de la Ville. [Je souligne.]

Il y a lieu de rejeter l'argument que formule aujourd'hui la Ville, savoir que les travaux et les améliorations supplémentaires qu'elle a exigés ne constituent pas un enrichissement, mais une sorte de fardeau.

B. *Y a-t-il eu appauvrissement corrélatif de l'appelante?*

L'analyse économique simple révèle que l'appelante s'est appauvrie corrélativement de 1,08 million de dollars. L'appelante a dû contribuer financièrement à la mise en place des infrastructures et fournir les espaces verts supplémentaires à même les terres qu'elle avait acquises. Aucune autre personne physique ou morale n'a contribué à l'enrichissement. Dans ces circonstances, comme l'a dit le juge Cory dans l'arrêt *Peter*, précité, p. 1012, « j'aurais cru qu'un enrichissement donnerait presque invariablement lieu à un appauvrissement correspondant de la personne qui a contribué à l'enrichissement. »

The City claims that the appellant had already turned a handsome profit on the project even without development of the two water lots. So it did, but that is beside the point. The question here is not whether the developer made a success of its project generally, but whether it suffered a detriment corresponding to the City's enrichment. The appellant is not required to subsidize city amenities from the profits earned elsewhere on the project in the absence of some legal requirement. The significance of the Servicing Agreement in this respect is an issue to be considered at the third stage.

C. *Is There a Juristic Reason to Deny Recovery to the Appellant?*

This branch of the test for unjust enrichment is pivotal, for as McLachlin J. observed in *Peter*, *supra*, at p. 990:

> It is at this stage that the court must consider whether the enrichment and detriment, morally neutral in themselves, are "unjust".

The use of the expression "juristic reason" in this connection emphasizes that "unjust" is to be addressed as a matter of law and legal reasoning rather than a free-floating conscience that may risk being overly subjective; see L. Smith, "The Mystery of 'Juristic Reason'" (2000), 12 *S.C.L.R.* (2d) 211, at p. 219. This third step has to some extent been redefined and reformulated in *Garland*, *supra*, at paras. 44-46. There are now two stages to the juristic reason inquiry. At the first stage, a claimant (here the appellant) must show that there is no juristic reason within the established categories that would deny it recovery. The established categories are the existence of a contract, disposition of law, donative intent, and "other valid common law, equitable or statutory obligatio[n]" (*Garland*, at para. 44). The categories may be added to over time (para. 46). On proving that none of these limited categorical reasons exist to deny recovery, the plaintiff (here the appellant) will have made out a *prima facie* case of unjust enrichment. It will have demonstrated "a positive reason for reversing the defendant's enrichment" (Smith, *supra*, at p. 244).

La Ville fait valoir que l'appelante a réalisé un profit considérable sans même avoir aménagé les deux plans d'eau. Soit, mais ça n'a rien à voir. Il ne s'agit pas de savoir si, en général, le promoteur immobilier a vu son projet couronné de succès, mais bien s'il a subi un désavantage corrélatif à l'enrichissement de la Ville. Sauf obligation légale de le faire, l'appelante n'a pas à subventionner les infrastructures de la ville par prélèvement sur ses profits provenant d'autres parties du projet. La portée du contrat de viabilisation à cet égard doit être examinée à la troisième étape. 21

C. *Existe-t-il un motif juridique justifiant le refus d'indemniser l'appelante?*

Ce volet du critère de l'enrichissement sans cause est le plus important. Comme l'a fait observer la juge McLachlin dans l'arrêt *Peter*, précité, p. 990 : 22

> C'est à cette étape que le tribunal doit vérifier si l'enrichissement et le désavantage, moralement neutres en soi, sont « injustes ».

Vu l'exigence d'un « motif juridique », « injustes » ou « sans cause » renvoie au droit et au raisonnement juridique, et non à une conscience morale à géométrie variable susceptible d'être trop subjective; voir L. Smith, « The Mystery of "Juristic Reason" » (2000), 12 *S.C.L.R.* (2d) 211, p. 219. Cette troisième étape a été, dans une certaine mesure, redéfinie et reformulée dans l'arrêt *Garland*, précité, par. 44 à 46. Elle se scinde désormais en deux. Dans un premier temps, le demandeur (en l'occurrence l'appelante) doit démontrer qu'aucun motif juridique appartenant à une catégorie établie ne justifie le refus de l'indemniser. Les catégories établies sont le contrat, la disposition légale, l'intention libérale et « les autres obligations valides imposées par la common law, l'equity ou la loi » (*Garland*, par. 44). D'autres catégories peuvent s'ajouter au fil du temps (par. 46). S'il prouve qu'aucun motif appartenant à ces catégories bien circonscrites ne justifie le défendeur de refuser de l'indemniser, le demandeur (en l'occurrence l'appelante) aura alors établi l'enrichissement sans cause *prima facie*. Il aura prouvé l'existence [TRADUCTION] « d'un motif concret d'annuler l'enrichissement du défendeur » (Smith, *loc. cit.*, p. 244). 23

24 Although this formulation requires the plaintiff to prove a negative, the task is made manageable by the limited number of categories, and it is only fair to put on the claimant the onus of proving the essential elements of its cause of action.

25 At the second stage, the onus shifts to the defendant (here the respondent City), who must rebut the *prima facie* case by showing that there is some other valid reason to deny recovery. In the absence of a convincing rebuttal, the transfer of wealth will be reversed. According to *Garland*, it is at this stage that the court should have regard to the reasonable expectation of the parties and public policy considerations. However, as Iacobucci J. added, at para. 46:

> The point here is that this area is an evolving one and that further cases will add additional refinements and developments.

26 With respect to the absence of a valid juristic reason in this case, the second trial judge was emphatic (at para. 17):

> There is no juristic reason for the City to retain the benefits without accounting to the plaintiff. I think it would be against conscience to have that result obtain.

27 I turn then to whether the appellant has demonstrated that the established categories do not apply.

(1) Stage One: The Established Categories

(a) *Contract*

28 In the usual course, the existence of a contract, such as was made by the parties to this appeal, would be a complete answer to the claim for unjust enrichment. The City relies on four contracts, namely (i) the purchase agreement between the appellant and BCEC; (ii) the subdivision servicing agreement; (iii) the assumption agreement; and (iv) the Songhees Master Agreement. There is no doubt that the parties were entitled to enter into agreements respecting the development of the 22-acre site, and that the project would not have been allowed to proceed without the appellant contributing to the City appropriate works and improvements. The

Bien que cette formulation oblige le demandeur à prouver l'inexistence de quelque chose, sa tâche est rendue possible par le nombre limité des catégories, et ce n'est que justice qu'il lui incombe d'établir les éléments essentiels de sa cause d'action.

Dans un deuxième temps, il appartient au défendeur (en l'occurrence la Ville intimée) de réfuter la preuve *prima facie* en avançant un autre motif valable de refuser l'indemnisation. S'il ne le fait pas de manière convaincante, il y a lieu d'annuler le transfert de richesse. Suivant l'arrêt *Garland*, c'est à cette étape que le tribunal doit tenir compte des attentes raisonnables des parties et des considérations d'intérêt public. Le juge Iacobucci a toutefois ajouté au par. 46 :

> Il faut comprendre ici que ce domaine est en évolution et que d'autres précisions et innovations résulteront d'affaires ultérieures.

Le juge du second procès a été on ne peut plus clair en ce qui concerne l'absence de motif juridique valable en l'espèce (par. 17) :

> [TRADUCTION] Aucun motif juridique ne justifie la Ville de conserver les avantages sans indemniser la demanderesse. Je crois que la conscience morale le lui défend.

Je me penche à présent sur la question de savoir si l'appelante a démontré que les catégories établies ne s'appliquent pas.

(1) Première étape : les catégories établies

a) *Contrat*

Habituellement, l'existence d'un contrat comme celui qu'ont signé les parties au présent pourvoi suffit à elle seule à sceller l'issue d'une action fondée sur l'enrichissement sans cause. La Ville invoque l'existence de quatre contrats : (i) la convention d'achat entre l'appelante et BCEC; (ii) le contrat de viabilisation des lots; (iii) la convention de prise en charge; (iv) l'accord-cadre. Nul doute qu'il était loisible aux parties de contracter pour l'aménagement du bien-fonds de 22 acres et que le projet n'aurait pu voir le jour si l'appelante n'avait pas fourni à la Ville les travaux et les améliorations appropriés. Or, la ville a exigé davantage que ce que prévoyait

problem is that the City insisted on receiving more than s. 989 of the *Municipal Act* permitted it to ask for, and in exchange, as found in the first trial, it offered an implied undertaking regarding zoning that it was not authorized to give. The development agreements therefore included a perfectly valid core, which has been carried out by all parties, but we are now required to address the *extra* works and improvements demanded by the City and given by the appellant in exchange for guaranteed zoning. The City successfully argued in the first appeal to this Court that the sale of zoning was *ultra vires* its powers, and therefore incapable of giving rise to a cause of action for breach of contract. The logical conundrum for the City at this stage is that it is the very elements of the contract the City demonstrated were *ultra vires* (extra services for guaranteed zoning) that it now argues are the juristic reason for its just retention of $1.08 million in improvements "at no cost to the City taxpayers" (Mackenzie J., at para. 20). In my opinion, it is not open to the City to rely on the contractual arrangements, which in their relevant parts flowed from the City's *ultra vires* demand, to defeat the appellant's claim on the particular facts of this case.

The trial judge found the "extra" works and undertakings given in exchange for the *ultra vires* zoning commitment to be clearly separate and identifiable. The cost was $1.08 million. There is therefore no difficulty on the facts in distinguishing between the City's lawful entitlement and the *ultra vires* extras.

The agreements have been carried into execution by the appellant, who no longer seeks to enforce the *ultra vires* provisions. The question is whether equity will take into account the *ultra vires* nature of the City's demand, which is the root of the legal difficulties that followed, in determining whether the contract of which it forms a central part is fatal to the appellant's claim in unjust enrichment.

The general rule, of course, is that it is not the function of the court to rewrite a contract for the

l'art. 989 de la *Municipal Act* et, en échange, comme l'a conclu le juge du premier procès, elle a pris un engagement implicite qu'elle n'avait pas le pouvoir de prendre relativement au zonage. Les conventions relatives à l'aménagement conféraient aux parties des obligations parfaitement valides dont elles se sont acquittées, mais nous devons maintenant nous pencher sur les travaux et les améliorations *supplémentaires* exigés par la Ville et fournis par l'appelante en contrepartie de l'assurance que le zonage serait maintenu. Dans le cadre du premier pourvoi, notre Cour a fait droit à l'argument de la Ville selon lequel cette assurance était *ultra vires* de ses pouvoirs et, partant, ne pouvait faire naître une cause d'action fondée sur l'inexécution de contrat. Pourtant, la Ville invoque aujourd'hui les éléments mêmes du contrat dont elle a établi le caractère *ultra vires* (infrastructures supplémentaires contre maintien du zonage) comme motif juridique justifiant la conservation d'améliorations d'une valeur de 1,08 millions de dollars [TRADUCTION] « sans qu'il en coûte un sou aux contribuables » (le juge Mackenzie, par. 20). Vu les faits de l'espèce, la Ville ne peut à mon sens opposer à l'allégation de l'appelante les conventions dont les éléments pertinents découlaient de ses exigences *ultra vires*.

29 Le juge de première instance a conclu que les travaux et les améliorations « supplémentaires » en contrepartie desquels avait été pris l'engagement *ultra vires* relatif au zonage étaient clairement distincts et identifiables. Leur coût s'élevait à 1,08 million de dollars. Il n'est donc pas difficile de distinguer entre ce à quoi la Ville avait légitimement droit et ce qui était *ultra vires*.

30 L'appelante a exécuté les conventions et ne cherche plus à faire appliquer les dispositions *ultra vires*. La question est de savoir si, en equity, il faut tenir compte de la nature *ultra vires* de la demande de la Ville, qui est à l'origine des démêlés juridiques subséquents, pour déterminer si le contrat dont cette demande constitue un élément central fait échec à l'action de l'appelante fondée sur l'enrichissement sans cause.

31 En règle générale, il n'appartient évidemment pas au tribunal de réécrire le contrat à la place des

parties. Nor is it their role to relieve one of the parties against the consequences of an improvident contract. None of that arises in this case. The question here, more precisely, is whether the City can be permitted in the first appeal to argue that it is absolved by the doctrine of *ultra vires* from any contractual responsibility to carry out the zoning obligations (that the trial court found it had undertaken to the appellant on the basis of a common mistake) and then in this appeal, in the same litigation (albeit in relation to a different cause of action), permitted to succeed on the basis that the same contract constitutes a juristic reason to obtain the extra works and improvements without paying for them. In my view, the City's success in the 2000 appeal knocked out of contention the juristic reason (the contractual provisions) on which it primarily relies in this appeal. I say that for two reasons. First, as a matter of equity, it is not necessary for the appellant in this action to try and set aside the entirety of its contractual arrangements with the City. It need only isolate the provisions relating to the *ultra vires* demand, and show why the City ought not to be allowed to rely on them as a defence to a claim in unjust enrichment. Secondly, the trial judge found that the *ultra vires* arrangements rested on a common mistake. Both the City and the appellant assumed the City had the legal authority to make zoning commitments the City did not possess. The finding of common mistake is important to the appellant's claim to recover the cost of the extra works and improvements. If there had been just the *ultra vires* transaction without the added element of common mistake, it would have been a different case and the outcome would not necessarily be the same.

(i) The Fruit of the *Ultra Vires* Demand

32 In many cases, no doubt, municipalities make demands that are not strictly authorized and developers do what they are asked to do because in the end they get the zoning they want. There is no suggestion that in the ordinary case such arrangements should be unwound on the basis of the doctrine of unjust enrichment. This case is different.

parties ni de soustraire l'une d'elles aux conséquences d'un engagement pris à la légère. Tel n'est pas l'objet du présent pourvoi. La question qui se pose plus précisément en l'espèce est de savoir si la Ville pouvait prétendre, dans le cadre du premier pourvoi, que la doctrine de l'*ultra vires* la soustrayait à toute obligation contractuelle relative au zonage (qu'elle avait contractée, selon le juge de première instance, sur le fondement d'une erreur commune), puis avoir gain de cause dans le présent pourvoi, toujours dans la même affaire (mais relativement à une autre cause d'action), en affirmant que le contrat en question constitue un motif juridique la justifiant de conserver les travaux et les améliorations supplémentaires sans en payer le prix. À mon avis, la victoire de la Ville en 2000 a fait tomber le motif juridique (les dispositions contractuelles) sur lequel elle s'appuie principalement aujourd'hui, et ce, pour deux raisons. Premièrement, en equity, l'appelante n'a pas à écarter toutes les conventions conclues avec la Ville. Il lui suffit d'isoler les dispositions liées à la demande *ultra vires* et de montrer pourquoi la Ville ne devrait pas être admise à les invoquer pour réfuter l'enrichissement sans cause. Deuxièmement, le juge de première instance a conclu que les accords *ultra vires* reposaient sur une erreur commune aux deux parties. Tout comme l'appelante, la Ville a supposé qu'elle était légalement habilitée à prendre un engagement en matière de zonage, ce qui n'était pas le cas. L'erreur commune est importante pour ce qui est du recouvrement du coût des travaux et des améliorations supplémentaires par l'appelante. La situation aurait été différente si nous avions été uniquement en présence d'une opération *ultra vires*, sans que ne s'y ajoute l'erreur commune, et l'issue n'aurait pas nécessairement été la même.

(i) La conséquence de la demande *ultra vires*

Dans bien des cas, il ne fait aucun doute que les municipalités formulent des demandes qu'elles ne sont pas, à strictement parler, autorisées à faire et que les promoteurs s'y plient parce qu'ils obtiennent en fin de compte le zonage voulu. Nul ne prétend que ces accords devraient normalement être écartés sur le fondement de l'enrichissement sans cause. La

As Mackenzie J. observed after the first trial (at para. 17):

> In short, everyone involved miscalculated. What are the legal consequences of this imbroglio?

To which Wilson J., presiding at the second trial, added, somewhat darkly (at para. 4):

> The plaintiff failed to adhere to the admonition, "put not your faith in princes", and must now accept the consequences.

Recognizing, as the trial judge did, that the source of the problem in this case is the City's *ultra vires* demand for works and improvements to which it was not entitled, one approach is to sever from the contractual arrangements the exchange of promises that flowed from that initial *ultra vires* demand.

It is true that these commercial agreements are, as one would expect, complex, and do not readily lend themselves to "blue-pencil" deletions. We are dealing, however, with an equitable cause of action, and equity looks to substance rather than to form. As stated earlier, a characteristic of the doctrine of unjust enrichment is the flexibility of remedies. Here the substance of the problem to be remedied is clearly identified. The respondent is sitting on $1.08 million worth of improvements which have been found to be the fruits of an *ultra vires* demand. The remedy sought is simply to reverse the wrongful transfer of wealth by ordering reimbursement of that amount to the appellant.

The City seeks to enjoy an unjustified windfall at the appellant's expense. The equitable doctrine would be a feeble thing if it did not possess the remedial flexibility to reverse an enrichment that has been established to the satisfaction of an experienced trial judge to be manifestly unjust. I would not give effect to a defence based on the form as opposed to the substance of the contractual documents.

présente espèce est particulière. Comme l'a souligné le juge Mackenzie à l'issue du premier procès (par. 17) :

> [TRADUCTION] Bref, toutes les parties se sont trompées. Quelles sont les conséquences juridiques de cet imbroglio?

Ce à quoi le juge Wilson, qui a présidé le second procès, a ajouté un peu sombrement (par. 4) :

> [TRADUCTION] La demanderesse a fait fi de l'exhortation « ne mettez point votre foi dans les princes », et elle doit maintenant en subir les conséquences.

33 Si, à l'instar du juge de première instance, l'on reconnaît que le problème découle en l'espèce de la demande de travaux et d'améliorations auxquels la Ville n'avait pas droit, une solution possible serait de retrancher des conventions intervenues l'échange de promesses ayant fait suite à la demande *ultra vires* initiale.

34 Il est vrai — et nul ne s'en étonnera — que ces conventions commerciales sont complexes et ne se prêtent guère au remaniement par voie de suppression. Nous sommes cependant appelés à statuer sur une cause d'action en equity, et l'equity s'intéresse au fond et non à la forme. Rappelons que l'une des caractéristiques de la doctrine de l'enrichissement sans cause est la souplesse dans les réparations susceptibles d'être accordées. En l'espèce, les données du problème qui appelle réparation sont clairement établies. L'intimée bénéficie d'améliorations d'une valeur de 1,08 million de dollars, et il a été statué qu'elles résultaient d'exigences *ultra vires*. La réparation demandée consiste simplement à annuler le transfert de richesse injustifié en ordonnant à l'appelante de payer le prix des améliorations.

35 La Ville cherche à bénéficier d'un avantage injustifié aux dépens de l'appelante. La doctrine de l'enrichissement sans cause aurait bien peu d'utilité si elle n'était pas assez souple, en matière de réparations, pour permettre l'annulation d'un enrichissement qui, selon un juge de première instance expérimenté, est manifestement injuste. Je ne ferais pas droit à un moyen de défense fondé sur la forme plutôt que sur la teneur des documents contractuels.

(ii) Common Mistake

36 Wilson J. found as a fact that the City and the appellant had entered into their contractual arrangements on the basis of a common mistake as to the City's legal authority. He said (at para. 34):

> I have already found that each of these parties believed in a set of circumstances which have now been found [in the earlier appeal] not to be true.

37 The "mistake" was the belief that the City had the authority to contract for the extra works and improvements in exchange for what was found to be an implied contractual obligation to maintain the zoning in place for a reasonable time, estimated at 10 to 12 years, to allow completion of the appellant's project. The mistake was not wholly unreasonable. The judges of this Court were divided 4 to 3 on that issue in the first PNI appeal.

38 The City now denies that it was under any such misapprehension, suggesting that it knew all along that it could not carry out what was found to be its side of the bargain, but that position was rejected on the facts by the trial judge as noted above.

39 The result, accordingly, is that the City and the appellant purported to contract with respect to the extra works and improvements under a common mistake of law as to the enforceability of their agreement. "It cannot be disputed", wrote Bacon V.C. in 1881, that "Courts of Equity have at all times relieved against honest mistakes in contracts . . . where not to correct the mistake would be to give an unconscionable advantage to either party": (*Burrow v. Scammell* (1881), 19 Ch. D. 175, at p. 182). Such a mistake undermines the juristic reason relied upon by the City, as La Forest J. pointed out in *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161, at p. 1200:

> From his analysis, Dickson J. [in *Hydro Electric Commission of Nepean v. Ontario Hydro*, [1982] 1 S.C.R. 347] concluded that the judicial development of the law of restitution or unjust (or as Dickson J. noted, "unjustified") enrichment renders otiose the distinction between mistakes of fact and mistakes of law. He would

(ii) L'erreur commune

Le juge Wilson a tiré la conclusion de fait que les conventions étaient intervenues entre la Ville et l'appelante en raison d'une erreur commune quant au pouvoir légal de la Ville. Voici ce qu'il a dit (par. 34) :

> [TRADUCTION] J'ai déjà conclu que chacune des parties s'était appuyée sur des faits dont l'inexactitude a été établie [dans le pourvoi antérieur].

L'« erreur » résidait dans la croyance que la Ville avait le pouvoir d'exiger par contrat des travaux et des améliorations supplémentaires en contrepartie de ce qui a été assimilé à une obligation contractuelle implicite de maintenir le zonage pendant une période raisonnable, soit de 10 à 12 ans, pour permettre le parachèvement du projet de l'appelante. L'erreur n'était pas entièrement déraisonnable, car lors du premier pourvoi, notre Cour a rendu un jugement partagé (4 juges contre 3) à ce sujet.

La Ville nie aujourd'hui s'être méprise, faisant valoir qu'elle savait dès le début qu'elle ne pouvait respecter sa part du marché. Or, au vu des faits de l'espèce, le juge de première instance a rejeté cette thèse, comme je l'ai indiqué précédemment.

Il appert donc que la Ville et l'appelante ont toutes deux conclu une convention relative aux travaux et aux améliorations supplémentaires sur le fondement d'une erreur de droit quant à son caractère exécutoire. Comme l'a écrit le vice-chancelier Bacon en 1881, [TRADUCTION] « il est indéniable que les cours d'equity ont toujours accordé réparation contre l'erreur commise de bonne foi en matière contractuelle [. . .] lorsque l'omission de la corriger aurait conféré un avantage indu à l'une ou l'autre partie » (*Burrow c. Scammell* (1881), 19 Ch. D. 175, p. 182). Pareille erreur compromet l'existence du motif juridique sur lequel s'appuie la Ville. Le juge La Forest a d'ailleurs fait remarquer dans l'arrêt *Air Canada c. Colombie-Britannique*, [1989] 1 R.C.S. 1161, p. 1200 :

> Cette analyse a amené le juge Dickson [dans *Hydro Electric Commission of Nepean c. Ontario Hydro*, [1982] 1 R.C.S. 347] à conclure que, étant donné la façon dont le droit en matière de restitution ou d'enrichissement [sans cause] (ou, comme le soulignait le juge Dickson, « injustifié ») a évolué devant les tribunaux, la distinction

abolish the distinction, and would allow recovery in any case of enrichment at the plaintiff's expense provided the enrichment was caused by the mistake and the payment was not made to compromise an honest claim, subject of course to any available defences or equitable reasons for denying recovery, such as change of position or estoppel. [Emphasis added.]

See also *Canadian Pacific Air Lines Ltd. v. British Columbia*, [1989] 1 S.C.R. 1133, at p. 1157.

Southin J.A. in the Court of Appeal (at para. 24) accepted the existence of the Songhees Phase II Subdivision Servicing Agreement as a valid juristic reason to deny recovery because

there is nothing in any of this [evidence] from which one could conclude that the original transaction would have come to fruition had the [appellant] asserted it would do only what could lawfully be required of a landowner under s. 989 of the Act.

This is true, but the fact is that the City and the appellant *did* make a deal on a basis which this Court found to be *ultra vires*. The City might not have done the deal on any other basis and certainly it is clear the appellant would not have undertaken the extra works and improvements without the zoning assurances it thought it had contracted for. However, the deal was done on the basis of a common mistake of law, the extra works and improvements are in place, and the relevant question now is who is to pay for them.

Southin J.A. also accepted the City's argument that what the appellant "asserts to be the deprivation, that is to say, the extra works, was part and parcel of the consideration it gave for the benefit which it received under the agreements" (para. 25). On this view, "the benefit" was the acquisition of the 22 acres of land and approval of the subdivision plan. Such a view, with respect, is at odds with the findings of fact by the trial judge as to the "consideration" the City and the appellant had agreed upon, namely the maintenance of the zoning in place for a reasonable time to permit the completion of the

entre les erreurs de fait et les erreurs de droit ne servait plus à rien. Le juge Dickson était d'avis de l'abolir et de permettre le recouvrement dans tous les cas d'enrichissement aux dépens du demandeur, quand l'erreur avait occasionné l'enrichissement et quand le paiement n'avait pas été effectué en vue de compromettre une réclamation légitime, sous réserve évidemment des moyens de défense ou des raisons d'équité qui permettraient de refuser le recouvrement, dont par exemple un changement de situation ou une fin de non-recevoir. [Je souligne.]

Voir aussi *Lignes aériennes Canadien Pacifique Ltée c. Colombie-Britannique*, [1989] 1 R.C.S. 1133, p. 1157.

La juge Southin de la Cour d'appel a reconnu (au par. 24) que l'existence du contrat de viabilisation des lots de la phase II constituait un motif juridique valable de refuser le recouvrement, car

[TRADUCTION] aucun élément de cette [preuve] ne permet de conclure que l'opération initiale se serait concrétisée si [l'appelante] avait affirmé qu'elle ne ferait que ce qui pouvait être légalement exigé d'un propriétaire foncier suivant l'art. 989 de la Loi.

Soit, mais il demeure que l'accord *conclu* par la Ville et l'appelante avait un fondement que notre Cour a jugé *ultra vires*. La Ville n'aurait peut-être pas conclu d'accord sur un autre fondement, et l'appelante n'aurait assurément pas entrepris les travaux et les améliorations supplémentaires sans la garantie contractuelle qu'elle pensait avoir obtenue relativement au zonage. Or, l'accord est intervenu par suite d'une erreur de droit commune, les travaux et les améliorations supplémentaires ont été réalisés et il s'agit désormais de savoir qui doit en assumer le coût.

La juge Southin a également fait sienne la thèse de la Ville selon laquelle [TRADUCTION] « l'appauvrissement allégué par l'appelante, c'est-à-dire les travaux supplémentaires, faisait partie intégrante de la contrepartie versée par elle pour obtenir l'avantage que lui conféraient les accords » (par. 25). Dans cette optique, « l'avantage » s'entendait de l'acquisition du bien-fonds de 22 acres et de l'approbation du plan de lotissement. En toute déférence, j'estime que cette interprétation va à l'encontre des conclusions de fait tirées par le juge de première instance quant à la « contrepartie » dont la Ville et

project. As noted earlier, the "extra" works and improvements were found to be distinct from what was lawfully required.

43 For these reasons, I conclude that the appellant has negatived the contractual provisions as a juristic reason permitting the City to retain the extra works and improvements without paying for them.

(b) *Disposition of Law*

44 It is evident that the appellant's claim must fail if the City's retention without payment of the $1.08 million enrichment is authorized by statute (*Peter*, *supra*, p. 1018; *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445, at p. 476).

45 The City relies on s. 914 of the *Local Government Act* which provides that no compensation is payable to anyone for any "reduction in the value of that person's interest in land, or for any loss or damages that result from the adoption of an official community plan or a bylaw under this Division or the issue of a permit under Division 9 of this Part". The City argues that the loss claimed by the appellant flows from the down-zoning, and is therefore unrecoverable by reason of the statute.

46 In my view, the claim here is not based on "the adoption of an official community plan or [zoning] bylaw". While the earlier appeal alleged that the down-zoning of the water lots breached an implied term of the contract, that claim was rejected, and the appellant's losses flowing from the down-zoning are no longer in issue. The appellant's cause of action for unjust enrichment was complete when it put in place the extra works and improvements in the mistaken belief that its contract with the City in respect thereto was enforceable. The mistake formed the basis of the City's successful appeal after the first trial.

l'appelante avaient convenu, soit le maintien du zonage pendant une période raisonnable afin que le projet puisse être mené à terme. Comme je l'ai indiqué précédemment, les travaux et les améliorations « supplémentaires » ont été jugés distincts de ceux qu'exigeait la loi.

Pour ces motifs, je conclus que l'appelante a réfuté l'argument que les dispositions contractuelles constituent un motif juridique justifiant la Ville de conserver les travaux et les améliorations supplémentaires sans en payer le prix.

b) *Disposition légale*

La demande de l'appelante doit de toute évidence être rejetée si la loi autorise la Ville à conserver, sans payer quoi que ce soit, l'enrichissement de 1,08 million de dollars (*Peter*, précité, p. 1018; *Renvoi relatif à la taxe sur les produits et services*, [1992] 2 R.C.S. 445, p. 476).

La Ville invoque l'art. 914 de la *Local Government Act*, qui prévoit que nul n'a droit à une indemnité pour la [TRADUCTION] « diminution de la valeur d'un bien-fonds ou pour tout préjudice ou perte résultant de l'adoption d'un plan d'urbanisme ou d'un règlement en vertu de la présente section ou de la délivrance d'un permis en application de la section 9 de la présente partie ». La Ville prétend que la perte alléguée par l'appelante découle de la modification du zonage et, partant, qu'elle est irrécouvrable du fait de la loi.

À mon sens, l'allégation considérée en l'espèce ne s'appuie pas sur [TRADUCTION] « l'adoption d'un plan d'urbanisme ou d'un règlement [de zonage] ». Même si, dans le premier pourvoi, l'appelante a allégué que la modification du zonage des plans d'eau avait contrevenu à une clause implicite du contrat, cette prétention a été rejetée, et les pertes subies par l'appelante par suite de cette modification ne sont désormais plus en cause. Les éléments constitutifs de l'enrichissement sans cause ont été réunis une fois que l'appelante a réalisé les travaux et les améliorations supplémentaires, croyant à tort que le contrat conclu avec la Ville à cet égard était exécutoire. L'erreur a permis à la Ville d'avoir gain de cause en appel du premier procès.

The City also relies on s. 215(3) of the *Land Title Act* under which the restrictive covenant bound the appellant to do the works "notwithstanding that the instrument . . . has not been signed by the covenantee". The City's argument amounts to the proposition that registration allows the City to do indirectly what would be *ultra vires* if done directly, and thereby to subvert the legislative intent to limit a municipality's authority, even as the municipality itself escapes its side of the bargain by pleading the doctrine of *ultra vires*. I would not give effect to the City's s. 215 argument. The second trial judge, Wilson J., found, at para. 5, that the appellant's obligations were "inextricably bound up" with the other provisions of the agreements including the City's *ultra vires* promise to maintain in place the requisite zoning. The appellant does not deny its obligation under the restrictive covenant or the underlying agreements. Its position is that in the circumstances, the agreements, flawed as they are, cannot be relied upon by the City as a juristic reason to keep the works and improvements without paying for them. I agree with that position.

47 La Ville s'appuie en outre sur le par. 215(3) de la *Land Title Act*, selon lequel l'engagement de ne pas faire obligeait l'appelante à effectuer les travaux [TRADUCTION] « même [si le bénéficiaire de l'engagement n'avait] pas signé l'acte ». Cela revient à dire que l'enregistrement de l'engagement permettait à la Ville de faire indirectement ce qui, directement, aurait été *ultra vires*, et de dénaturer ainsi l'intention du législateur de limiter le pouvoir d'une municipalité, même lorsque celle-ci ne respecte pas sa part du marché en invoquant la doctrine de l'*ultra vires*. Je ne retiendrais pas l'argument de la Ville fondé sur l'art. 215. Le juge du deuxième procès, le juge Wilson, a statué au par. 5 de ses motifs que l'obligation de l'appelante était [TRADUCTION] « inextricablement liée » aux autres dispositions des accords, y compris la promesse *ultra vires* de la Ville de maintenir le zonage. L'appelante ne nie pas son obligation découlant de l'engagement de ne pas faire ou des accords sous-jacents. Elle maintient que, dans les circonstances, les accords étant entachés d'une erreur, ils ne peuvent être invoqués par la Ville comme motif juridique de conserver les travaux et les améliorations sans en payer le prix. Je suis de cet avis.

(c) *Donative Intent*

c) *Intention libérale*

The City contends that it is common for developers to offer "sweeteners" in excess of what a municipality can demand for zoning and subdivision approvals. This is true. Each side gets what it wants and moves on. However, their deal is not based on a common mistake. And here the appellant did not get what the City undertook to give it. Mackenzie J., at the initial trial, whose findings were adopted by Wilson J. at the second trial, flatly rejected any suggestion that the appellant possessed a donative intent (at para. 29):

48 La Ville fait valoir qu'il est courant qu'un promoteur immobilier offre une « rallonge » à ce que la municipalité peut exiger en échange d'une autorisation relative au zonage et au lotissement. Cela est vrai. Chacun obtient ce qu'il veut et va de l'avant. Mais leur accord ne repose pas sur une erreur commune. Et, en l'espèce, l'appelante n'a pas obtenu ce que la Ville s'était engagée à lui donner. Au premier procès, le juge Mackenzie, dont les conclusions ont été reprises par le juge Wilson lors du second procès, a catégoriquement rejeté l'idée que l'appelante ait eu une intention libérale (par. 29) :

The characterization of park dedications and service cost expenditures as voluntary belies the reality. PNI was pursuing a business venture. It negotiated terms of purchase with BCEC and a services agreement with the City with a precise expectation of the lots it would acquire, the zoning for each lot and the extent of development thereby permitted. It made commitments pursuant

[TRADUCTION] Qualifier de désintéressées les dépenses engagées pour l'aménagement d'espaces verts et la viabilisation fait totalement fi de la réalité. PNI exploitait une entreprise. Elle a négocié des conditions d'acquisition avec BCEC et un contrat de viabilisation avec la Ville en ayant des attentes précises quant aux lots qu'elle acquerrait, au zonage de chaque lot et à l'ampleur

to written agreements with mutual obligations that it considered enforceable. Its motives were commercial and not philanthropic.

49 The appellant did not offer a "sweetener" for something it got. It offered consideration for an implied undertaking it turned out the City was able to repudiate.

(d) *Other Valid Common Law, Equitable or Statutory Obligation*

50 Southin J.A. stated, at para. 26:

> In any event, the juristic reason for what the appellant did in 1993 is that the Legislature had conferred upon it the power to do the act of downzoning. The by-law is of the same force and effect as if it had been enacted by the Legislature itself and provides a complete answer to any and all claims arising out of it.

51 With respect, this argument presupposes that the claim for unjust enrichment "arose" out of the down-zoning. However, the claim for unjust enrichment does not depend on the down-zoning. It depends on the fact that the City has obtained $1.08 million worth of extra works and improvements at the appellant's expense to which, after securing a court order declaring that it had no power to do what it purported to undertake to do, the City has no legitimate entitlement.

52 The City also argues that requiring it to pay for the extra works and improvements would constitute an "indirect fetter" on the exercise of its legislative power, but this is not so. The appellant has never attacked the validity of the down-zoning. The appellant no longer seeks damages for breach of contract that included loss of profits on a project it was unable to build. We are now dealing simply with the cost of extra works and improvements. The focus is not on the appellant's loss but on the City's enrichment. The power to down-zone in the public interest does not immunize the City against claims for unjust enrichment.

de l'aménagement qui y serait autorisé. Elle a pris des engagements par écrit dans des accords synallagmatiques qu'elle jugeait exécutoires. Ses visées étaient commerciales, et non philanthropiques.

L'appelante n'a pas offert de « rallonge » pour obtenir une chose qu'elle avait déjà. Elle l'a fait en contrepartie d'un engagement tacite que la Ville a pu en fin de compte répudier.

d) *Autres obligations valides imposées par la common law, l'equity ou la loi*

La juge Southin a tenu les propos suivants (par. 26) :

> [TRADUCTION] Quoi qu'il en soit, le motif juridique pour lequel l'appelante a agi comme elle l'a fait en 1993 réside dans le pouvoir de modifier le zonage que lui avait conféré le législateur. Le règlement est tout aussi exécutoire que s'il avait été pris par le législateur lui-même et il permet de régler entièrement tout litige découlant de son application.

En toute déférence, cet argument présuppose que l'allégation d'enrichissement sans cause « découle » de la modification de zonage. Or, tel n'est pas son fondement. Elle tire sa source de l'obtention par la Ville, aux frais de l'appelante, de travaux et d'améliorations supplémentaires d'une valeur de 1,08 million de dollars auxquels elle n'a pas légitimement droit vu le jugement déclarant qu'elle n'était aucunement habilitée à faire ce qu'elle s'était engagée à faire.

La Ville prétend en outre que la contraindre à payer les travaux et les améliorations supplémentaires « entraverait indirectement » l'exercice de son pouvoir législatif. Ce n'est pas le cas. L'appelante n'a jamais contesté la validité de la modification du zonage. Elle ne demande plus de dommages-intérêts pour rupture de contrat, notamment pour le manque à gagner afférent au projet qu'elle n'a pu mener à terme. Désormais, seul le coût des travaux et des améliorations supplémentaires est en cause. L'accent est mis non pas sur la perte de l'appelante, mais bien sur l'enrichissement de la Ville. Le pouvoir de modifier le zonage dans l'intérêt public ne met pas la Ville à l'abri d'une action fondée sur l'enrichissement sans cause.

(2) Stage Two: Reasonable Expectation of the Parties and Public Policy Considerations

Under stage two of the "juristic reason" inquiry, the onus falls on the City to show that to allow the claim of unjust enrichment in this case would frustrate the reasonable expectation of the parties. It has not discharged this onus. On the contrary, Wilson J. found that neither the City nor the appellant expected the extra works and improvements to be donated. The reasonable expectation was that the works and improvements would be paid for out of the profits from those parts of the Phase II project the appellant was prevented by the City from building. The City did not expect to get the extra works and improvements for nothing, but the agreed form of consideration (guaranteed zoning) turned out to be beyond its powers. The City now owns the works, and it is consistent with the parties' *reasonable* expectations that the appellant be reimbursed for their cost.

The City contends that the grant of an equitable remedy in this case would be bad public policy.

First, the grant of the equitable remedy would not frustrate the legislative purpose in making such zoning commitments unenforceable. In fact, the City *did* down-zone the lots in question and *was* held able to do so without having to pay damages for breach of contract. Whether or not it should pay the cost of benefits it actually demanded and received is a different question.

Second, it is not suggested that the City or the appellant made these agreements for an improper purpose. On the contrary, Mackenzie J. at the first trial considered the "interlocking agreements [to be] an innovative means of achieving the parties' differing objectives by hinging binding obligations on each piece going into place" (para. 26). He pointed out that the exchange of contractual promises ultimately found to be *ultra vires* was designed, as stated by the City's solicitor, "to facilitate an unusual rezoning of a large area of undeveloped and

(2) Deuxième étape : attentes raisonnables des parties et considérations d'intérêt public

53 À la deuxième étape de l'analyse relative à l'existence d'un « motif juridique », il incombe à la Ville de démontrer que faire droit à l'action fondée sur l'enrichissement sans cause irait à l'encontre des attentes raisonnables des parties. Elle ne l'a pas fait. Le juge Wilson a conclu au contraire que, en ce qui concerne les travaux et les améliorations supplémentaires, ni la Ville ni l'appelante ne s'attendaient à ce qu'il s'agisse d'un don. Toutes deux s'attendaient raisonnablement à ce que leur coût soit prélevé sur les profits tirés de la partie du projet de l'appelante qui n'a pu voir le jour à cause de la modification du zonage. La Ville ne s'attendait pas à ce que les travaux et les améliorations supplémentaires ne lui coûtent rien, mais il s'est avéré que la contrepartie convenue (l'assurance que le zonage serait maintenu) outrepassait ses pouvoirs. La Ville est maintenant propriétaire des infrastructures, et il est compatible avec les attentes *raisonnables* des parties qu'elle en paie le coût à l'appelante.

54 La Ville prétend que, en l'espèce, l'octroi d'une réparation fondée sur l'equity irait à l'encontre de l'intérêt public.

55 Premièrement, une telle réparation ne serait pas contraire à l'intention du législateur de rendre inexécutoire un engagement relatif au zonage. En effet, la Ville *a* modifié le zonage des lots en question et il *a été* décidé qu'elle pouvait le faire sans verser de dommages-intérêts pour rupture de contrat. C'est une autre question que de savoir si elle devrait supporter le coût des avantages qu'elle a demandés et qui lui ont été conférés.

56 Deuxièmement, personne ne prétend que la Ville ou l'appelante a conclu les conventions dans un dessein illégitime. Au contraire, lors du premier procès, le juge Mackenzie a estimé que les [TRADUCTION] « conventions interdépendantes offraient aux parties un moyen innovateur de réaliser leurs objectifs divergents en rattachant des obligations à chaque composante » (par. 26). Il a signalé que les engagements contractuels jugés en fin de compte *ultra vires* visaient, pour reprendre les termes employés par l'avocat de la Ville, [TRADUCTION] « à faciliter

unsubdivided land" (para. 26). No one disputes that the redevelopment, as planned, was thought to be in the overall best interest of the municipality.

57 Third, I am not persuaded that it would be good public policy to have municipalities making development commitments, then not only have them turn around and attack those commitments as illegal and beyond their own powers, but allow them to scoop a financial windfall at the expense of those who contracted with them in good faith. This is precisely the sort of unfairness that the doctrine of unjust enrichment is intended to address.

58 The City has not pointed to any other public policy that ought to preclude recovery on the facts of this case. The City insisted on the works and improvements it now owns on the Songhees lands. It should pay for the cost of their construction. Municipalities are subject to the law of unjust enrichment in the same way as other individuals and entities.

V. Disposition

59 I would therefore allow the appeal, set aside the decision of the British Columbia Court of Appeal, and restore the trial judgment requiring the respondent City to pay the appellant $1.08 million. Interest will accrue on that amount at registrar's rates from time to time commencing the 1st day of October 1993 to the date of this judgment. The appellant is entitled to its costs of the trial before Wilson J. and of the appeal from that judgment to the British Columbia Court of Appeal, and the costs of the present appeal in this Court.

Appeal allowed with costs.

Solicitors for the appellant: Cox, Taylor, Victoria.

Solicitors for the respondent: Staples McDannold Stewart, Victoria.

la modification inhabituelle du zonage d'un vaste secteur non aménagé et non loti » (par. 26). Nul ne conteste que le réaménagement projeté était censé servir au mieux l'intérêt général de la municipalité.

Troisièmement, je ne suis pas persuadé qu'il serait dans l'intérêt public qu'une municipalité prenne un engagement relatif à l'aménagement, puis non seulement s'y dérobe et le conteste au motif qu'il est illégal et outrepasse ses pouvoirs, mais profite d'un avantage financier aux dépens d'un cocontractant de bonne foi. C'est précisément à ce type d'injustice que vise à remédier la doctrine de l'enrichissement sans cause.

La Ville n'a pas invoqué d'autres considérations d'intérêt public faisant obstacle au recouvrement en l'espèce. Elle a insisté pour obtenir les travaux et les améliorations dont elle est désormais propriétaire sur les terres Songhees. Elle doit en payer le coût. L'enrichissement sans cause s'applique à une municipalité comme à toute personne physique ou morale.

V. Dispositif

Je suis donc d'avis d'accueillir le pourvoi, d'annuler la décision de la Cour d'appel de la Colombie-Britannique et de rétablir le jugement de première instance ordonnant à la ville intimée de verser 1,08 million de dollars à l'appelante. Cette somme portera intérêt aux taux établis périodiquement par le registraire à compter du 1er octobre 1993 jusqu'à la date du présent jugement. L'appelante a droit aux dépens en première instance (devant le juge Wilson) et en appel de ce jugement devant la Cour d'appel de la Colombie-Britannique, ainsi qu'aux dépens du présent pourvoi devant notre Cour.

Pourvoi accueilli avec dépens.

Procureurs de l'appelante : Cox, Taylor, Victoria.

Procureurs de l'intimée : Staples McDannold Stewart, Victoria.

TAB5

Jedfro Investments (U.S.A.) Limited and Elsie Iwasykiw, in her capacity as Litigation Administrator for the estate of Morris Iwasykiw *Appellants*

v.

Nadia Jacyk, in her capacity as Litigation Administrator for the estate of Peter Jacyk, Prombank Investment Limited, Prombank International (U.S.A.) Limited, Louis V. Matukas and Gramat Investments (U.S.A.) Limited *Respondents*

INDEXED AS: JEDFRO INVESTMENTS (U.S.A.) LTD. *v.* Jacyk

Neutral citation: 2007 SCC 55.

File No.: 31561.

2007: October 11; 2007: December 20.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Charron and Rothstein JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contracts — Enforcement — Breach — Parties to joint venture agreement not abiding by its terms — Whether agreement terminated — Whether agreement still enforceable — Whether agreement breached — Whether agreement required repayment of defaulting party's initial investment in joint venture.

I, J and M, via their corporations, entered into a joint venture agreement to purchase, develop and sell a property purchased from Air Products. Part of the purchase price was secured by a note and a trust deed in favour of Air Products. When Air Products demanded repayment, the joint venture agreement required each partner to pay its proportionate share of the sum demanded. Only J was prepared to meet this demand. As the parties agreed that the survival of the joint venture required the note to be paid, J had one of his companies, Prombank Investment, a non-party to the joint venture agreement, purchase the note. Although I and M had defaulted on the joint venture agreement, the parties did not wish to abide by its

Jedfro Investments (U.S.A.) Limited et Elsie Iwasykiw, en sa qualité d'administratrice à l'instance de la succession de Morris Iwasykiw *Appelantes*

c.

Nadia Jacyk, en sa qualité d'administratrice à l'instance de la succession de Peter Jacyk, Prombank Investment Limited, Prombank International (U.S.A.) Limited, Louis V. Matukas et Gramat Investments (U.S.A.) Limited *Intimés*

RÉPERTORIÉ : JEDFRO INVESTMENTS (U.S.A.) LTD. *c.* JACYK

Référence neutre : 2007 CSC 55.

N° du greffe : 31561.

2007 : 11 octobre; 2007 : 20 décembre.

Présents: La juge en chef McLachlin et les juges Bastarache, Binnie, LeBel, Deschamps, Charron et Rothstein.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Contrats — Mise à exécution — Violation — Parties à un accord de coentreprise ne se conformant pas à ses dispositions — L'accord a-t-il été résilié? — L'accord peut-il encore être mis à exécution? — Y a-t-il eu violation de l'accord? — L'accord prescrivait-il le remboursement à la partie défaillante de son investissement initial dans la coentreprise?

I, J et M ont, par l'entremise de leurs sociétés, conclu un accord de coentreprise pour l'achat, l'aménagement et la vente d'une propriété achetée à Air Products. Le prix d'achat a été garanti en partie au moyen d'un billet et d'un acte de fiducie en faveur d'Air Products. Au moment où Air Products a demandé le remboursement, l'accord de coentreprise prévoyait que chaque associé devait payer sa part proportionnelle de la somme demandée. Seul J était disposé à accéder à cette demande. Comme les parties convenaient que le paiement du billet était nécessaire à la survie de la coentreprise, J a fait acheter le billet par une de ses sociétés, Prombank Investment, qui n'était pas partie à l'accord de coentreprise. Bien que I et M aient manqué à l'accord

default provisions. M reached an agreement with J, but I did not. Even when Prombank Investment indicated that it intended to foreclose, I took no steps to raise the money required. Prombank Investment did foreclose and I lost the investment he and his company had put into the joint venture. They sued J, M and their companies for breach of the joint venture agreement and related relief. The trial judge dismissed the action and the Court of Appeal upheld the decision.

Held: The appeal should be dismissed.

While the parties may have ignored the joint venture agreement, the obligations under it remained in effect as none of the ways in which a contract can be discharged is established on the facts. There was no discharge by agreement because the parties never reached a new agreement to terminate the joint venture agreement. Similarly, abandonment discharges a contract only if it amounts to a new contract in which the parties agree to abandon the old one; ignoring a contract does not establish a new contract to terminate the old contract. Nor was it established that the parties had elected to treat the breach as ending the joint venture agreement. [16-17] [22-23] [28]

The joint venture agreement was not breached because J did not advance funds under s. 4.02(a) of the agreement. That section only provided a right, not an obligation, to a non-defaulting party to advance funds on behalf of a defaulting party. Instead, one of J's companies purchased Air Products' note, which any third party could have done. Section 8.03 of the agreement, which required the consent of all three members of the joint venture in order to make decisions relating to the joint venture project, did not assist because: Prombank Investment merely assumed the position Air Products had occupied as a creditor to the joint venture; s. 4.02(d) of the agreement removed the consent requirement under the circumstances arising here; and the foreclosure was simply the exercise of legal rights under the note. [24-28]

I and his company are not entitled to the return of their initial investment in the joint venture. These monies were formally forfeited by the foreclosure by Prombank Investment. Furthermore, the doctrine of unjust enrichment did not apply. The joint venture

de coentreprise, les parties ne voulait pas se conformer à ses dispositions relatives au défaut de paiement. M a conclu une entente avec J, mais non I. Même lorsque Prombank Investment a indiqué qu'elle comptait procéder à la forclusion, I n'a rien fait pour recueillir les sommes requises. Prombank Investment a procédé à la forclusion et I a perdu la somme que lui-même et sa société avaient investie dans la coentreprise. Ils ont poursuivi J, M et leurs sociétés pour violation de l'accord de coentreprise et ont demandé réparation. La juge de première instance a rejeté l'action et la Cour d'appel a maintenu cette décision.

Arrêt : Le pourvoi est rejeté.

Même s'il se peut que les parties n'aient pas tenu compte de l'accord de coentreprise, les obligations qui découlaient de cet accord s'appliquaient toujours étant donné que les faits ne démontrent pas qu'il a été mis fin au contrat de l'une ou l'autre des façons qui permettent de le faire. Le contrat n'a pas pris fin avec le consentement des parties étant donné que ces dernières ne l'ont jamais résilié au moyen d'un nouvel accord. De même, la renonciation ne met fin à un contrat que si elle constitue un nouveau contrat dans lequel les parties conviennent de renoncer à l'ancien contrat; le fait de ne pas tenir compte d'un contrat ne prouve pas l'existence d'un nouveau contrat résiliant l'ancien contrat. Il n'a pas été établi non plus que les parties avaient choisi de considérer que le manquement mettait fin à l'accord de coentreprise. [16-17] [22-23] [28]

Il n'y a eu aucune violation de l'accord de coentreprise du fait que J n'a pas avancé de fonds en application de la clause 4.02a) de cet accord. Cette clause prévoyait seulement qu'une partie non défaillante avait le droit, et non l'obligation, d'avancer des fonds pour une partie défaillante. Au lieu de cela, l'une des sociétés de J a acheté le billet d'Air Products, ce que tout tiers aurait pu faire. La clause 8.03 de l'accord, qui exigeait le consentement de tous les trois membres de la coentreprise pour prendre des décisions concernant la coentreprise, n'était pas utile pour les raisons suivantes: Prombank Investment ne faisait que se substituer à Air Products en tant que créancière de la coentreprise, la clause 4.02d) de l'accord supprimait l'exigence de consentement dans les circonstances existant en l'espèce et la forclusion constituait un simple exercice des droits que la loi reconnaissait au titre du billet. [24-28]

I et sa société n'ont pas droit au remboursement de leur investissement initial dans la coentreprise. Cette somme a été formellement confisquée lors de la forclusion par Prombank Investment. De plus, le principe de l'enrichissement sans cause ne s'appliquait pas.

agreement was a juristic reason why the money need not be repaid, and the foreclosure was a known and procedurally fair consequence of not paying the amount due. [29-30] [35-36]

Cases Cited

Referred to: *Paal Wilson & Co. A/S v. Partenreederei Hannah Blumenthal*, [1983] 1 All E.R. 34; *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533; *Pettkus v. Becker*, [1980] 2 S.C.R. 834; *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, 2004 SCC 25; *Pacific National Investments Ltd. v. Victoria (City)*, [2004] 3 S.C.R. 575, 2004 SCC 75.

Authors Cited

Chitty on Contracts, vol. 1, 29th ed. by H. G. Beale. London: Sweet & Maxwell, 2004.

APPEAL from a judgment of the Ontario Court of Appeal (Laskin, Borins and Juriansz JJ.A.) (2006), 80 O.R. (3d) 533, 210 O.A.C. 153, 18 B.L.R. (4th) 8, [2006] O.J. No. 1963 (QL), affirming a decision of Macdonald J. (2005), 2 B.L.R. (4th) 151, [2005] O.J. No. 514 (QL). Appeal dismissed.

James C. Orr and *Kenneth A. Dekker*, for the appellants.

Benjamin Zarnett and *Julie Rosenthal*, for the respondents Nadia Jacyk, in her capacity as Litigation Administrator for the estate of Peter Jacyk, Prombank Investment Limited and Prombank International (U.S.A.) Limited.

Andrew J. Macdonald, for the respondents Louis V. Matukas and Gramat Investments (U.S.A.) Limited.

The judgment of the Court was delivered by

THE CHIEF JUSTICE — The appellants claim monies under a joint venture agreement entered into with the respondents for the purpose of holding and developing a property interest near Denver, Colorado. The respondents deny liability. The first issue on the appeal is whether the joint venture agreement is enforceable by the appellants

L'accord de coentreprise constituait un motif juridique de ne pas avoir à rembourser la somme en question, et la forclusion était une conséquence connue et équitable sur le plan procédural du défaut de payer le montant dû. [29-30] [35-36]

Jurisprudence

Arrêts mentionnés : *Paal Wilson & Co. A/S c. Partenreederei Hannah Blumenthal*, [1983] 1 All E.R. 34; *Shelanu Inc. c. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533; *Pettkus c. Becker*, [1980] 2 R.C.S. 834; *Garland c. Consumers' Gas Co.*, [2004] 1 R.C.S. 629, 2004 CSC 25; *Pacific National Investments Ltd. c. Victoria (Ville)*, [2004] 3 R.C.S. 575, 2004 CSC 75.

Doctrine citée

Chitty on Contracts, vol. 1, 29th ed. by H. G. Beale. London : Sweet & Maxwell, 2004.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (les juges Laskin, Borins et Juriansz) (2006), 80 O.R. (3d) 533, 210 O.A.C. 153, 18 B.L.R. (4th) 8, [2006] O.J. No. 1963 (QL), qui a confirmé une décision de la juge Macdonald (2005), 2 B.L.R. (4th) 151, [2005] O.J. No. 514 (QL). Pourvoi rejeté.

James C. Orr et *Kenneth A. Dekker*, pour les appelantes.

Benjamin Zarnett et *Julie Rosenthal*, pour les intimées Nadia Jacyk, en sa qualité d'administratrice à l'instance de la succession de Peter Jacyk, Prombank Investment Limited et Prombank International (U.S.A.) Limited.

Andrew J. Macdonald, pour les intimés Louis V. Matukas et Gramat Investments (U.S.A.) Limited.

Version française du jugement de la Cour rendu par

LA JUGE EN CHEF — Les appelantes demandent le remboursement de la somme versée au titre de l'accord de coentreprise conclu avec les intimés pour détenir et aménager une propriété près de Denver au Colorado. Les intimés nient toute responsabilité. La première question en litige dans le présent pourvoi est de savoir si l'accord de

and, if so, whether the respondents are in breach. The second issue is whether the respondents are required to reimburse the sums advanced by the appellants to acquire and maintain the property.

2 I conclude that the joint venture agreement remained in effect and was not breached by the respondents. The respondents are not liable to the appellants for the monies advanced.

Background

3 Morris Iwasykiw, Peter Jacyk and Louis Matukas were sophisticated businessmen who had known each other for a long time. In 1989, they registered a partnership in Colorado, Tower Centre Partners, to purchase the Denver property from Air Products and Chemicals Inc. ("Air Products"). Part of the purchase price was paid with advances made by the three partners. The balance was secured by a note and a trust deed in favour of Air Products.

4 In 1991, Iwasykiw, Jacyk and Matukas entered into a joint venture agreement to purchase, develop and sell the Denver property, holding the following interests: Jacyk 60 percent; Iwasykiw 30 percent; and Matukas 10 percent. Each of the covenantors brought a corporate party into the joint venture agreement. The Air Products note was due in June 1991. The land was not as saleable as originally thought, and the note was extended. Payments reducing the principal were made consistently until 1995. However, in 1996 Air Products demanded repayment of US$3.8 million, failing which it would commence proceedings to enforce its security under the trust deed. Under the terms of the joint venture agreement, each partner was required to pay its proportionate share of the sum demanded.

5 It emerged that only Jacyk was prepared to meet this demand. Neither Iwasykiw nor Matukas were in a position to harness the funds they needed to pay their respective shares. The parties agreed

coentreprise peut être mis à exécution par les appelantes et, dans l'affirmative, s'il y a manquement de la part des intimés. La deuxième question est de savoir si les intimés sont tenus de rembourser les sommes avancées par les appelantes pour acquérir et conserver la propriété.

Je conclus que l'accord de coentreprise demeurait en vigueur et n'a pas été violé par les intimés. Ces derniers ne sont pas tenus de rembourser aux appelantes les sommes qu'elles ont avancées.

Contexte

Morris Iwasykiw, Peter Jacyk et Louis Matukas étaient des hommes d'affaires avertis qui se connaissaient depuis longtemps. En 1989, ils ont enregistré une société de personnes au Colorado, la Tower Centre Partners, pour acheter la propriété de Denver à Air Products and Chemicals Inc. (« Air Products »). Le prix d'achat a été payé en partie au moyen de sommes avancées par les trois associés. Le solde a été garanti au moyen d'un billet et d'un acte de fiducie en faveur d'Air Products.

En 1991, MM. Iwasykiw, Jacyk et Matukas ont conclu un accord de coentreprise pour l'achat, l'aménagement et la vente de la propriété de Denver. La participation de MM. Jacyk, Iwasykiw et Matukas était respectivement de 60 p. 100, 30 p. 100 et 10 p. 100. Chaque auteur de l'engagement introduisait une personne morale dans l'accord de coentreprise. Le billet d'Air Products arrivait à échéance en juin 1991. Les terrains se sont révélés plus difficiles à vendre qu'on l'avait cru au départ, et la date d'échéance du billet a été prorogée. Il y a eu remboursement systématique du capital jusqu'en 1995. Toutefois, en 1996, Air Products a demandé le remboursement de 3,8 millions $US, faute de quoi elle entamerait des procédures pour réaliser sa garantie aux termes de l'acte de fiducie. L'accord de coentreprise prévoyait que chaque associé devait payer sa part proportionnelle de la somme demandée.

Il s'est avéré que seul M. Jacyk était disposé à accéder à cette demande. Ni M. Iwasykiw ni M. Matukas n'étaient en mesure de rassembler les fonds requis pour payer leurs parts respectives.

that the survival of the joint venture required the note to be paid; otherwise Air Products would foreclose and they would lose their investments. At a June 24, 1996 meeting, Jacyk offered to use one of his companies to avert the crisis precipitated by Air Products' demand. The parties contemplated that Jacyk would advance funds on behalf of the other two to pay off the entire amount of the note. The possibility that Jacyk would purchase the note was also considered, according to Iwasykiw's testimony at discovery that Jacyk was "telling us all the time that he's going to buy the note". On July 20, hearing that Jacyk had gone ahead and purchased the note, Iwasykiw, the trial judge found, recognized Jacyk's purchase of the note as a strategic move benefiting all three parties to the joint venture.

An unresolved issue remained as to what the defaulting parties, Iwasykiw and Matukas, would give in exchange for being bailed out of the crisis. The joint venture agreement contained default provisions, but none of the parties wished to abide by them. Iwasykiw and Matukas felt they were too onerous. Jacyk, for his part, wanted a bigger share of the profits. Matukas, in the end, agreed to Jacyk's terms, including a 35 percent profit participation in favour of Jacyk. Iwasykiw, however, did not want to forego any profits from the project. He indicated that he would find the financing to meet his obligations under the note elsewhere and made an offer, which was not accepted, to give a first mortgage over certain unrelated property and a personal guarantee to Jacyk instead of profit participation. Iwasykiw voiced no objection to Jacyk's purchase of the note. Moreover, despite knowing that foreclosure would occur if the note was not paid, Iwasykiw "took no meaningful steps to raise the money for his share through the many assets that were available to him" ((2005), 2 B.L.R. (4th) 151 (Ont. S.C.J.), at para. 30).

Les parties convenaient que le paiement du billet était nécessaire à la survie de la coentreprise, sinon Air Products procéderait à la forclusion et elles perdraient alors leurs investissements. Lors d'une réunion tenue le 24 juin 1996, M. Jacyk a offert de recourir à l'une de ses sociétés pour conjurer la crise provoquée par la demande d'Air Products. Les parties ont prévu que M. Jacyk avancerait des fonds pour les deux autres afin de payer en entier le montant du billet. La possibilité que M. Jacyk achète le billet a également été envisagée, d'après le témoignage de M. Iwasykiw présenté lors de l'interrogatoire préalable, dans lequel celui-ci a affirmé que M. Jacyk [TRADUCTION] « nous répétait sans cesse qu'il achèterait le billet ». Le 20 juillet, en apprenant que M. Jacyk était allé de l'avant et avait acheté le billet, M. Iwasykiw a, selon la juge de première instance, reconnu que l'achat du billet par M. Jacyk était une stratégie avantageuse pour tous les trois membres de la coentreprise.

Il restait à décider quelle contrepartie les parties défaillantes, MM. Iwasykiw et Matukas, devraient offrir pour qu'on les tire de ce mauvais pas. L'accord de coentreprise contenait des dispositions relatives au défaut de paiement, mais aucune des parties ne voulait se conformer à ces dispositions. Messieurs Iwasykiw et Matukas estimaient qu'elles étaient trop onéreuses. Pour sa part, M. Jacyk réclamait une part plus importante des profits. Monsieur Matukas a finalement accepté les conditions de M. Jacyk, y compris le droit de M. Jacyk à une part de 35 p. 100 des profits. Cependant, M. Iwasykiw ne souhaitait renoncer à aucun profit découlant de la coentreprise. Il a indiqué qu'il trouverait ailleurs les fonds nécessaires pour s'acquitter de ses obligations au titre du billet et il a offert, ce qui a été refusé, de consentir à M. Jacyk une première hypothèque sur un bien n'ayant aucun rapport avec la coentreprise ainsi qu'une garantie personnelle au lieu d'une part des profits. Monsieur Iwasykiw n'a formulé aucune objection à l'achat du billet par M. Jacyk. De plus, même s'il savait qu'il y aurait forclusion si le billet n'était pas payé, M. Iwasykiw [TRADUCTION] « n'a fait aucune démarche sérieuse pour recueillir les fonds nécessaires pour payer sa part au moyen des nombreux éléments d'actif dont il disposait » ((2005), 2 B.L.R. (4th) 151 (C.S.J. Ont.), par. 30).

7 Jacyk's company Prombank Investment Ltd., a non-party to the joint venture agreement, now held the security interest with respect to which Tower Centre Partners was a debtor. Prombank Investment Ltd. indicated in mid-August that it intended to foreclose. When the note fell due, therefore, Iwasykiw faced Prombank foreclosing his interest in the Colorado property unless the obligations under the note were met. By this time, Jacyk had concluded its arrangement with Matukas and Matukas's company Gramat. The same terms were agreed to by Jacyk's other company — the one that was a party to the joint venture agreement. Not believing that Prombank Investment Ltd. would exercise its rights, Iwasykiw took no steps to raise the money required. In fact, Iwasykiw made no attempt to communicate with Jacyk until late September, when he requested a meeting to discuss refinancing his company's (Jedfro Investments Ltd.) obligations under the note. Jacyk refused the request. Prombank Investment Ltd. foreclosed, with the effect that Iwasykiw lost the US$1.4 million he and Jedfro Investments Ltd. had invested in the joint venture. Iwasykiw appeared at the foreclosure proceedings in Colorado but was by that point unable to prevent it from happening.

La société Prombank Investment Ltd. de M. Jacyk, qui n'était pas partie à l'accord de coentreprise, détenait désormais la garantie dont Tower Centre Partners était débitrice. Prombank Investment Ltd. a indiqué à la mi-août qu'elle comptait procéder à la forclusion. Par conséquent, lorsque le billet est arrivé à échéance, M. Iwasykiw risquait de voir Prombank Investment Ltd. forclore sa participation dans la propriété du Colorado, à moins qu'il ne s'acquitte de ses obligations au titre du billet. Monsieur Jacyk avait alors déjà conclu son entente avec M. Matukas et sa société Gramat. L'autre société de M. Jacyk, celle qui était partie à l'accord de coentreprise, a accepté les mêmes conditions. Croyant que Prombank Investment Ltd. n'exercerait pas ses droits, M. Iwasykiw n'a rien fait pour recueillir les sommes requises. En fait, M. Iwasykiw n'a tenté de communiquer avec M. Jacyk qu'à la fin septembre, lorsqu'il a sollicité une rencontre pour discuter du refinancement de la dette de sa société (Jedfro Investments Ltd.) au titre du billet. Monsieur Jacyk a refusé de le rencontrer. Prombank Investment Ltd. a procédé à la forclusion, de sorte que M. Iwasykiw a perdu la somme de 1,4 million $US que lui-même et Jedfro Investments Ltd. avaient investie dans la coentreprise. Monsieur Iwasykiw a comparu dans le cadre de l'action en forclusion intentée au Colorado, mais il n'était plus en mesure d'empêcher la forclusion.

8 Iwasykiw and Jedfro Investments Ltd. sued Jacyk, Matukas and their companies for breach of the joint venture agreement and related relief. Jacyk and Matukas launched counterclaims. Jacyk and Iwasykiw both died between discovery and trial, but their estates carried on the litigation.

Monsieur Iwasykiw et Jedfro Investments Ltd. ont poursuivi MM. Jacyk et Matukas ainsi que leurs sociétés pour violation de l'accord de coentreprise et ont demandé réparation. Messieurs Jacyk et Matukas ont déposé des demandes reconventionnelles. Messieurs Jacyk et Iwasykiw sont décédés entre l'interrogatoire préalable et le procès, mais leurs successions ont pris la relève.

9 The trial judge dismissed the action, holding that none of the parties had relied upon the provisions of the joint venture agreement. In her view, by failing to make a deal with Jacyk, unlike Matukas, Iwasykiw was the author of his own misfortune. He knew the consequences of the foreclosure but did not take steps to preserve his interest despite his ability to do so. The trial judge found that it was not reasonable under the circumstances for Iwasykiw,

La juge de première instance a rejeté l'action, concluant qu'aucune des parties n'avait invoqué les dispositions de l'accord de coentreprise. Elle a estimé que, en omettant de s'entendre avec M. Jacyk comme l'avait fait M. Matukas, M. Iwasykiw avait été l'artisan de son propre malheur. Il connaissait les conséquences de la forclusion, mais il n'a rien fait pour protéger sa participation malgré sa capacité de le faire. Selon la juge de première instance,

having reached no agreement with Jacyk, to think his interest in the joint venture lands was protected.

The Court of Appeal for Ontario dismissed the appeal ((2006), 80 O.R. (3d) 533). It agreed that none of the parties, faced with the crisis precipitated by the calling of the loan, had relied on the joint venture agreement. Pursuing a strategy of self-interest, Iwasykiw and Jedfro Investments Ltd. had failed to object to the plan to foreclose on their interest. Laskin J.A., for the court, stated that when parties act in a way that shows they do not intend to comply with or be bound by the terms of their written agreement, one party cannot later ask to have the agreement enforced for its benefit.

Iwasykiw's estate and Jedfro Investments Ltd. now appeal to this Court.

Analysis

Can the appellants sue on the joint venture agreement? There is no doubt that the agreement was a valid contract. The question is whether it has been discharged or, failing this, whether it is unenforceable for some other reason.

The appellants' position is that the joint venture agreement was never terminated and remains on foot. They submit that negotiations do not terminate an agreement, unless the negotiations result in a new agreement. In this case, they argue, the parties never got beyond the stage of attempting to negotiate a new agreement, and therefore the joint venture agreement remains in force.

The ways in which a contract can be discharged are well established. It may be discharged by performance, by agreement, by frustration, and by repudiatory or fundamental breach. In addition to these major categories, it is possible to end a contract by merger, alteration or cancellation of

il n'était pas raisonnable dans les circonstances, que, après avoir omis de s'entendre avec M. Jacyk, M. Iwasykiw croie que sa participation dans les terrains de la coentreprise était protégée.

10 La Cour d'appel de l'Ontario a rejeté l'appel ((2006), 80 O.R. (3d) 533). Elle était d'accord pour dire qu'aucune des parties n'avait invoqué l'accord de coentreprise lors de la crise provoquée par la demande de remboursement du prêt. Toujours mûs par leur intérêt personnel, M. Iwasykiw et Jedfro Investments Ltd. ne se sont pas objectés au projet de forclusion de leur participation. Le juge Laskin a affirmé, au nom de la Cour d'appel, que, lorsque des parties adoptent un comportement démontrant qu'elles ne comptent pas se conformer ou être assujetties aux modalités de l'accord écrit qu'elles ont signé, l'une d'elles ne peut pas, par la suite, demander que l'accord soit exécuté à son profit.

11 La succession de M. Iwasykiw et Jedfro Investments Ltd. se pourvoient maintenant devant notre Cour.

Analyse

12 Les appelantes peuvent-elles intenter une action fondée sur l'accord de coentreprise? Il n'y a aucun doute que cet accord était un contrat valide. Il s'agit uniquement de savoir si on y a mis fin ou, dans le cas contraire, s'il est non susceptible d'être mis à exécution pour quelque autre raison.

13 Les appelantes soutiennent que l'accord de coentreprise n'a jamais été résilié et qu'il tient toujours. Elles font valoir que des négociations ne mettent fin à un accord que si elles aboutissent à un nouvel accord. Selon les appelantes, les parties en l'espèce n'ont jamais fait plus que tenter de négocier un nouvel accord et, par conséquent, l'accord de coentreprise demeure en vigueur.

14 Les façons de mettre fin à un contrat sont bien établies : l'exécution, le consentement des parties, l'impossibilité d'exécution et la rupture répudiatoire ou fondamentale. À ces principales catégories, on peut ajouter la fusion, la modification ou l'annulation d'un instrument, ainsi que des circonstances

a written instrument, and in particular circumstances not relevant here, such as by the death of a party (in the case of a personal contract), bankruptcy and winding up. (See *Chitty on Contracts* (29th ed. 2004), ch. 21 to 25.)

15 The contract here at issue was clearly not discharged by performance. Nor was it frustrated. This leaves discharge by agreement or by repudiatory breach. Applied to the facts of this case, both these modes of discharge present problems.

16 Discharge by agreement is problematic because, as the appellants point out, the negotiations between the parties never culminated in a new agreement. In order to discharge the joint venture agreement, a new agreement that it be terminated must be established. The facts as found by the trial judge do not support the conclusion that the parties had reached a new agreement to terminate the joint venture agreement. The trial judge found that both parties acted as if they were not bound by the joint venture agreement. They ignored it, or parts of it, as they saw fit. But this does not establish a new contract to terminate the old contract. To establish a new agreement it must be shown that there was an offer by one party, accepted by the other, or an exchange of promises, supported by consideration. There must be a meeting of the minds on the essential terms — in this case the ending of the joint venture agreement. There is no evidence that the parties ever arrived at a concluded agreement to end the joint venture agreement. What happened was that one party, Jacyk, bought the note that had precipitated the crisis and then tried to negotiate the terms under which he assumed the obligations of the others. He concluded a new agreement with Matukas. But no new agreement was ever concluded with Iwasykiw.

17 It is suggested that if both parties are found to have abandoned a contract, that will terminate it.

particulières non pertinentes en l'espèce, comme le décès d'une partie (dans le cas d'un contrat personnel), la faillite et la liquidation. (Voir *Chitty on Contracts* (29e éd. 2004), ch. 21 à 25.)

Il est évident, en l'espèce, que le contrat n'a pas pris fin parce qu'il avait été exécuté ou parce qu'il était impossible de l'exécuter. Il reste la possibilité qu'il ait pris fin avec le consentement des parties ou à cause d'une rupture répudiatoire. Ces deux façons de mettre fin à un contrat posent des problèmes lorsqu'ils sont appliqués aux faits de la présente affaire.

La possibilité que l'accord ait pris fin avec le consentement des parties fait problème parce que, comme les appelantes l'ont souligné, les négociations entre les parties n'ont jamais abouti à un nouvel accord. Pour mettre fin à l'accord de coentreprise, il faut le résilier au moyen d'un nouvel accord. Les faits constatés par la juge de première instance ne permettent pas de conclure que les parties l'avaient résilié au moyen d'un nouvel accord. La juge de première instance a décidé que les deux parties s'étaient comportées comme si elles n'étaient pas liées par l'accord de coentreprise. Elles n'ont pas jugé bon de tenir compte de cet accord ou de certaines parties de celui-ci. Toutefois, cela ne prouve pas l'existence d'un nouveau contrat résiliant l'ancien contrat. Pour établir l'existence d'un nouvel accord, il faut démontrer qu'une partie a présenté une offre qui a été acceptée par l'autre partie, ou qu'il y a eu échange de promesses avec contrepartie. Il doit y avoir accord des volontés sur les modalités essentielles, à savoir en l'espèce la fin de l'accord de coentreprise. Rien ne prouve que les parties aient jamais conclu un accord mettant fin à l'accord de coentreprise. Ce qui s'est produit, c'est qu'une partie, M. Jacyk, a acheté le billet à l'origine de la crise, pour ensuite tenter de négocier les conditions auxquelles il assumerait les obligations des autres parties. Monsieur Jacyk a conclu un nouvel accord avec M. Matukas. Toutefois, aucun nouvel accord n'a jamais été conclu avec M. Iwasykiw.

On laisse entendre qu'un contrat est résilié si on juge que les deux parties y ont renoncé. Cependant,

However, abandonment discharges a contract only if it amounts to a new contract in which the parties agree to abandon the old one. As Lord Diplock stated in *Paal Wilson & Co. A/S v. Partenreederei Hannah Blumenthal*, [1983] 1 All E.R. 34 (H.L.), at pp. 48-49:

> To the formation of the contract of abandonment, the ordinary principles of the English law of contract apply. To create a contract by exchange of promises between two parties where the promise of each party constitutes the consideration for the promise of the other what is necessary is that the intention of each *as it has been communicated to and understood by the other* (even though that which has been communicated does not represent the actual state of mind of the communicator) should coincide. That is what English lawyers mean when they resort to the latin phrase consensus ad idem and the words that I have italicised are essential to the concept of consensus ad idem, the lack of which prevents the formation of a binding contract in English law.

While both the trial and appeal courts referred saliently to the intention of the parties not to be bound by the joint venture agreement after the crisis precipitated by Air Products' call for payment, the Court of Appeal *per* Laskin J.A. expressed the view that the principles in *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533 (C.A.), meant the parties' obligations under the contract had come to an end.

The facts, however, do not support a finding of the consensus necessary for a new contract, as discussed above. Therefore the finding of the trial judge that none of the parties acted as though they were bound by the joint venture agreement after the note was called does not end the obligations under that agreement.

It is also difficult to see how the doctrine of repudiation assists on the facts here. A contract may be said to be repudiated when one party acts in a way that evinces an intent to no longer be bound by the contract. The other party then may, at its option, elect to terminate the contract.

la renonciation ne met fin à un contrat que si elle constitue un nouveau contrat dans lequel les parties conviennent de renoncer à l'ancien contrat. Comme l'a affirmé lord Diplock dans l'arrêt *Paal Wilson & Co. A/S c. Partenreederei Hannah Blumenthal*, [1983] 1 All E.R. 34 (H.L.), p. 48-49 :

> [TRADUCTION] Les principes ordinaires du droit anglais des contrats s'appliquent à la formation du contrat de renonciation. Pour qu'un contrat soit formé par l'échange de promesses entre deux parties, la promesse de l'une tenant lieu de contrepartie à celle de l'autre, il doit y avoir accord des volontés *exprimées et comprises par les parties* (même si la volonté exprimée ne traduit pas l'état d'esprit réel de la partie qui l'exprime). Voilà ce qu'entendent les avocats anglais par l'expression latine consensus ad idem, et les termes que j'ai mis en italique sont essentiels à cette notion, faute de quoi il ne peut y avoir formation d'un contrat ayant force obligatoire en droit anglais.

18 Bien que les tribunaux de première instance et d'appel aient surtout mentionné l'intention des parties de ne pas être liées par l'accord de coentreprise à la suite de la crise provoquée par la demande de remboursement de prêt présentée par Air Products, la Cour d'appel, sous la plume du juge Laskin, a exprimé l'avis que, suivant les principes de l'arrêt *Shelanu Inc. c. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533 (C.A.), les obligations contractuelles des parties étaient éteintes.

19 Toutefois, comme nous l'avons vu, les faits ne permettent pas de conclure à l'existence du consensus nécessaire à la formation d'un nouveau contrat. Par conséquent, la conclusion de la juge de première instance voulant qu'aucune des parties ne se soit comportée comme si elle était liée par l'accord de coentreprise après la demande de remboursement du billet n'éteint pas les obligations découlant de cet accord.

20 Il est également difficile de voir en quoi le principe de la répudiation peut être utile à la lumière des faits de la présente affaire. On peut affirmer qu'il y a répudiation d'un contrat lorsqu'une partie adopte un comportement qui traduit son intention de ne plus être liée par ce contrat. L'autre partie peut alors, à sa discrétion, choisir de résilier le contrat.

21 It is submitted that Iwasykiw's failure to pay his share of the debt (US$900,000) when the note was called constituted repudiation of the contract. However, it is questionable whether this failure to pay constituted repudiation. In the context of the present case, Iwasykiw's refusal to pay does not amount to an intention to no longer be bound by the contract. Although Iwasykiw could not or did not wish to comply with his obligations regarding the note, the evidence demonstrates that he nevertheless wanted to keep the joint venture agreement on foot. The trial judge, to be sure, stated that the parties "had little regard for the terms of the [joint venture agreement]" (para. 39). However, having "little regard" for an agreement does not establish that a party is repudiating the agreement. Ordinary, non-repudiatory breach is consistent with ignoring the terms of an agreement. More is required to establish repudiation. In view of the evidence, I do not find it necessary to deal with the argument that, because the joint venture contemplated the result of non-payment, failure to pay did not constitute repudiation.

On fait valoir que, en ne payant pas sa part de la dette (900 000 $US) au moment de la demande de remboursement du billet, M. Iwasykiw a répudié le contrat. Toutefois, il n'est pas certain que ce défaut de paiement constituait une répudiation. Dans le contexte de la présente affaire, le refus de payer de M. Iwasykiw ne constitue pas une intention de ne plus être lié par le contrat. Même si M. Iwasykiw ne pouvait ou ne voulait pas respecter ses obligations concernant le billet, la preuve démontre qu'il tenait quand même à ce que l'accord de coentreprise demeure en vigueur. Certes, la juge de première instance a affirmé que les parties [TRADUCTION] « avaient fait peu de cas des modalités de [l'accord de coentreprise] » (par. 39). Toutefois, le fait de faire « peu de cas » d'un accord ne prouve pas qu'une partie répudie cet accord. La rupture non-répudiatoire ordinaire peut laisser croire que l'on a fait abstraction des modalités d'un accord. Il faut quelque chose de plus pour établir la répudiation. Compte tenu de la preuve, je ne juge pas nécessaire d'examiner l'argument selon lequel, parce que l'accord de coentreprise prévoyait le résultat d'un non-paiement, le défaut de paiement ne constituait pas une répudiation.

22 If one could draw from this problematic evidence the conclusion that Iwasykiw's failure to pay his share of the note constituted repudiation of the contract, it would be necessary to establish that Jacyk and Matukas elected to treat this breach as ending the joint venture agreement. This is not clear. Jacyk did not advise Iwasykiw that he was treating the joint venture agreement as at an end because of his failure to pay the US$900,000. Rather, he continued to ask for new terms to reflect the fact that he had bought the loan and saved the joint venture.

Pour pouvoir conclure de cette preuve problématique que le défaut de M. Iwasykiw de payer sa part du billet constituait une répudiation du contrat, il faudrait établir que MM. Jacyk et Matukas ont choisi de considérer que ce manquement mettait fin à l'accord de coentreprise, ce qui n'est pas clair. Monsieur Jacyk n'a pas avisé M. Iwasykiw qu'il considérait que le défaut de ce dernier de verser la somme de 900 000 $US mettait fin à l'accord de coentreprise. Il a plutôt continué de solliciter de nouvelles modalités qui reflèteraient le fait qu'il avait acheté le prêt et sauvé la coentreprise.

23 In summary, none of the ways in which a contract can be discharged is established on the facts in this case. I therefore conclude that it has not been established that the joint venture agreement came to an end. We must therefore proceed on the basis that the joint venture agreement was not terminated and remained in force.

En résumé, les faits de la présente affaire ne démontrent pas qu'il a été mis fin au contrat de l'une ou l'autre des façons qui permettent de le faire. Je conclus donc qu'il n'a pas été établi que l'accord de coentreprise a pris fin. Nous devons donc tenir pour acquis que l'accord de coentreprise n'était pas résilié et demeurait en vigueur.

This brings us to the appellants' principal contention: that the respondents, and in particular Jacyk, breached the joint venture agreement. The appellants argue that Jacyk was bound by s. 4.02(a) to advance funds on behalf of the defaulting parties and, if they failed to repay their debts, to buy out their interests pursuant to s. 7.05. However, s. 4.02(a) of the agreement provided only a right to a non-defaulting party to advance funds on behalf of a defaulting party and eventually, should the party in default fail to repay those funds, to buy out that party's interest. Section 4.02(a) did not oblige Jacyk to do anything. In fact, Jacyk did not advance funds under s. 4.02(a). He did something different — which any third party could have done — namely, to purchase Air Products' note. Therefore, it cannot be said that s. 4.02(a) was breached.

The appellants' argument that s. 8.03 of the agreement was breached also fails. Section 8.03 required the consent of all three members of the joint venture in order to make decisions or take actions relating to the joint venture project or affecting the joint venture lands. The appellants contend that Jacyk's purchase of Air Products' note constituted a decision or action in relation to the joint venture or affecting the joint venture lands. They further contend that in any event Jacyk's foreclosure on the joint venture property falls within this clause. On both or either of these grounds, the appellants assert that the respondents are in breach of the joint venture agreement.

It is questionable whether the assignment of the note or the foreclosure could constitute a breach of this provision, considering that Prombank Investment Ltd. merely assumed the position Air Products had previously occupied as a creditor to the joint venture. In any case, s. 4.02(d) of the agreement removed the s. 8.03 consent requirement under circumstances such as those arising here. Section 4.02(d) provided that when a member was in default of its obligations, the non-defaulting member would be authorized to make decisions and take actions relating to the joint venture

Cela nous amène à l'argument principal des appelantes voulant que les intimés, et en particulier M. Jacyk, aient violé l'accord de coentreprise. Les appelantes font valoir que M. Jacyk était tenu, en vertu de la clause 4.02a), d'avancer des fonds pour les parties défaillantes et, si celles-ci ne remboursaient pas leur dette, de racheter leurs participations conformément à la clause 7.05. Cependant, la clause 4.02a) de l'accord ne faisait qu'accorder à une partie non défaillante le droit d'avancer des fonds pour une partie défaillante et, en fin de compte, de racheter la participation de la partie défaillante si jamais elle ne remboursait pas ces fonds. La clause 4.02a) n'obligeait pas M. Jacyk à faire quoi que ce soit. En fait, M. Jacyk n'a pas avancé de fonds en application de la clause 4.02a). Il a posé un autre geste — que tout tiers aurait pu poser — à savoir, il a acheté le billet d'Air Products. On ne saurait donc affirmer que la clause 4.02a) a été enfreinte.

L'argument des appelantes selon lequel la clause 8.03 de l'accord a été enfreinte ne tient pas non plus. La clause 8.03 exigeait le consentement de tous les trois membres de la coentreprise pour prendre des décisions ou des mesures concernant la coentreprise ou touchant les terrains de la coentreprise. Les appelantes prétendent que l'achat par M. Jacyk du billet d'Air Products constituait une décision ou mesure concernant la coentreprise ou touchant les terrains de la coentreprise. Elles ajoutent que, de toute façon, la forclusion de la propriété de la coentreprise par M. Jacyk relève de cette clause. Pour l'un ou l'autre de ces motifs ou les deux à la fois, les appelantes affirment que les intimés violent l'accord de coentreprise.

Il n'est pas certain que la cession du billet ou la forclusion pourrait constituer une violation de cette disposition, compte tenu du fait que Prombank Investment Ltd. ne faisait que se substituer à Air Products en tant que créancière de la coentreprise. De toute façon, la clause 4.02d) de l'accord supprimait l'exigence de consentement prévue à la clause 8.03 dans des circonstances comme celles qui existent en l'espèce. La clause 4.02d) prévoyait que, si un membre manquait à ses obligations, le membre non défaillant serait autorisé à prendre des décisions et des mesures concernant la coentreprise sans qu'il

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without requiring the approval or consent of the member in default. Having put Iwasykiw and Matukas on notice that they were in default of their obligations on the note, Jacyk was entitled, as the only non-defaulting member, to act unilaterally to avoid foreclosure by Air Products.

27 For the same reasons, I cannot accept the argument that Jacyk's foreclosure constituted a breach of the joint venture agreement. Jacyk was simply exercising his legal rights under the note that had been assigned to him. In any event, the appellants' failure to pay the US$900,000 owing on the note brought s. 4.02(d) into play, removing the need for consent.

28 I conclude that while the parties may have ignored the joint venture agreement, the obligations under it remained in effect and were not breached by the respondents.

29 The appellants assert that, in any event, they should receive the return of their initial investment in the joint venture of US$1.4 million. I do not agree. These monies were formally forfeited by the foreclosure by Prombank Investment Ltd. on the note and trust deed it bought from Air Products. Air Products had the right to foreclose on the joint venture if the joint venture defaulted on the note. Prombank, having bought the note and trust deed, stood in Air Products' shoes. Iwasykiw failed to meet his liability under the note. Prombank advised it would foreclose. Iwasykiw did nothing, except belatedly ask for a meeting with Jacyk. The foreclosure took place. At this point, Iwasykiw's interest in the joint venture was terminated. Under the principles of mortgage law, he lost his investment. As the trial judge put it, he gambled that Jacyk would not foreclose, and he lost. I see no legal basis upon which this Court could revive that interest and hold that the respondents must return that investment.

soit nécessaire d'obtenir l'approbation ou le consentement du membre défaillant. Ayant avisé MM. Iwasykiw et Matukas qu'ils manquaient à leurs obligations au titre du billet, M. Jacyk avait le droit, en tant que seul membre non défaillant, d'agir unilatéralement pour éviter la forclusion par Air Products.

Pour les mêmes raisons, je ne puis retenir l'argument selon lequel la forclusion par M. Jacyk constituait une violation de l'accord de coentreprise. Monsieur Jacyk ne faisait qu'exercer les droits que la loi lui reconnaissait au titre du billet qui lui avait été cédé. En tout état de cause, le défaut des appelantes de verser la somme de 900 000 $US due au titre du billet faisait intervenir la clause 4.02d), ce qui avait pour effet de supprimer le besoin de consentement.

Je conclus que, même s'il se peut que les parties n'aient pas tenu compte de l'accord de coentreprise, les obligations qui découlaient de cet accord s'appliquaient toujours et n'ont fait l'objet d'aucun manquement de la part des intimés.

Les appelantes prétendent que, de toute façon, elles devraient obtenir le remboursement de leur investissement initial de 1,4 million $US dans la coentreprise. Je ne suis pas de cet avis. Cette somme a été formellement confisquée lors de la forclusion par Prombank Investment Ltd. du billet et de l'acte de fiducie qu'elle avait achetés à Air Products. Air Products avait le droit de soumettre la coentreprise à la forclusion en cas de défaut de paiement du billet de la part de cette dernière. Après avoir acheté le billet et l'acte de fiducie, Prombank Investment Ltd. prenait la place d'Air Products. Monsieur Iwasykiw ne s'est pas acquitté de la responsabilité qui lui incombait en vertu du billet. Prombank Investment Ltd. a prévenu qu'elle procéderait à la forclusion. Monsieur Iwasykiw s'est contenté de solliciter tardivement une rencontre avec M. Jacyk. Il y a eu forclusion, ce qui a mis fin à la participation de M. Iwasykiw dans la coentreprise. Suivant les principes du droit hypothécaire, M. Iwasykiw a perdu son investissement. Comme la juge de première instance l'a dit, il a parié que M. Jacyk ne procéderait pas à la forclusion et il a perdu son pari. À mon avis, aucun fondement juridique ne permet à notre Cour de rétablir cette participation et de conclure que les intimés doivent rembourser l'investissement en cause.

In the alternative, the appellants submit that this money should be returned on the basis of unjust enrichment. A finding of unjust enrichment has three requirements: an enrichment, a corresponding deprivation and an absence of any juristic reason for the enrichment. The fact that a party's actions have benefited another is not enough; it must also be "evident that the retention of the benefit would be 'unjust' in the circumstances of the case": *Pettkus v. Becker*, [1980] 2 S.C.R. 834, at p. 848, *per* Dickson J. (as he then was).

The first two requirements of unjust enrichment are present in the case at bar. The respondents enjoyed the benefit of the appellants' investment money and the appellants suffered an uncompensated loss of those funds when the foreclosure occurred.

With respect to the third requirement, the appellants must show that the facts do not fall within one of the "established categories" of juristic reason, such as contract or "other valid common law, equitable or statutory obligations": *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, 2004 SCC 25, at para. 44.

The respondent Jacyk submits that the operation of the joint venture agreement provides a juristic reason why the US$1.4 million is not repayable to the appellants. The parties voluntarily contracted to invest money for the purpose of acquiring and maintaining the property, without providing for any right to have the money repaid under the circumstances that eventually arose.

The respondent's position is supported by the general rule "that it is not the function of the court to rewrite a contract for the parties. Nor is it their role to relieve one of the parties against the consequences of an improvident contract": *Pacific National Investments Ltd. v. Victoria (City)*, [2004] 3 S.C.R. 575, 2004 SCC 75, at para. 31.

The foreclosure proceedings may also provide a juristic reason for the enrichment. It was

30 Subsidiairement, les appelantes soutiennent que cette somme devrait faire l'objet d'un remboursement fondé sur l'enrichissement sans cause. Trois conditions doivent être remplies pour que l'on puisse conclure à l'enrichissement sans cause : un enrichissement, un appauvrissement correspondant et l'absence de motif juridique justifiant l'enrichissement. Il ne suffit pas que les actes d'une partie aient procuré un avantage à une autre partie; il doit aussi être « évident [. . .] que la rétention de l'avantage serait "injuste" dans les circonstances de l'affaire » : *Pettkus c. Becker*, [1980] 2 R.C.S. 834, p. 848, le juge Dickson (plus tard Juge en chef).

31 Les deux premières conditions requises pour qu'il y ait enrichissement sans cause sont remplies en l'espèce. Les intimés ont bénéficié de la somme investie par les appelantes, qui ont perdu cette somme, sans être indemnisées, lorsqu'il y a eu forclusion.

32 Quant à la troisième condition, les appelantes doivent démontrer que les faits n'entrent dans aucune des « catégories établies » de motifs juridiques, comme le contrat ou les « autres obligations valides imposées par la common law, l'equity ou la loi » : *Garland c. Consumers' Gas Co.*, [2004] 1 R.C.S. 629, 2004 CSC 25, par. 44.

33 L'intimé Jacyk soutient que l'application de l'accord de coentreprise constitue un motif juridique de ne pas rembourser la somme de 1,4 million $US aux appelantes. Les parties se sont volontairement engagées par contrat à investir de l'argent pour acquérir et conserver la propriété, sans prévoir aucun droit au remboursement de cet argent dans les circonstances qui sont finalement survenues.

34 Le point de vue de l'intimé est étayé par la règle générale selon laquelle « il n'appartient [. . .] pas au tribunal de réécrire le contrat à la place des parties ni de soustraire l'une d'elles aux conséquences d'un engagement pris à la légère » : *Pacific National Investments Ltd. c. Victoria (Ville)*, [2004] 3 R.C.S. 575, 2004 CSC 75, par. 31.

35 L'action en forclusion pourrait également constituer un motif juridique d'enrichissement. C'est

the operation of the statutory regime surrounding foreclosures that led to the appellants' "deprivation". The foreclosure proceedings were a known and procedurally fair consequence of not paying the amount due. The appellants chose not to pay and suffered the consequence the law prescribed — foreclosure of their interest. They cannot now seek a return of the money on the basis of unjust enrichment.

36 I conclude that the doctrine of unjust enrichment does not apply and that the appellants are not entitled to the return of their initial investment.

37 For these reasons, I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: Affleck Greene Orr, Toronto.

Solicitors for the respondents Nadia Jacyk, in her capacity as Litigation Administrator for the estate of Peter Jacyk, Prombank Investment Limited and Prombank International (U.S.A.) Limited: Goodmans, Toronto.

Solicitors for the respondents Louis V. Matukas and Gramat Investments (U.S.A.) Limited: Markson Macdonald, Toronto.

l'application du régime législatif encadrant les forclusions qui a entraîné l'« appauvrissement » des appelantes. L'action en forclusion était une conséquence connue et équitable sur le plan procédural du défaut de payer le montant dû. Les appelantes ont choisi de ne pas payer et ont subi les conséquences prévues par la loi, à savoir la forclusion de leur participation. Elles ne peuvent pas maintenant solliciter le remboursement de cette somme en invoquant l'enrichissement sans cause.

Je conclus que le principe de l'enrichissement sans cause ne s'applique pas et que les appelantes n'ont pas droit au remboursement de leur investissement initial.

Pour ces motifs, je suis d'avis de rejeter le pourvoi avec dépens.

Pourvoi rejeté avec dépens.

Procureurs des appelantes : Affleck Greene Orr, Toronto.

Procureurs des intimées Nadia Jacyk, en sa qualité d'administratrice à l'instance de la succession de Peter Jacyk, Prombank Investment Limited et Prombank International (U.S.A.) Limited : Goodmans, Toronto.

Procureurs des intimés Louis V. Matukas et Gramat Investments (U.S.A.) Limited : Markson Macdonald, Toronto.

TAB6

Court of Queen's Bench of Alberta

Citation: Allarco Entertainment Inc. (Re), 2009 ABQB 503

Date: 20090914
Docket: 0903 09146
Registry: Edmonton

In the Matter of The *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

And in the Matter of Allarco Entertainment Inc. and Allarco Entertainment 2008 Inc. and Alliance Films Inc.

Memorandum of Decision of the Honourable Madam Justice J.B. Veit

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Summary

[1] On June 16, 2009, the Allarco Entertainment companies, which operate Super Channel - a pay-per-view television channel - obtained protection from their creditors pursuant to the provisions of the *Companies' Creditors Arrangement Act*. As part of the initial, *ex parte*, order under the statute, Allarco Entertainment obtained a "pay-per-play" regime in relation to its obligations to Alliance Films Inc., a program supplier. Alliance Films now applies for a variation of the initial order: it argues that the court had no jurisdiction to grant what amounts to a major, unilateral, variation of its contracts with Allarco Entertainment. For an overall fee which was to be paid in instalments, the Alliance contracts allowed Allarco Entertainment to exhibit films and television series, including the right to exhibit through subscription video on demand, for a limited number of times over a specific time period. Alliance asserts that the contract fees are paid for the ongoing right to exhibit the films or series episodes, that there is no "pay-per-play" provision in the contracts, and that the courts should not have imposed such a variation on Alliance.

[2] Alternatively, Alliance argues that if the court does have jurisdiction to approve such contract variations, the court should not have exercised its discretion in favour of this variation because a "pay-per-play" regime constitutes a negative incentive on the debtor, Allarco Entertainment, to use the service provided by Alliance.

[3] Alliance Films Inc. brought this motion in July, 2009. The court adjourned the motion on the condition that Allarco Entertainment negotiate in good faith with Alliance. The resulting negotiations were unsuccessful. On August 17, 2009, Allarco Entertainment terminated its contracts with Alliance Films. In its amended motion, in addition to asking for a variation in relation to the "pay-per-play" term in the initial order, Alliance also now asks the court to invalidate Allarco Entertainment's terminations.

[4] *In its initial order, even if the court did have jurisdiction to vary the Allarco Entertainment/Alliance Film contracts by establishing a different payment structure than the one set out in the contracts, it should not have done so: a post-protection service provider usually has the right to maintain its contract prices.*

[5] The CCAA states that where, under licence agreements, a contractor provides new services to a debtor who has obtained creditor protection, that service provider is entitled to "immediate payment"; this is compared to the provider who provided services prior to the granting of creditor protection, whose right to enforce payment is stayed. The CCAA does not state the basis on which compensation is to be paid for post-protection services. Allarco Entertainment argues that the basis for compensation should be "what is just and reasonable"; here, the debtor claims that a "pay-per-play" payment scheme is fair because it will get rid of instalment payments to Alliance, the payment of which will hinder Allarco Entertainment's ability to re-organize. Alliance Films argues that, at this stage of the CCAA proceedings, the court does not have the right to make unilateral contract changes. At this stage of the proceedings, the broad wording of the CCAA, which is remedial legislation, does allow the courts to make some contracts between debtors and creditors: for example, with respect to utilities such as electricity, the court can allow the service provider to be paid not only the usual utility rate but also a security deposit: ***Hydro-Québec.*** Another example is the court's decision that some contract provisions relate to past services, and cannot therefore be enforced, and that other contract provisions relate to post-protection services for which the debtor incurs an obligation of immediate payment: ***Nortel***. These are examples of the limited way in which the courts have jurisdiction to vary contracts in an initial order under CCAA proceedings. It is not necessary to articulate the principle which applies to the jurisdiction of the court in relation to contracts, s. 11.3(a) of the CCAA, and initial orders, but if that were required, it may be that, in the initial order courts have only a limited jurisdiction to affect contractual rights and that contractual payment terms negotiated between debtors and creditors generally represent the payments which debtors are required to make if they use the services set out in those contracts post-protection as that scale of payment best represents both a fair and reasonable price for the services and business in the ordinary course. This principle arises from the common law's respect for contractual obligations. Generally, contracts cannot be varied by courts: contracts represent, in effect, a law which private parties have agreed applies to them. Court can interpret or rectify, but not vary, contracts. Even courts of equity generally limited themselves to deciding

which contracts, or portions of contracts, would not be enforced by the justice system. Legislation could, of course, give to the courts the jurisdiction to vary or create contracts; however, given the clear state of the common law on this issue, explicit statutory provisions would be required to give courts a general jurisdiction to vary contracts. Such explicit authority is not given to courts in the CCAA at this stage of proceedings. The court's only authority in the situation here was to distinguish between those portions of the Alliance contracts which represent services that have already been performed, the enforcement of which is stayed, and those portions which deal with the provision of ongoing services, the payment for which Allarco Entertainment was required to make according to the contract if it wished to continue using Alliance's services.

[6] *Allarco Entertainment is, however, entitled to terminate its contracts with Alliance Films.*

[7] After the issuance of the initial order, Allarco Entertainment negotiated with Alliance in good faith. The granting of protection from creditors is designed to promote such negotiations. Alliance is not required to continue to provide services to Allarco Entertainment post-protection; on the other hand, Allarco Entertainment is entitled to terminate contracts. The court does have a general oversight jurisdiction to determine if the termination of a contract by a debtor is just and reasonable. On this motion, Allarco Entertainment has satisfied that test: among other important aspects of the statutory test, the evidence establishes that, during the negotiations, Alliance Films was attempting to obtain a security status for its contracts which did not exist in its original contracts. Granting new security to Alliance post-protection would have given Alliance an advantage over other Allarco Entertainment creditors. Allarco Entertainment was in fact prevented from acceding to these attempts by Alliance Films.

Cases and authority cited

[8] **By Alliance Film:** ***Thomson Knitting Inc., Re*** (1925), 1925 CarswellOnt 5 (Ont. S.C. in Bankruptcy, App. Div.) citing ***William Hamilton Mfg. Co. v. Hamilton Steel and Iron Co.*** (1911), 23 O.L.R. 270; ***Doman Industries Ltd., Re*** (2003), 2003 CarswellBC 538 (B.C.S.C.); ***Skeena Cellulose Inc., Re*** (2003), 2003 CarswellBC 1399 (B.C.C.A); ***Doman Industries Ltd., Re***, 2004 CarswellBC 1545 (B.C.C.A In Chambers); ***T. Eaton Co., Re*** (1999), 1999 CarswellOnt 3542 (Ont. S.C.J. [Commercial List]) citing ***Keddy Motor Inns Ltd., Re*** (1992), 13 C.B.R. (3d) 245 (N.S.C.A.); ***Doman Industries Ltd., Re*** 2004 CarswellBC 1262 (B.C.S.C.); ***Companies Creditors' Arrangement Act,*** R.S.C. 1985, c. C-36, as amended, s. 11.3; ***Stelco Inc., (Re)*** 2005 CarswellOnt 1537 (C.A.); ***In Re Enron Corp.*** 279 B.R. 695 (N.Y. Bankr. Gonzalez 2002); ***In Re Kmart Corporation*** 293 B.R. 905; ***In Re Thatcher Glass Corporation*** 59 B.R. 797 at 6 (Banker D. Conn. 1986).

[9] **By the Allarco Entertainment corporations:** ***Lehndorff General Partner Ltd., Re***, 9 B.L.R. (2d) 275 (Ont. Ct. J. (Gen. Div.)); ***T. Eaton Co., Re***, (1997) 46 C.B.R. (3d) 293 (Ont. Ct. J. (Gen. Div.)); ***Nortel Networks Corp., Re***, 2009 WL 1763447 (Ont. Sup. Ct.); ***In Re Kmart Corporation, et al., Debtors***, 293 B.R. 905 (Ill. Bankr. Sonderby 2003); ***In Re Enron Corp. et al. Debtors***, 279 B.R. 695 (N.Y. Bankr. Gonzalez 2002); ***Skeena Cellulose Inc., Re***, (2002), 43

C.B.R. (4th) 187 (B.C.S.C.); ***Blue Range Resource Corp., Re***, (2000), 192 D.R.R. (4th) 281 (Alta. C.A.); ***T. Eaton Co., Re***, (1999), 14 C.B.R. (4th) 288 (Ont. S.C.J.); ***Doman Industries Ltd., Re*** (2004), 29 B.C.L.R. (4th) 178 (S.C.); ***Blue Range Resource Corp., Re***, (1999), 245 A.R. 154 (Q.B.); ***New Skeena Forest Products Inc., Re***, 2005 BCCA 192; ***Woodward's Ltd., Re***, (1993), 100 D.L.R. (4th) 133 (B.C.S.C.); ***Campeau v. Olympia & York Developments Ltd.*** (1992), 14 C.B.R. (3d) 303 (Ont. Ct. J. Gen. Div.); ***Air Canada (Re)*** 66 O.R. (3d) 257, [2003] O.J. No. 2976 (C.A.); ***Sagecrest Dixon Inc. (Re)*** [2009] O.J. No. 1127 (Comm.List); ***Air Canada (Re)*** [2003] O.J. No. 6239 (Comm.List).

[10] **By the court:** ***Smith Brothers Contracting Ltd. (Re)*** [1998] B.C.J. No. 728 (B.C. Sup. Ct.); ***West Bay SonShip Yachts v Esau*** 2009 BCCA 31, [2009] B.C.J. No. 120; ***Smoky River Coal (Re)*** 2001 ABCA 209, [2001] A.J. No. 1006; ***Hydro-Québec c Fonderie Poitras ltée*** 2009 QCCA 1416, [2009 J.Q. no 7438; ***Les Boutiques San Francisco Incorporées*** [2004] Q.J. No. 2886.

[11] Appendix A: The payment scheme in the initial order

1. Background

[12] The following information is uncontested, or if contested, the court is able to come to a conclusion on the existence of a fact without ordering a trial of that issue.

a) Factual

[13] The Allarco Entertainment companies operate Super Channel, an English language general interest pay television channel, one of only 3 pay-per-view television channels in Canada. The business of the companies is licensed and regulated by the Canadian Radio-Television and Telecommunications Commission, CRTC. One of the licensing requirements is the delivery of a certain proportion of Canadian content programming, which requirement ensures greater value for programming packages which satisfy that requirement.

[14] The Allarco Entertainment companies rely on broadcasting distribution undertakings, BDUs, such as Rogers, Shaw and Bell TV, to sell Super Channel as a programming option. By law, the BDUs are obligated to treat all program networks equally, and not to unfairly encourage their customers to purchase the services of one program network in preference to others. Allarco Entertainment has an ongoing complaint about one of the BDUs, alleging that that distributor has not dealt fairly with Super Channel; this complaint is now the subject of a lawsuit, which is being case managed in Ontario. In a parallel mode, Allarco Entertainment has also laid its complaints against that BDU with the CRTC; there has not yet been a resolution of those complaints by the Commission.

[15] When they applied for an initial order under the CCAA, the Allarco Entertainment companies had approximately 425 outstanding program license agreements, PLAs, with various entertainment program suppliers. Although the Allarco Entertainment companies had their own form of PLA which it used whenever possible, some of the more well known program licensors

required the Allarco Entertainment companies to enter into the licensors' standard form of PLA. Approximately $64,000,000.00 of programming has been delivered to the Allarco Entertainment companies, for which payment had not been made when those companies applied for protection from their creditors.

[16] Allarco Entertainment's PLAs with Twentieth Century Fox are the most significant component of the Super Channel programming cost.

[17] Alberta Treasury Branch is the first secured creditor of the Allarco Entertainment companies; it holds general security agreements containing a charge over Allarco Entertainment's present and after acquired personal property. The ATB facility is currently fully drawn. ATB has agreed, on certain conditions, to reestablish the MasterCard facility for Allarco Entertainment. ATB has also indicated to Allarco Entertainment that it is prepared, on certain conditions, to forbear in pursuing recovery under the guarantee of the ATB facility.

[18] Alliance has 5 PLAs with Allarco Entertainment. The PLAs typically give to Allarco Entertainment the right to play the programs offered in a package on an exclusive basis. Moreover, the first time an individual program is broadcast, Allarco Entertainment can advertise the play as a premiere, which has added value over and above the rights of exclusive broadcast.

[19] When Alliance first brought this motion, it was concerned mainly with two of its program licence agreements with Allarco Entertainment, the January 15, 2008 PLA - Super Channel Q1 08 package - and the February 25th 2008 PLA - Super Channel Q2 08 package. Those agreements are similarly structured. However, there are at least two important terms which are found in the latter agreement which are not found in the former.

[20] The first of these terms is:

> Security Interest
>
> Licensee shall grant Licensor a security interest in respect of Licensee's payment obligations and Licensee shall execute and deliver documentation necessary to effect the foregoing.

Although Q2 2008 was agreed to and accepted by the parties on March 31st, 2008, by June 16, 2009, no security documents had been prepared by either Allarco Entertainment or Alliance Films. Alliance characterizes this contractual term as an equitable charge which has all the validity of a legal charge.

[21] The second of the terms is:

> Termination Rights
>
> In the event of default by Licensee (including failure to pay amounts when due and/or if assignment for the benefit of creditors, seeks relief under any bankruptcy law or similar

> law for the protection of debtors, or allows a petition of bankruptcy to be filed against it, or a receiver or trustee to be appointed for substantially all of its assets that is not removed with 30 days), Licensor shall be entitled to terminate or suspend Licensee's rights with respect to programming (i) licensed hereunder; and/or (ii) licensed to Licensee by Licensor pursuant to any other agreement. In the event Licensor decides to terminate Licensee's rights to programming, all rights will automatically revert to Licensor, free and clear of any and all encumbrances and Licensor shall be entitled to immediate possession of all related materials.

In its PLAs which contained termination rights, Alliance did not terminate its contracts with Allarco Entertainment once it knew that Allarco Entertainment had obtained an initial order under the CCAA.

[22] Alliance has 3 other PLAs with Allarco Entertainment. Alliance did not focus on these 3 PLAs because no payments are due at this time in relation to those agreements. Of those additional agreements: PLA 2007/2008 Allarco Package does not contain any security or termination clauses; PLA Super Channel Q4- 08 package does not contain a security clause but does contain a termination clause; and, PLA Super Channel Q3-08 Package contains both a security clause and a termination clause.

[23] In their applications before the Court, Allarco Entertainment has provided the court with this broad stroke explanation of what its Plan of Arrangement might entail:

- sale to a third party investor of a portion or all of the equity in the business, having in mind the value of the existing CRTC license;
- ongoing active involvement in the business by entities related to Charles R. Allard, the sole director of Allarco Entertainment Inc.;
- significant reduction in both the cost of programming and general overhead expense would allow a viable business at a much lower level of subscriber involvement;
- success in the claim against the BDU would increase the number of subscribers;
- injection of funding into the business either by way of equity or further loans.

[24] The Allarco Entertainment companies proposed, and in the initial order the court approved, PricewaterhouseCoopers Inc. as the Monitor under these proceedings. The Monitor has not, of course, taken a position on this application; however, the Monitor reports that, to date, it has not uncovered any abusive conduct by the Allarco Entertainment companies.

[25] Paragraph 16 of the initial order provided that payment under the PLAs between Allarco Entertainment and various program licensors was to be made in accordance with the terms set out in para. 43 of the affidavit of the President and Chief Operating Officer of the Allarco Entertainment companies. Those terms are set out in appendix A hereto.

[26] Since the granting of the initial order, Allarco Entertainment has continued to advertise access to Alliance programming, including subscription on demand, SVOD, rights.

[27] The initial order has been extended by court order to September 30, 2009.

[28] There is a dispute between the parties about the proportion of the contract payments which Alliance Films has received, and would receive, since the protection order. That issue will be discussed further in relation to the termination by Allarco Entertainment of the Alliance contracts.

[29] There is a dispute between the parties concerning the content of the negotiations which preceded the termination by Allarco Entertainment of the Alliance contracts. This dispute will be referred to in the discussion of the termination issue hereunder.

[30] As of August 17, 2009, Allarco Entertainment repudiated its contracts with Alliance and noted, "Any damages suffered by Alliance as a result of such repudiation will be dealt with in the claims process in the CCAA proceedings".

[31] Although the PLA providers set out in the Appearances section hereunder have been given notice of this application, only MGM has provided evidence and submissions on the motion, although many of the other parties attended the hearing by telephone. MGM is owed in excess of $1,400,000.00 in outstanding claims for licensing fees not paid to it prior to the date of the initial order in these proceedings. MGM would have expected payments in excess of $2,000,000.00 between the date of the initial order and February 2010 in the ordinary course. MGM will continue to provide Allarco with new films, at a discounted price, while MGM defers certain other payments for films which have already been delivered to Allarco. MGM is of the view that the continuation of the CCAA process is in the best interest of MGM and likely in the best interest of many other programming suppliers in these proceedings.

b) Legislative

[32] Section 11 of the CCAA reads:

> 11. (1) Notwithstanding anything in the Bankruptcy and Insolvency Act or the Winding-up Act, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.
>
> (2) An application made for the first time under this section in respect of a company, in this section referred to as an "initial application", shall be accompanied by a statement indicating the projected cash flow of the company and copies of all financial statements, audited or unaudited, prepared during the year prior to the application, or where no such statements were prepared in the prior year, a copy of the most recent such statement.
>
> (3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,
(a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

. . .

(6) The court shall not make an order under subsection (3) or (4) unless
(a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
(b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

[33] In 1997, the following amendment was made to s. 11 of the BCCA:

11.3 No order made under section 11 shall have the effect of
(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
(b) requiring the further advance of money or credit.

(Emphasis added)

2. At this stage of the CCAA proceedings, does the court have the jurisdiction to approve unilateral contract changes proposed by Allarco Entertainment to Alliance Film contracts?

[34] The short answer to this question is, No.

[35] As a prelude to the discussion of the specific issue which is before the court, the court observes that the conclusion reached by Bauman J. in ***Smith Brothers***, a leading decision on the interpretation of s. 11.3 of the CCAA, to the effect that it is the use (emphasis in the original at

para. 19) of "leased property, not the making of the lease itself, after the stay order, which is within the purview of s. 11.3(a)" also apply here. The implications of that finding are twofold: the Alliance contracts are "true" licenses within the meaning of ***Smith Brothers*** - which means on the one hand that they are not security documents - and, Alliance cannot be forced to provide the portions of those contracts which relate to the provision of services post-protection without an immediate claim for those services.

[36] The nature of the Alliance contracts is that they provide a service - the right to advertise and broadcast the availability of a package of programming - rather than the right to make a single broadcast. The advertising by Allarco Entertainment of the availability of the Alliance Films packages, including SVOB rights, constitutes "use" of the Alliance Films licensed property.

[37] Allarco argues that s. 11.3 (a) of the CCAA which entitles a service provider to require immediate payment for services provided after the initial order does not indicate the payment basis on which those services will be provided. Allarco Entertainment suggests that this gap in the legislation is one which the court has the jurisdiction to fill and that the test for determining payment should be what is a just and equitable basis for compensation. Alliance argues that there is no gap, or that if there is a gap, the terms of the contract relating to payment should be accepted as being the proper basis for the provision of post-protection services.

[38] To provide guidance in filling the gap, Allarco Entertainment proposes American jurisprudence pursuant to s. 503(b) of the *Bankruptcy Code* which allows a court to give priority treatment to "administrative expenses". However, in order to do so, the court must conclude not only that the debt arises out of a transaction with the debtor in possession, but also that the payment of the debt is beneficial to the operation of the debtor's business. Allarco notes that the concept of "beneficial" is narrowly interpreted, as is to be expected in a regime where those administrative expenses receive priority. For example, in ***Kmart Corporation***, the bankruptcy court asserted that "post-petition performance alone does not automatically translate into a benefit to the estate, even if there was inducement on the part of the debtor"; the same principle was also applied in ***Enron***.

[39] I agree with Allarco Entertainment that there is a gap in the CCAA relating to the payment for post-protection services.

[40] However, with respect, I disagree with Allarco Entertainment's proposed use of American jurisprudence. As the B.C. Court of Appeal emphasizes in ***West Bay SonShip***, although similar policy objectives inform Canadian and American insolvency legislation, and while certain American decisions might even be persuasive in certain Canadian insolvency situations, in each specific potential use of American jurisprudence care must be exercised to ensure that, in the particular case, both the American legislative scheme is similar to that in Canada and, in the absence of expert evidence on the state of American law, that the American reasoning in a particular case is not conflated with the state of American jurisprudence on the issue.

[41] For example, here the Alliance Films PLAs are, in Canadian or Albertan parlance, executory contracts. However, American authorities are not helpful on the treatment of "executory contracts" in the CCAA partly because the specialized interpretation of that term in American bankruptcy law is different from the interpretation of that term in Alberta and perhaps in Canada:

> 31 In "A Joint Report of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals - Joint Task Force on Business Insolvency Law Reform - March 15, 2002", the authors cited the following meanings for "executory contract":
>
> What is an executory contract? Neither the CCAA nor the BIA use the expression, but the United States Bankruptcy Code does in s. 365 ("Code, s. 365"). In general contract law, "executory contract" means a contract under which one or both parties still have obligations to perform. However, in U.S. bankruptcy law the expression is normally given a narrower meaning. According to the most widely accepted definition in the United States, an executory contract for the purposes of Code s. 365 is:
>
> > a contract under which both the obligations of the bankrupt ["A"] under the contract and the other party to the contract ["B"] are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other.
> > (Countryman, "Executory Contracts in Bankruptcy" (1974) 57 Minnesota Law Review 439 (Part 1), at 460).

[42] More pertinently in this particular case, while there is in the American *Bankruptcy Code* a priority for administrative expenses which include "the actual, necessary costs and expenses of preserving the estate", there is no such limitation in s. 11.3 of the CCAA. Here, all post-protection service providers are entitled to claim immediate payment for their services. Therefore, the American jurisprudence is not, in this particular case, helpful.

[43] In any event, however, no decision has been brought to my attention in which an American court has, other than in a utility situation which will be discussed later in the context of Canadian case law, itself calculated a price other than the contract price for the provision of post-protection services. Indeed, the weight of American jurisprudence on the issue appears to be that the contract price is assumed to be a reasonable price unless the debtor can show that the contract price is clearly unreasonable.

[44] In the circumstances here, rather than to rely on American jurisprudence for guidance, it is more appropriate to rely on Canadian law and on first principles. As has been noted in much of the jurisprudence which interprets the CCAA, there is jurisdiction in the statute for a court to work out arrangements that will maximize benefits to all affected parties. As our Court of Appeal put it in ***Smoky River Coal, (Re)***:

> 16 CCAA orders become the roadmap for the proceedings and the litigation which may follow. Orders must therefore be drafted with clarity and precision. The purpose of

the CCAA must be kept at the forefront in both drafting and interpreting a CCAA order. The CCAA is remedial legislation. As was stated in Re Lehndorff General Partner Ltd. (1992), 17 C.B.R. (3d) 24 (Ont. Gen. Div):

> The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable a plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court.
>
> (Emphasis added)

[45] The court's jurisdiction is not, however, unlimited. One limiting feature is the timing of the court's intervention. There is no doubt that, at the stage of the approval or failure of a plan, a court can impose terms on an unwilling creditor. We are not, however, at that stage.

[46] At this stage, that is the stage of the initial order, whatever services are provided post-protection are offered by service providers who are entitled to be paid for those services. Generally, two payment regimes will be adopted. One is that ongoing service providers will accept, at least until the presentation of a plan, some new, negotiated, plan. Obviously if the parties to a contract agree to a variation of the terms of that contract, that variation governs. However, a service provider is not required to provide post-protection services without the right to claim immediate payment. If a service provider will not agree to modify its contractual payment terms in order to provide post-protection services, then the debtor must either terminate the contract or pay the contractual amount. In reaching this conclusion, I rely on the fact that, at the stage of the initial order, it would be inappropriate for a court to attempt to draw up a contract for the parties. What the parties have negotiated in a contract should generally be presumed to be a fair and reasonable price for the services provided. Not only are courts not business experts, but the cost of attempting to bring the court up to speed on the reasons that a creditor and a debtor each have for advancing a payment proposal would exhaust the financial capacity of an already insolvent debtor. At the stage of the presentation of a plan, the situation is, of course, different: at that stage the court has much more information on which to rely, including the business acumen of all other creditors.

[47] Two exceptions to the general rule that contract terms govern have been identified in the jurisprudence. First, there are utility contracts: see ***Hydro-Québec***. Even though the original contract for service did not contain any form of security payment, a court approved a security deposit as a term of post-protection provision of services. The provision of utilities is, however, a unique form of contract. On the one hand, utility contracts are contracts of adhesion whose payment terms are typically regulated by government or government-established commissions, and, on the other, the debtor does not typically have any choice in service providers. In those circumstances, it is appropriate for a court to set the terms of payment for post-protection services since a utility provider should not be required to provide post-protection services which require the advance of further credit: see s. 11.3(b). It appears that American jurisprudence takes

a similar view with respect to utilities: see ***Thatcher Glass***. The crucial nature of utility services requires the intervention of the court where the parties cannot agree on a fee for post-protection services; in other circumstances, a service provider can protect itself by refusing to provide services. These principles are usefully addressed by the Court of Appeal in ***Hydro-Québec***:

> 80 L'alinéa a) de l'article 11.3 de la LACC établit un principe clair : pendant la période de suspension, le fournisseur a droit d'être payé pour les services qu'il rend au fur et à mesure de leur utilisation.
>
> 81 Voici d'ailleurs les commentaires du professeur Richard H. McLaren au sujet de cet article:
>
> > Section 11.3 acts as an exemption to the stay provisions of s. 11 of the CCAA. It appears the section is meant to balance the rights of creditors with debtors. The section addresses the concern that judges had too much discretion in issuing stays. Under s. 11.3(a), if a person supplies goods or services or if the debtor continues to occupy or use leased or licensed property, the court will not issue a stay order with respect to the payment for such goods or services or leased or licensed property. In essence, s. 11.3(a) will not permit the court to prohibit these individuals from demanding payment from the debtor for goods, services or use of leased property, after a court order is made.16
>
> 82 Ce principe connaît cependant des limites pratiques. Il arrive parfois que la réalité s'oppose à ce que le fournisseur soit payé immédiatement pour les services qu'il fournit à une compagnie débitrice. La fourniture d'électricité en est un exemple patent : il s'agit d'un service continu qu'il est impossible de facturer au fur et à mesure de la consommation.
>
> 83 En pareilles circonstances, il est juste et équitable pour le fournisseur de services de demander des garanties de paiement. Commentant la décision Re Smoky River Coal Ltd17, les auteurs Houlden, Morawetz et Sarra déclarent:
>
> > Under its inherent powers, the court can create a security for creditors who supply goods and services to the debtor after the filing of a CCAA petition and can provide for the priority and ranking of such a security interest with respect to other security holders. If the plan under the CCAA fails, the court can determine who are entitled to share in the proceeds of the security interest.18
>
> . . .
>
> 87 Au sujet du droit applicable, le juge Rolland s'exprime en ces termes:
>
> > [13] Il découle de ce qui précède qu'un fournisseur ne peut exiger d'être payé d'avance pour un service à fournir.
> > [14] Ainsi, un créancier peut exiger d'être payé immédiatement lors de la livraison, mais pas de recevoir un paiement d'avance pour des services à fournir.

> [15] La situation est relativement simple lorsqu'il s'agit d'un bien individualisé, vendu et livré.
> [16] Cela peut être plus compliqué dans les cas d'un approvisionnement continu d'un service comme l'électricité, le téléphone ou le gaz.
> [17] Exiger de la débitrice qu'elle paie un mois d'avance comme le demande Gaz Métro, alors qu'elle entend fermer plus de 30 locaux au cours des prochains jours ou semaines, a pour effet de créer un fardeau trop onéreux pour la débitrice.
> [18] La LACC ne fait pas exception quant aux créanciers qu'il s'agisse de fournisseur d'un service continu par opposition à un fournisseur de biens.
> [19] Le tribunal a discrétion pour établir une procédure permettant au fournisseur de ne pas être préféré ou pénalisé par rapport aux autres créanciers.
> (je souligne)

[48] In that particular case, the court concluded that a $42,000.00 guarantee was reasonable in the circumstances.

[49] The second exception from the obligation to pay the contract price for post-protection service, an exception which constitutes a lesser intrusion on the freedom of contract than the outright establishment of new payment terms, is the selection by a court from amongst the provisions of one contract of certain services for which the debtor must pay the contract price while other provisions are identified as ones for which the debtor is not immediately required to pay: ***Nortel***. In that case, the contract - a collective agreement - included both payments to persons who were no longer providing service to the debtor and payments to persons who were providing post-protection service to the debtor. The union advanced two arguments in support of its claim that all contract payments should be made post-protection. The first was that the services that had been provided in the past were part of the consideration for services that were being provided post-protection. The second was that, because of a statutory requirement, the union did not have the freedom which most service providers have, to refuse to provide ongoing service to a debtor which has received protection from its creditors. (On this latter point, there is a certain analogy between the union - which could not, for legislative reasons, withdraw its services despite the wording of s. 11.3(a) - and Alliance, which cannot withdraw the services which it provided in three contracts because those contracts grant licences to Allarco Entertainment without termination rights arising on insolvency.) The ***Nortel*** court rejected both arguments. Although the court decided which portions of the contract had to be paid, it did not purport to vary the contractual basis for payment; it merely decided which portions of the contract were eligible for payment post-protection.

[50] It appears that a similar approach was taken in ***Les Boutiques San Francisco***: the debtor could either decide to terminate the contract for display shelves, or pay the contract price for those units.

[51] There may be other exceptions to the general rule but I have not been provided with any Canadian case law which has identified any such exceptions.

[52] The two exceptions to the rule that post-protection services are to be paid according to the contract price reenforce the generality of the rule. Generally, contracts cannot be varied by

courts: they can be interpreted or rectified but not varied. Even courts of equity limited themselves to remedies which recognized the basic authority of contracts: a court of equity might, for example, require a contracting party to render proper accounts even though that was not a term of the contract if the rendering of accounts was necessary to enforce the contract. Similarly, a court of equity might grant relief from the consequences of certain contracts - such as contracts that were unconscionable. In other cases, a court might decide that, for public policy reasons, certain contracts, such as gambling contracts, would not be enforced by the justice system.

[53] Legislation could, of course, give to the courts a broad jurisdiction to create or vary contracts or to over-ride them. An example of the latter is the *Divorce Act* which provides that a court should taken into account any contract between the parties in relation, for example, to spousal support, but that the court is not limited in making a spousal support order by the terms of the contract between the parties.

[54] Given the respect for contracts in the common law, explicit statutory provisions are required to give courts the jurisdiction to impose unilateral variations in contracts. Such explicit authority is not given to courts in the CCAA at the initial order stage.

[55] Moreover, as was noted at the outset, it is important to correctly identify the nature of the Alliance PLAs: these are not pay-per-play contracts, but rather contracts which allow Allarco Entertainment to advertise the availability of Alliance product without in fact broadcasting Alliance product. The effect of imposing a pay-per-play payment term on Alliance at this stage would be to impose upon Alliance the obligation to provide a continuing service - allowing Allarco Entertainment to continue to advertise the availability of Alliance programming - without providing payment for that service. Indeed, as Alliance has emphasized, Allarco Entertainment's web-site continued, post-protection, to advertise Alliance programming. It is not necessary on this application to determine whether forcing Alliance to continue to provide its services to Allarco Entertainment can also be characterized as requiring Alliance to make a further advance of credit to Allarco.

[56] For the reasons set out above, having now heard argument from the party affected, this court varies para. 16 of its initial, *ex parte*, order by removing the reference to para. 43(b) of the Knox affidavit and replacing it with a reference to the contractual payments due to Alliance.

3. Should the court invalidate Allarco Entertainment's termination of the Alliance Films contracts?

[57] The short answer to this question is, No.

[58] Alliance correctly states that the statutory right of a debtor which has obtained protection from its creditors to terminate contracts is subject to judicial oversight. Alliance argues that it is not reasonable for Allarco Entertainment to terminate its contracts because:

- Allarco was able to obtain a "pay-per-play" clause and they should therefore be required to honour the contracts;

- the exchanges between Allarco and itself establish that Allarco was intent on obtaining a "pay-per-play" provision to give itself additional, inappropriate, power in its negotiations with Alliance;
- it is not appropriate for Allarco Entertainment to defend its actions by starting from the proposition that it has only so much cash available; rather, Allarco should be required to raise additional funds;
- Allarco Entertainment did not negotiate in good faith.

[59] For the purpose of this application, the court sets the following test which Allarco Entertainment must meet for termination of its contracts with Alliance Films: the termination must be fair, appropriate, reasonable, and must have been issued after good faith negotiations. I have concluded that Allarco Entertainment meets that test.

[60] In coming to that conclusion, the most important of the reasons considered by the court is the evidence that Alliance attempted, during the negotiations, to become a secured creditor, an effort that would have given Alliance an unfair advantage over other Allarco Entertainment creditors. The fact that Alliance was negotiating for such security benefits is acknowledged by Alliance; it takes the position, however, that this was not a "new" feature since some of its contracts contained provision for granting security. With respect, this is not defensible. Each contract must be enforced on its own; three of the Alliance contracts did not contain a security clause. With respect to those agreements, the addition of a security clause would be "new". Moreover, even with respect to those two contracts which did contain a security clause, no security documents had been executed.

[61] In addition to the grave concern about Alliance attempting to improve its position relative to other debtors, there are other factors which the court weighs in Allarco Entertainment's favour in concluding that it should not invalidate Allarco's termination of Alliance contracts:

- while it is true that, during the negotiations, Allarco Entertainment was the beneficiary of a "pay-per-play" regime and had thus obtained what it wanted relative to Alliance as a creditor, Allarco Entertainment was also aware that Alliance had attacked the legitimacy of that provision. While on this motion Allarco valiantly argued in favour of the "pay-per-play" regime relative to Alliance, it is not unreasonable to assume that Allarco also came to an informed decision that it was at least vulnerable on that issue;

- there was a reasonable business basis for Allarco Entertainment's original application for a "pay-for-play" regime relative to Alliance. It appears to me that the main business argument in Allarco's failure is that substantial ongoing payments to Alliance throughout the year as opposed to what the evidence describes as the overwhelming position in other contracts which provide for payments at the beginning and at the end of the licence period, or at the beginning, after 12 months and at the end of the licence period seriously hamper Allarco's attempts to establish a plan which would allow them to go forward rather than to fall into bankruptcy;

- there is a dispute between Allarco Entertainment and Alliance about the cost to Alliance of the "pay-per-play" provision: Allarco states that it had paid more than 5 cents on the dollar of contractual obligations. Alliance states that termination of its contracts will place it in a worse

position that the PLA providers with whom Allarco has been able to reach an accommodation. While it may be true that termination will be less advantageous to Alliance than going forward on some accommodation basis, part of the point of the CCAA is to allow for the termination of some contracts so long as the test for termination is met;

- similarly, it is a reasonable business concern of Allarco's to have fresh programming to offer potential subscribers and that such programming not consist solely of leftovers from other potential licensees;

- it would not make sense to impose upon an insolvent company the obligation to borrow more money in order to meet all its debts before it terminated certain of its contracts. Such an inflexible rule would make an effective reorganization impossible. On the evidence on this motion, at this stage of the CCAA proceedings, Allarco Entertainment has made reasonable arrangements with its banker and guarantor;

- there is no evidence that Allarco negotiated in bad faith. Rather, the evidence suggests that Allarco was attempting to make reasonable accommodations with Alliance. For example, it is not reasonable that Allarco should be required to take only that programming which has been refused by all other potential licensees. Nor is it the case that Alliance is irrevocably linked to Allarco: Alliance has other markets to which it can offer its programming;

- finally, the opinion of MGM - a creditor which is roughly in the same position relative to Allarco Entertainment as is Alliance - that there have been significant changes in the business of all affected companies which legitimizes the writing down of entertainment packages for the purposes of the development of a CCAA plan supports the general approach which Allarco Entertainment has taken in the negotiations.

[62] Although Alliance Film's notice of motion requests an order invalidating Allarco Entertainment's termination of the Alliance Films contract, at the hearing Alliance suggested that what it really wanted was a determination of the variation agreement first. If that issue were resolved in its favour, Alliance then hoped that further negotiations with Allarco Entertainment would be possible. Alliance suggested that even if Allarco Entertainment were to maintain its termination of the contracts, then Alliance may require some additional evidence to support its position that the termination should not be approved. With respect, I cannot adopt that approach. The determination about whether a termination at this stage meets the required test should be made as close as possible to the date of termination in order to ensure that the court has the same overall perspective as did the parties as of the date of termination.

4. Costs

[63] If the parties are not agreed on costs, I may be spoken to within 30 days of the release of this decision.

Heard on the 2nd, 3rd, 8th and 9th days of September, 2009.
Dated at the City of Edmonton, Alberta this 14th day of September, 2009.

J.B. Veit
J.C.Q.B.A.

Appearances:

Frank R. Dearlove, Bennett Jones LLP
for the Applicant, Alliance Films Inc.

Charles P. Russell, Q.C., McLennan Ross LLP
for Allarco Entertainment Inc. and Allarco Entertainment 2008 Inc.

Richard T.G. Reeson, Q.C., Miller Thomson LLP
for Alberta Treasury Branches

Michael J. McCabe, Q.C., Reynolds Mirth Richards & Farmer LLP
for Pricewaterhouse Coopers Inc.

David Ullmann, Minden Gross LLP
for MGM Television of Canada, a division of Metro-Goldwyn-Mayer Studios, Inc.

Marc-Andre Morin, McMillan
for Twentieth Century Fox/Incendo Television Distribution Inc. and
Incendo Media Inc.

Harry Fogul, Aird & Berlis LLP
for Twentieth Century Fox/Incendo Television Distribution Inc.

Eric Vallieres, McMillan
for TVA Films, a division of TVA Group Inc.

Patrick Roche, Heenan Blaikie
for Maple Pictures Corp.

Roger P. Simard, Fraser Milner Casgrain LLP
for National Bank of Canada

Andre Bennett, President & CEO, Cinema Esperanza International Inc.
for Cinema Esperanza International Inc.

Danny M. Nunes, ThorntonGroutFinnigan LLP
for NBC Universal

Bertrand Langlois, CA, VP Finance, Christal Films Distributions Inc.
for Christal Films Distributions Inc.

Alan H. Brown, Boughton Law Corporation
for Starz Media LLC

Appendix A

The following are the portions of para. 43 of Mr. Knox's first affidavit which are incorporated by reference in para. 16 of the initial court order:

> (a) For those existing Program License Agreements in which the fee for delivery of a single broadcast, such as a prize fight, must be paid upon delivery of that Program, the cash flow contemplates such payment as each Program is delivered;
>
> (b) In the case of those existing Program License Agreements with fixed terms and with a limited number of Exhibition Days, and where the license window is already open, the Cash Flow Projections have been prepared based upon a formula where the overall cost of the Contract is divided by the total number of Exhibition Days permitted, with that Exhibition Day rate being applied for the number of Exhibition Days the Business actually runs that program during the Cash Flow Projection period;
>
> (c) For existing Program Licensing Agreements which provide for monthly payments, those payments falling due during the CCAA proceedings will be paid;
>
> (d) As a license window opens during the CCAA Proceedings on a Licensing Agreement now in existence, license fees shall be paid in accordance with that Licensing Agreement; and
>
> (e) For Programming which is obtained by the Business during the CCAA Proceedings under Licensing Agreements not now in existence, the licensing fees shall be paid in accordance with the terms of each such Program License Agreement.
>
> (Emphasis added)

The only program licence agreements which come within the terms set out in para. (b) above are the Alliance Films Inc. PLAs.

TAB7

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-036133-094

DATE: **SEPTEMBER 8, 2010**

PRESENT: THE HONOURABLE MR. JUSTICE CLÉMENT GASCON, J.S.C.

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

ABITIBIBOWATER INC.
And
ABITIBI-CONSOLIDATED INC.
And
BOWATER CANADIAN HOLDINGS INC.
And
The other Petitioners listed on Schedules "A", "B" and "C"
Debtors / Petitioners

And
ERNST & YOUNG INC.
Monitor

And
THE ROYAL TRUST COMPANY
Mise en cause

JUDGMENT ON RE-AMENDED MOTION FOR DIRECTIONS ON THE IDENTITY OF THE PERSONS WHOSE BENEFITS UNDER THE BOWATER SUPPLEMENTAL EXECUTIVE RETIREMENT PLANS WERE SECURED BY A LETTER OF CREDIT (#677)

JG1793

INTRODUCTION

[1] On April 17, 2009, the Court issued an order (as subsequently amended and restated, the "**Initial Order**") pursuant to the *Companies' Creditors Arrangement Act* (the "***CCAA***") in respect of (i) Abitibi-Consolidated Inc. ("**ACI**") and subsidiaries thereof (collectively, the "**Abitibi Petitioners**"), (ii) Bowater Canadian Holdings Inc. and affiliates and subsidiaries thereof (collectively, the "**Bowater Petitioners**") and (iii) certain partnerships.

[2] At that time, one of the Bowater Petitioners, Bowater Canadian Forest Products Inc. ("**BCFPI**"), was the sponsor of three Supplemental Executive Retirement Plans (the "**SERPs**"). The SERPs' purpose was to give supplemental retirement benefits to a limited number of executives in addition to the benefits payable from any registered pension plan of BCFPI. The SERPs provided these post-retirement benefits to various members, be they eligible employees or beneficiaries of deceased participants.

[3] Pursuant to a trust agreement (the "**Trust Agreement**"), the benefits payable under the SERPs were partially secured by a letter of credit held by The Royal Trust Company ("**RTC**"), in trust for the eligible members.

[4] On May 1, 2009, as a result of their insolvent status and the issuance of the Initial Order, the Petitioners advised RTC that they had suspended the payments of all SERPs benefits and would not renew the letter of credit securing those[1].

[5] On May 26, 2009, RTC replied that it would call for payment on the letter of credit that it held[2]. It did so on that day and thus received an amount of some $23,065,000[3].

[6] When this letter of credit was called for payment, there were, from a practical standpoint, five different categories of SERPs members:

a) 48 Canadian resident members who had retired before December 31, 2003;

b) 6 Canadian resident members who had retired after December 31, 2003 but before May 26, 2009;

c) 3 U.S. resident members who had retired before December 31, 2003;

d) 11 members who were still active employees of BCFPI; and

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1 Exhibit R-17.
2 Exhibit R-18.
3 Exhibit R-7.

e) 6 members who were deferred vested members, that is, terminated employees who had not yet begun to receive their pension benefits under the SERPs.

[7] Of these five categories, only the first three were being paid pension benefits under the SERPs when BCFPI advised RTC that it was suspending all SERPs payments.

[8] There is a dispute as to which members are entitled to share in the proceeds of this letter of credit and as to how the proceeds are to be distributed. By their Motion[4], the Petitioners seek a declaration that:

a) the only persons entitled to continue to receive monthly SERPs payments from the proceeds of the letter of credit held by RTC are:

i) The Canadian resident members of the SERPs who retired before December 31, 2003 (listed in Schedule A to the Motion);

ii) The Canadian resident members of the SERPs who retired after December 31, 2003 but before May 26, 2009, including Mr. Donald Campbell (listed in Schedule B to the Motion), but only on the value of their SERPs benefits accrued up to December 31, 2003; and

iii) The U.S. resident members of the SERPs, including Mr. Jerry Soderberg (listed in Schedule C to the Motion);

b) RTC should pay the full monthly SERPs payments to the persons entitled to receive such from the proceeds of the letter of credit until they are exhausted in accordance with Schedule F to the Motion or until further order of the Court.

[9] In short, the Petitioners consider that the members who had not yet begun to receive pension benefits under the SERPs on May 26, 2009, namely the active employees (listed in Schedule D to the Motion) and the deferred vested members (listed in Schedule E to the Motion), should not be entitled to share in the proceeds of the letter of credit.

[10] The Petitioners so conclude based upon the wording of the relevant sections of the SERPs, their interpretation and application of their terms, and the letters and notices they sent over the years to the SERPs members in relation to the meaning and intent of the protection afforded by this letter of credit.

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[4] Re-Amended Motion for Directions on the Identity of the Persons Whose Benefits Under the Bowater Supplemental Executive Retirement Plans Were Secured by a Letter of Credit dated July 2, 2010 (the "**Motion**").

[11] Of course, the members listed in Schedules A, B and C to the Motion support the conclusions sought. Without surprise, the members listed in Schedules D and E, that the Petitioners consider must be excluded from any sharing, contest the Petitioners' position. They dispute the interpretation of the relevant sections of the SERPs proposed by the Petitioners and insist that no resolution of BCFPI Board of Directors ever approved the purported changes made to the protection given to them by the letter of credit.

[12] Through their Motion, the Petitioners also ask the Court to authorize BCFPI to amend the Trust Agreement in accordance with Amendment No 1 (the "**Amended Trust Agreement**")[5]. Amongst others, the Petitioners want to dissociate BCFPI from all of its obligations under the Trust Agreement and to create a committee of beneficiaries who would take over from BCFPI the power to give directions to RTC and to make all decisions regarding the funds still to be managed.

[13] RTC disagrees with most of the amendments proposed to the Trust Agreement. It does not want to dissociate BCFPI from the Trust Agreement and to be forced to deal from now on with a committee of beneficiaries, on terms and conditions that it finds unacceptable.

THE ISSUES

[14] Two questions are at issue here: 1) Are the future SERPs benefits of the active employees and the deferred vested employees covered by the letter of credit? 2) Should the Court incorporate the changes to the Trust Agreement proposed by the Petitioners?

[15] To analyse the two questions, a review of the applicable SERPs, the letter of credit, the relevant changes made over the years to the SERPs and the most current actuarial valuations of the SERPs is necessary at the outset.

THE SERPs

[16] Bowater Pulp and Paper Canada Inc. ("**BPPC**"), formerly Avenor Inc., implemented the first of the SERPs effective July 16, 1993 (the "**1993 SERP**")[6]. On July 1, 1995, this 1993 SERP was restated into three SERPs (collectively, the "**1995 SERPs**")[7]:

a) The Supplemental Retirement Benefit Plan for Grade 11 and under Employees of Bowater Pulp and Paper Canada Inc.;

b) The Supplemental Retirement Benefit Plan for Grade 12 and under Employees of Bowater Pulp and Paper Canada Inc.; and

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5 Exhibit R-29.
6 Exhibit R-1.
7 Exhibit R-2.

c) The Senior Executive Retirement Plan.

[17] The rules of the 1995 SERPs were afterwards restated in 1997 (collectively, the "**1997 SERPs**")[8].

[18] Finally, effective January 1, 2002, BPPC and BCFPI merged and continued their operations under the name of BCFPI. On the merger date, BCFPI became the sponsor of the 1997 SERPs which were renamed as follows (collectively, the "**2003 SERPs**")[9]:

a) The Supplemental Retirement Benefit Plan for Grade 27 and under Employees of Bowater Canadian Forest Products Inc.;

b) The Supplemental Retirement Benefit Plan for Grade 28 and under Employees of Bowater Canadian Forest Products Inc.; and

c) The Senior Executive Retirement Plan of Bowater Canadian Forest Products Inc.

[19] Throughout the years, each of the 1995 SERPs, the 1997 SERPs and the 2003 SERPs have included the following provisions dealing with BPPC or BCFPI contributions and the letter of credit, the SERPs' interpretation and administration, and BPPC or BCFPI authority to amend the SERPs:

SECTION 4- CONTRIBUTIONS

4.01 No contribution shall be required from a Participant in respect of benefits payable under this Supplemental Plan.

4.02 The benefits payable under this Supplemental Plan shall, unless decided otherwise by Avenor Inc. at its entire discretion, be payable by the Corporation out of its operating funds as they become due and the Corporation shall be under no obligation whatsoever to pay contributions in advance to fund such benefits.

4.03 Notwithstanding Subsection 4.02, the Corporation will arrange for the payment of benefits provided under the Supplemental Plan to be secured through a letter of credit from a financial institution.

13.08 INTERPRETATION

a) This provision of this Supplemental Plan shall be interpreted in accordance with the laws of the Province of Quebec and shall be binding upon and enure to the benefit of the Corporation and its successors and assigns.

b) Headings wherever used herein are for reference purposes only, and do not limit or extend the meaning of any of the provisions of this Supplemental Plan.

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[8] Exhibit R-3.
[9] Exhibit R-4.

SECTION 14- ADMINISTRATION

14.01 The Corporation shall decide on all matters relating to the interpretation, administration and application of this Supplemental Plan, consistently with the text of the Supplemental Plan.

14.02 To facilitate any action required to be taken by the Corporation under the Supplemental Plan, the Board of Directors of the Corporation may, at its discretion, delegate the responsibility for administration of the Supplemental Plan to any person(s) appointed specifically for this purpose to act on behalf of the Corporation.

SECTION 15- FUTURE OF THE PLAN

15.01 Notwithstanding anything to the contrary herein, the Corporation reserves the right to make amendments to this Supplemental Plan. Any such amendment shall be communicated in writing by the Corporation to the Participants indicating the effective date of such amendment which, subject to Subsection 15.02 below, shall not precede the date that such communication is deemed to have been received by the Participants pursuant to Subsection 13.07 hereunder. Furthermore, the Corporation will not have the right to make such amendment only in respect of one or more Participants but such amendment shall have to be made in respect of all Participants, excluding those Participants who have already commenced to receive benefits hereunder.

15.02 When an amendment is made to this Supplemental Plan pursuant to Subsection 15.01 above as a result of a corresponding amendment to the Registered Plan, such amendment shall take effect as of the same effective date as applicable in respect of the corresponding amendment to the Registered Plan.

15.03 No amendment made to this Supplemental Plan by the Corporation pursuant to this Section 15 can have the effect of reducing the amount or value of the benefits accrued by the Participants under this Supplemental Plan prior to the effective date of such amendment.

(Emphasis added)

THE LETTER OF CREDIT

[20] As appears from this section 4.02, BPPC or BCFPI had the obligation to pay the benefits under the SERPs out of their operating funds, as the benefits became due. There were no contributions by the participants (section 4.01) and BPPC or BCFPI were under no obligation to pay contributions in advance to fund the benefits (section 4.02).

[21] Pursuant to section 4.03, BPPC or BCFPI were required, however, to establish a trust to hold documentary credits or letters of guarantee or investments to secure the payment of the benefits under the SERPs to the members.

[22] On August 14, 1996, BPPC entered into the Trust Agreement with Montreal Trust Company ("MTC") so that MTC would hold a letter of credit (initially in the amount of $30,000,000) to secure the payment of the benefits under the SERPs[10].

[23] The Board of Directors' resolution approving the Trust Agreement referred to "an amount sufficient to cover the current level of liabilities of the Corporation under the SERPs" and to the fact that the letter of guarantee would be drawable "in the event the Corporation does not meet payment obligations to participants under the SERPs"[11].

[24] The Trust Agreement provided that MTC was to hold the letter of credit until such time as the Corporation defaulted on the payment of the benefits under the SERPs. MTC was then to call the letter of credit, hold the proceeds in trust for all eligible members of the SERPs, and distribute the proceeds to them to the extent that they were sufficient for that purpose.

[25] MTC was bound by the terms of the SERPs and required to perform such duties imposed upon it pursuant to the Trust Agreement and each related SERPs. MTC was entitled to act on the instructions or written directions of the Corporation.

[26] Effective January 1, 2003, RTC replaced MTC as trustee of the Trust Agreement holding the letter of credit[12].

[27] The letter of credit was renewed annually at various face amounts determined by BCFPI until it was called for payment in May 2009, triggering the receipt by RTC of the amount of approximately $23,065,000[13].

[28] The rules of the Income Tax Act (Canada) (the "**ITA**"), applicable to "Retirement Compensation Arrangements", required RTC to then pay a refundable tax to the Canada Revenue Agency ("**CRA**") of 50% of the amount it received upon calling the letter of credit. In addition, the ITA requires that 50% of any income (interest, dividend or capital gain) realized by RTC on the assets held under the Trust Agreement be paid to the CRA as a refundable tax. These amounts will be refunded by the CRA after the end of each calendar year during which RTC pays SERPs benefits to the eligible SERPs members.

[29] The balance of the proceeds is presently held by RTC in 30-day Government of Canada Treasury Bills.

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10 Exhibit R-5.
11 Exhibit R-5.
12 Exhibit R-6.
13 Exhibit R-7.

THE CHANGES TO THE 2003 SERPS

[30] Since 2003, BCFPI issued three letters and notices to the members to advise them of purported changes to the SERPs that affected which members' benefits were secured by the letter of credit.

[31] On November 24, 2003, BCFPI first sent a letter to the then 38 active (i.e. not retired) SERPs members[14]. The last paragraph of the letter stated that only the benefits of retired SERPs members and only SERPs benefits accrued up to December 31, 2003 would be secured by a letter of credit from then on:

> "Please be advised that SERP benefits for service from January 1st, 2004 for all Canadian operations will not be secured by way of a letter of credit. DB SERP benefits for service up to December 31st, 2003 will continue to be secured that way for former BPPC employees working in Canada. For employees who have elected the DC plan, the DC SERP applicable to service from January 1st, 2003 is not secured by a letter of credit. This limitation of the use of a letter of credit does not affect the calculation of your total pension benefits."
>
> (Emphasis added)

[32] Even though some active members, including, for instance, Mr. Cayouette who testified at hearing, apparently disagreed with BCFPI position, none of them formally raised any kind of opposition to this letter.

[33] On May 27, 2005, BCFPI sent another notice to the then 33 active SERPs members to further clarify what had been said in the 2003 letter, namely that only the benefits of retired SERPs members and only SERPs benefits accrued up to December 31, 2003 would be secured by a letter of credit[15]:

> "**Notice to former BPPC employees eligible for Supplementary Pension benefits**
>
> The purpose of this notice is to clarify the status of the letter of credit that pertains to the members of the Bowater Canadian Forest Products Inc. Supplemental Retirement Benefit Plan for Grade 27 and Under, the Supplemental Retirement Benefit Plan for Grade 28 and Over and the Senior Executive Retirement Plan, which provide benefits to former employees of Bowater Pulp and Paper Canada Inc.
>
> (...)
>
> During this year's annual renewal process for the letter of credit, the Company reviewed the methodology applied to the calculation of the letter of credit in light of the language quoted above. The Company determined that the letter of credit will be calculated based on the following methodology:

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[14] Exhibit R-8.
[15] Exhibit R-9.

- The letter of credit will secure the payment of benefits to retirees and survivors who have started to receive their pension under the plans; it will not secure in advance the payment of benefits that may become payable sometime in the future to active employees or to terminated employees who are not yet in pay status (terminated vested participants).

- As you have been previously notified in the letter describing the pension re-design, the letter of credit will only secure benefits attributable to service accrued through December 31, 2003, or through December 31, 2002 for members who have elected to participate in the DC plan effective January 1, 2003.

- Further, the letter of credit will only secure the payment of benefits attributable to service that is accrued through December 31, 2003 or through December 31, 2002 for members who have elected to participate in the DC plan effective January 1, 2003, based upon the earnings determined as of December 31, 2003 and based on the early retirement provisions that would have applied if termination of employment or retirement had occurred on December 31, 2003 taking into account the maximum pension payable from the registered plan at pension commencement.

- The benefits to be secured by the letter of credit are to be calculated as though the plans were wound up and benefits settled on the valuation date for members in receipt of a pension on that date.

The Company is currently updating the letter of credit in accordance with the principles described above. The amount of the letter of credit will be recalculated on a periodic basis.

The calculations applicable to the letter of credit do not affect the calculation of your individual pension benefits. Your future retirement benefits will continue to be computed in accordance with the plan provisions, regardless of the amount of, or method of calculation applicable to, the letter of credit. If you should have any questions, please contact Georges Cabana at [...]."

(Emphasis added)

[34] On May 30, 2005, a similar letter[16] was sent to seven SERPs members who were deferred vested members on that date. It stated:

"Notice to former BPPC employees eligible for Supplementary Pension benefits

The purpose of this notice is to clarify the status of the letter of credit that pertains to the members of the Bowater Canadian Forest Products Inc. Supplemental Retirement Benefit Plan for Grade 27 and Under, the Supplemental Retirement Benefit Plan for Grade 28 and Over and the Senior

[16] Exhibit R-10.

> Executive Retirement Plan, which provide benefits to former employees of Bowater Pulp and Paper Canada Inc. (BPPC).
>
> (...)
>
> During this year's annual renewal process for the letter of credit, the Company reviewed the methodology applied to the calculation of the letter of credit in light of the language quoted above. The Company has determined that the letter of credit will secure the payment of benefits to retirees and survivors who have started to receive their pension under the plans. It will not secure in advance the payment of benefits that may become payable sometime in the future to active employees or to terminated employees who are not yet in pay status (terminated vested participants). The benefits to be secured by the letter of credit are to be calculated as though the plans were wound up and benefits settled on the valuation date for members in receipt of a pension on that date.
>
> The Company is currently updating the letter of credit in accordance with the principles described above. The amount of the letter of credit will be recalculated on a periodic basis.
>
> The calculations applicable to the letter of credit do not affect the calculation of your individual pension benefits. Your future retirement benefits will continue to be computed in accordance with the plan provisions, regardless of the amount of, or method of calculation applicable to, the letter of credit. If you should have any questions, please contact Georges Cabana at [...]."
>
> (Emphasis added)

[35] None of the active or deferred vested members apparently reacted to the letters or notices sent in 2005. Even if Mr. Cayouette testified that he did not remember reading the e-mail that was then allegedly sent to him as active employee, no one seriously disputes that these letters and notices were in fact duly sent by BCFPI. The Contestation filed by the members listed in Schedules D and E indeed appeared to accept the existence of these letters and notices. On the balance of probabilities, the Court finds that they were remitted to the members concerned by BCFPI.

[36] Subsequently, around September 2005, BCFPI requested that restatements of the SERPs be prepared effective as of January 1, 2003, including amendments that would reflect the content of the 2003 letters and the 2005 letters (the "**2003 Draft Restatement**").

[37] The 2003 Draft Restatement thus amended sections 1.02 and 4.03 of the BCFPI SERPs as follows[17]:

> "1.02 The restated text of this Supplemental Plan is effective as of January 1, 2003 and as of such date replaces and cancels the application of any prior plan or agreement, whether oral or written, between a participant therein and the Corporation and providing for supplemental retirement benefits to be paid to such

[17] Exhibit R-11.

participant in addition to those payable from any registered pension plan of the Corporation. However, this Supplemental Plan shall not apply to or otherwise modify benefits payable or the terms and conditions for payment of such benefits to any former employee who has retired from or otherwise terminated his employment with Bowater Canadian Forest Products Inc. or its predecessors or their affiliates prior to the effective date of this Supplemental Plan.

4.03 Notwithstanding Subsection 4.02, the Corporation will arrange for the payment of benefits provided under the Supplemental Plan to be secured through a letter of credit from a financial institution. For greater certainty, such letter of credit shall not apply during active employment with the Corporation and shall only apply from pension commencement. Furthermore, the letter of credit shall only apply in respect of benefits provided under this Supplemental Plan for Credited Service prior to January 1, 2004, based on Final Average Earnings and Average Incentive Target up to December 31, 2003 and taking into account the early retirement reduction that would have applied if employment had terminated or retirement had occurred on December 31, 2003 but taking into account the maximum pension applicable under the Registered Plan at pension commencement. The letter of credit shall not apply either in respect of Participants subject to US tax as a result of being a US citizen, a US resident or being employed by Bowater Inc. or any affiliated company in the US, unless they have elected in writing to be covered by the letter of credit."

(Emphasis added)

[38] However, Petitioners have not been able to locate a resolution of BCFPI Board of Directors amending sections 1.02 and 4.03 of the 2003 SERPs as they read in this 2003 Draft Restatement, nor one resolution adopting the 2003 Draft Restatement.

[39] Later on, in July 2009, an officer of BCFPI executed a further restatement of the SERPs, this time "effective January 1, 2003, including amendments up to January 1, 2009 inclusive" (the "**2009 Restatement**")[18]. In that document, the wording of section 4.03 was similar to that of the 2003 Draft Restatement. Yet, the BCFPI Board of Directors did not adopt either a resolution to give effect to this 2009 Restatement.

THE ACTUARIAL VALUATIONS

[40] That said, at various times during the relevant years, BCFPI obtained from Mercer actuarial valuations of its liabilities pursuant to the SERPs for the purpose of establishing the face amount of the letter of credit held by RTC.

[41] Actuarial valuations as of June 2005 and March 2008 were so performed, in compliance with the 2003 Draft Restatement and the letters sent in 2003 and 2005 to the SERPs members[19].

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[18] Exhibit R-13.

[19] Exhibits R-15 and R-16.

[42] Both the June 2005 and the March 2008 actuarial valuations of Mercer disclosed the following information:

> "To Bowater Canadian Forest Products Inc.
>
> At your request, we have conducted an actuarial valuation of the liabilities as at (...) in respect of certain Supplemental Retirement Plans of Bowater Canadian Forest Products Inc. The purpose of this valuation is to determine the face amount of the letter of credit as of such date. We are pleased to present the results of the valuation.
>
> (...)
>
> Based on the terms of the Supplemental Retirement Plans and on notices provided to active and vested terminated members, the letter of credit covers pensions in payment relative to benefits for service up to December 31, 2003 (December 31, 2002 for any member who elected to participate in the DC plan effective January 1, 2003), based on earnings up to December 31, 2003 taking into account the early retirement reductions that would have applied if termination or retirement had occurred on December 31, 2003 and also taking into account the maximum pension applicable at pension commencement.
>
> In accordance with the RCA Trust Agreement between Avenor Inc. and Montreal Trust Company, the amount of the letter of credit shall be equivalent to Bowater Canadian Forest Products Inc.'s determination of its liabilities to beneficiaries. Such determination shall be based on actuarial valuations which the Trustee shall be under no obligation to review or assess."
>
> (Emphasis added)

[43] In both valuations, Mercer also indicated that "liabilities correspond only to liabilities for pensions in payment, consistent with the notices provided (by BCFPI) to affected members".

ANALYSIS

[44] In the end, this Judgment deals with yet another unfortunate consequence of the insolvency of the Petitioners and their filing for Court protection under the *CCAA*. Simply put, BCFPI does not have the financial resources to continue funding the payment of the SERPs benefits to eligible members. Only the letter of credit remains for those entitled to its proceeds.

[45] And still, even if the entitlement is limited to those members identified by the Petitioners in the Motion, according to Schedule F and Mercer's projections[20], there will not be enough to cover everyone for everything they are entitled to under the SERPs. The available funds are expected to run out sometime in January 2026.

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[20] Exhibit R-31.

[46] Be that as it may, the Court must decide the pending issues based upon the interpretation of the relevant sections of the SERPs and the behaviour of the parties in relation thereto.

[47] With due respect to the arguments raised by the members listed in Schedules D and E, the Court considers that the Petitioners' position is correct under the circumstances. Only the members listed on Schedules A, B and C are entitled to share in the proceeds of the letter of credit.

[48] For what it is worth, this does not negate to the members listed in Schedules D and E their entitlement to the SERPs benefits and their claims in that regard in the context of the restructuring. This Judgment is only concerned with the proceeds of the letter of credit securing, in part, the benefits payable under the SERPs.

[49] With respect to the amendments sought by the Petitioners to the Trust Agreement, however, the Court is of the view that it does not have the authority to impose such upon the interested parties in the absence of any consensus on the nature, extent and wording of the provisions at issue.

[50] The Court's explanations follow.

1) THE MEMBERS ENTITLED TO SHARE IN THE LETTER OF CREDIT

A) The Canadian Members Who Retired Before December 31, 2003

[51] 48 members of the SERPs are Canadian who retired before December 31, 2003. They include the 44 retirees and four beneficiaries listed in Schedule A to the Motion.

[52] No one disputes that the benefits of these members are covered by the letter of credit. The Court agrees.

[53] The language of the 2003 SERPs provides that the payment of their benefits is to be secured by the letter of credit. They were never advised that their benefits, in whole or in part, were not covered by the letter of credit. The amendments to the 2003 SERPs reflected in the 2003 Draft Restatement and the 2009 Restatement provide that their benefits are covered by the letter of credit. The actuarial valuations prepared by Mercer in 2005 and 2008 included their benefits in the calculation of the amount of the letter of credit.

B) The Canadian Members Who Retired After December 31, 2003

[54] Six members of the SERPs are Canadian who retired after December 31, 2003 and before May 26, 2009. They are listed in Schedule B to the Motion.

[55] Similarly to the Canadian members who retired before December 31, 2003, no one disputes that the benefits of these members are covered by the letter of credit, as long as they are limited to the benefits accrued up to December 31, 2003. Again, the Court agrees with that assertion.

[56] Although the language of the 2003 SERPs provides that the payment of benefits is to be secured by a letter of credit, BCFPI's intention was clearly that only SERPs benefits accrued up to December 31, 2003, would be secured by the letter of credit.

[57] Letters were sent on November 24, 2003 to the SERPs members who were active as of that date in order to advise them that only the benefits of retired SERPs members and only SERPs benefits accrued up to December 31, 2003, would be secured by the letter of credit. This change was also reflected in the 2003 Draft Restatement and the 2009 Restatement.

[58] In addition, the actuarial valuations prepared by Mercer in 2005 and 2008 limited the liabilities of the SERPs towards the members who retired after December 31, 2003 to the value of the benefits that accrued up to December 31, 2003, such that the face value of the letter of credit was based on the pre-December 31, 2003 earnings and service.

[59] The Court also agrees with Petitioners that Mr. Donald Campbell should be included in that group. He was on salary continuance on April 17, 2009 when the Initial Order was issued. As a result of the Initial Order, his salary continuance was discontinued and his active employment was terminated as of April 15, 2009. Thereafter, Mr. Campbell elected to retire on May 1, 2009.

[60] It is appropriate to treat him as a Canadian resident member who retired after December 31, 2003 but before May 26, 2009, as opposed to an active employee.

C) The U.S. Members

[61] There were, at the date of the Motion, three members of the SERPs who were U.S. citizens: one retiree who is a Canadian resident (Mr. Warren Woodworth), one beneficiary who is a U.S. resident (Mrs. Alyce Flenniken), and Mr. Jerry Soderberg. All three members of this group retired prior to December 31, 2003. They are listed in Schedule C to the Motion.

[62] The SERPs liabilities to Mrs. Flenniken and Mr. Woodworth are covered by the letter of credit. The language of the 2003 SERPs provides that the benefits of all members, including the U.S. members, are covered by the letter of credit and these members have not received any notice or letter from BCFPI whereby they were advised that their benefits, in whole or in part, were not covered by the letter of credit.

[63] True, there were, however, negative tax consequences in the United States if the benefits of a U.S. member were secured by a letter of credit. The tax rules of the Internal Revenue Code (the "**IRC**") provided that securing SERPs benefits of SERPs members who were taxpayers of the United States resulted in the obligation for such SERPs members to include in the income for the year during which such security was granted the value of the benefits so secured.

[64] For that reason, in the 2003 Draft Restatement and in the 2009 Restatement, it was indicated that the liabilities of the SERPs to the members of this group were not secured by the letter of credit unless they elected in writing to be covered by the letter of credit.

[65] Accordingly, the value of the SERPs liabilities to Mrs. Flenniken and Mr. Woodworth were not included in the calculation of the face value of the letter of credit held by RTC in 2005 or 2008. The 2008 actuarial valuation indeed stated:

> "For tax reasons U.S. taxpayers are not covered by the letter of credit unless they elect to be covered. We understand that U.S. taxpayers have been notified by Bowater Canadian Forest Products Inc. to this effect."

[66] Nevertheless, the Petitioners do not have any indication in their files that these U.S. members were at any time invited to make such an election. Therefore, their liabilities should have been included in the valuations.

[67] As for Mr. Soderberg, also a citizen and resident of the United States, on August 4, 1995, he was given confirmation, through two letters, of changes to his compensation package which included participation in the 1993 SERP[21]. On January 6, 1997, he was advised that his SERPs benefits were secured by a letter of credit held by MTC[22]. On February 25, 1997, he was further advised that although he was and would continue to be a participant of the Avenor America Inc. pension plan (a U.S. pension plan), he would remain entitled to the pension benefits set forth in the letter of August 4, 1995 describing his pension entitlements[23].

[68] Still on January 6, 1997, he was granted a Change of Control Agreement by Avenor. During August 1998, there was a change of control, such that the agreement was therefore triggered. On September 3, 1998, Mr. Soderberg was informed of the computation of his benefits pursuant to this Change of Control Agreement and, as a result, fully released and discharged Avenor Inc. and BPPC from all further obligations. He retired on October 1, 1998 and on October 2, 1998[24], he was advised that he would start to receive a pension from the U.S. pension plan and that his SERPs benefits would be assumed by Bowater Inc. and paid from the U.S.

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21 Exhibit R-24.
22 Exhibit R-25.
23 Exhibit R-26.
24 Exhibit R-28.

[69] Yet, the value of the SERPs liabilities to Mr. Soderberg was not included in the calculation of the face value of the letter of credit held by RTC in 2005 or 2008 because he did not and does not participate in a Canadian registered pension plan.

[70] Despite this, based on the above-mentioned letters sent to Mr. Soderberg, the Court agrees with Petitioners that he should also be entitled to continue to receive, from May 1, 2009, his monthly SERPs payments from the proceeds of the letter of credit.

D) The Active Employees and The Deferred Vested Members

[71] On May 26, 2009, eleven members of the SERPs were still active employees and six were deferred vested members. They are listed in Schedules D and E to the Motion.

[72] Petitioners submit that the benefits of the active employees and the deferred vested members should not be covered by the letter of credit for four main reasons:

- On a proper interpretation, the relevant sections of the SERPs do not allow for it;
- The active employees and the deferred vested members received letters dated November 24, 2003, May 27, 2005, and May 30, 2005 which specified that the letter of credit did not secure the payment of benefits that may become payable some time in the future to active employees or deferred employees;
- The 2003 Draft Restatement and the 2009 Restatement both provided that the letter of credit did not secure benefits during active employment with the corporation or to deferred vested members and shall only apply from pension commencement;
- The actuarial valuations prepared by Mercer in 2005 and 2008 did not include the benefits of the active members and of the deferred vested members.

[73] The Court agrees that the active employees listed on Schedule D and the deferred vested members listed on Schedule E are not entitled to receive monthly SERPs payments from the proceeds of the letter of credit.

[74] First, it is a reasonable interpretation of the relevant provisions of the SERPs to suggest that the letter of credit covers benefits in payment to the retirees and their beneficiaries, and not the potential future payments to active employees and deferred vested employees.

[75] The SERPs are contracts of successive performance. Subsection 4.02 provides that BCFPI shall pay the benefits payable thereunder as they become due.

[76] Benefits payable under the SERPs are benefits payable on a monthly basis pursuant to Sections 5 to 11, i.e. on Normal Retirement Date (age 65), Early Retirement

Date (age 55), postponed retirement date (after age 65), disability date, death or the date of termination of employment. No benefits are due nor become due before the earliest of such dates.

[77] BCFPI's undertaking pursuant to Subsection 4.03 can be interpreted as securing the payment of the benefits provided by the SERPs, not the benefits payable in se or per se. Accordingly, only benefits that are in payment are secured by the letter of credit.

[78] The SERPs provide in Subsection 13.08 that their provisions shall be interpreted in accordance with the laws of the Province of Quebec. The relationship between a SERP Participant and BCFPI is contractual and the relevant rules on interpretation are set out in Articles 1425 to 1434 *CCQ*.

[79] Pursuant to these rules of interpretation, Subsections 4.02 and 4.03 of the SERPs should not be construed in a vacuum but in relation to each other and other provisions of the SERPs (Article 1427 *CCQ*).

[80] Second, under the SERPs, it was for BCFPI to decide on all matters relating to the (i) interpretation, (ii) administration, and (iii) application of the plans.

[81] In the exercise of these powers, BCFPI issued the letters dated November 24, 2003 (Exhibit R-8), May 27, 2005 (Exhibit R-9) and May 30, 2005 (Exhibit R-10).

[82] The Court agrees that BCFPI's decision to only secure benefits in payment and not benefits under accrual was a reasonable decision reached pursuant to Subsection 14.01.

[83] When such decisions are reasonable and reached without consideration of reasons or motives that are outside of the scope of the discretion granted to the "decision-making person", the Courts will not lightly intervene in the "decision-making" process[25].

[84] As can be seen from the language of the 2003 and 2005 letters, there were reasonable reasons for BCFPI to reach such decisions. In *James Robert Marchant* v. *The Royal Trust Company* and *Bowater Pulp and Paper Canada Inc.*[26], the Court upheld the administrator's decision to deny an enhanced benefit since the decision was reasonable and not taken in bad faith.

[85] Third, even if the letters and notices sent in 2003 and 2005 were viewed as amendments to the SERPs rather than interpretation, administration or application of the SERPs, they were nevertheless valid amendments pursuant to Subsection 15.01.

[86] This provision imposes three conditions to the validity of an amendment:

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[25] See *Neville* v. *Wynne*, 2005 BCSC 483, confirmed 2006 BCCA 460, and *Patrick Communications Inc.* v. *Telus*, 2006 BCSC 854, confirmed 2007 BCCA 200.

[26] (1999), 26 C.C.P.B. 126, (S.C., 1999-09-30), SOQUIJ AZ-99026555.

(1) The amendment must be communicated in writing by BCFPI to the Participants;

(2) The communication must indicate the effective date of the amendment which must not precede the date that the communication is deemed to have been received by the Participants; and

(3) The amendment must be made in respect of all Participants, excluding those who have already commenced to receive benefits under the SERPs.

[87] These conditions were met here. The letters were communicated in writing by BCFPI to the Participants in accordance with the first condition. The first letter was dated November 24, 2003 and came into effect on January 1, 2004. The second letters were dated May 27 and 30, 2005 and came into effect immediately. Therefore, the three letters met the second condition. Finally, the amendment affected all active employees and deferred vested members, as required by the third condition.

[88] That is not all.

[89] The validity of the letters was never challenged by any active employee or deferred vested employee before the current proceedings. This is quite telling. In matters of contractual interpretation, Article 1426 *CCQ* states that the interpretation given by the parties and their behaviour in that regard are factors to be taken into account.

[90] In comparison, the subsequent behaviour of both BCFPI and Mercer was in strict compliance with such changes.

[91] The mentions appearing in the 2003 Draft Restatement and 2009 Restatement cited before show clearly that it was either BCFPI's interpretation, administration or application of the SERPs that the letter of credit guaranteed only the benefits then in payment to the retirees or their beneficiaries or, at the very least, its definite intention to amend the SERPs along those lines.

[92] It is true that BCFPI has not been able to locate a resolution of its Board of Directors amending Subsections 1.02 and 4.03 of the SERPs as they read in the 2003 Draft Restatement, nor adopting the 2003 Draft Restatement. It is also true that the Board of Directors did not adopt a resolution to give effect to the 2009 Restatement.

[93] Nevertheless, this is not fatal to the validity of BCFPI's decision respecting the interpretation, administration and application of the plans or the amendments brought about by the 2003 and 2005 letters.

[94] The active employees and the deferred vested employees who have contested the Motion allege that a resolution of the Board of Directors was required to modify the SERPs or to authorize officers to modify the SERPs.

[95] However, they have not pointed to any provision of BCFPI's articles or by-laws that would require such a resolution for such an amendment. Moreover, nothing in the *Canada Business Corporations Act* ("***CBCA***") requires a board resolution in such a case.

[96] At worst, the active employees and deferred vested employees can argue that the delegation to Mr. Cabana, the V.P. Human Resources & Public Affairs, Canadian Operations of BCFPI who signed the letters at issue, was not in accordance with Subsection 14.02 of the SERPs.

[97] If that is the argument, there has been subsequent ratification by BCFPI, whether through the employer certifications referred to in the Mercer valuations and executed by another officer, or through the provision of a letter of credit that was calculated without taking into account the benefits that would have eventually become due to the active employees and the deferred vested employees.

[98] In addition, Section 16(3) of the *CBCA* provides a safe harbour as follows:

> "(3) Rights preserved – No act of a corporation, including any transfer of property to or by a corporation, is invalid by reason only that the act or transfer is contrary to its articles or this Act."

[99] Lastly, on that point, Maurice and Paul Martel are of the opinion that the co-contracting party ("*le tiers*") cannot attack the contract by invoking internal corporate irregularities such as the lack of appropriate authorization[27]:

> "*Donc, lorsqu'une irrégularité de régie interne entache une transaction, elle ne peut être invoquée par le tiers pour faire annuler cette transaction. Seule la compagnie ou un de ses actionnaires pourrait l'invoquer. Quant à la compagnie, une telle démarche est vouée à l'échec dès le départ si elle veut l'entreprendre pour faire annuler la transaction, car le tiers est protégé par la règle de l'indoor management. Reste l'actionnaire: il ne pourrait pas faire annuler la transaction, car la règle de l'indoor management joue ici encore en faveur du tiers. D'ailleurs, il n'est même pas sûr que l'actionnaire jouisse d'un tel recours, surtout si l'irrégularité a été ratifiée par la majorité des actionnaires.*"

[100] In closing, from a mere practical standpoint, one could add that pursuant to the Mercer actuarial valuations, the amount of the letter of credit was based on the assumption that only retirees and their beneficiaries were covered by the letter of credit, with the result that funds have not been put aside for the active employees and the deferred vested employees. Any deficit that already exists in terms of the coverage of the benefits payable to retirees would therefore be increased if they were included.

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[27] Maurice MARTEL et Paul MARTEL, *La Compagnie au Québec: les aspects juridiques,* v. 1, Montreal: Wilson & Lafleur / Martel ltée, 2010, paragraph 26-20.

[101] Moreover, neither the calculation of the SERPs benefits of the active employees and the deferred vested employees, nor the way in which the active employees and the deferred vested employees would benefit from the letter of credit, is clear. In fact, both would create problems because of the number of unknown assumptions that would likely influence the calculations of any benefits.

[102] The Court will therefore limit the SERPs members' entitlement to the proceeds of the letter of credit to the members listed in Schedules A, B and C to the Motion. As requested by the Petitioners, this conclusion will be binding upon all SERPs members. The Court is satisfied that the Motion, be it in its original or amended forms, has been duly communicated to the Service List and to the attorneys who have appeared on behalf of many of the members, while being at the same time always sent by registered mail to all SERPs members and posted on the Monitor's website.

[103] That said, there are, in principle, three ways in which the proceeds of the letter of credit can be distributed to the members entitled to share in those:

a) RTC can continue to make monthly payments to the members entitled to share in the proceeds of the letter of credit until the funds are exhausted. By Judgment rendered July 2, 2010, the Court, with the consent of everyone, has already ordered RTC to resume the monthly payments to the members listed in Schedules A, B and C to the Motion for all outstanding arrears payable since May 1, 2009;

b) RTC can distribute the balance of the proceeds on a pro rata basis based on the value of each member's benefits as at the date of this Judgment; or

c) RTC can distribute the balance of the proceeds on a pro rata basis based on the value of each member's benefits as at May 26, 2009.

[104] The Court agrees with Petitioners that the first approach is to be preferred for the time being. It is fairer to the members entitled to receive monthly SERPs payments from the proceeds of the letter of credit. It is, in fact, in accordance with the approach already followed by the Court in its Judgment of July 2, 2010.

[105] Conversely, the second and third approaches would likely require an amendment to the SERPs and the Trust Agreement in order to pay lump sums, which creates a problem under the circumstances, as will be discussed below.

[106] Since there is no real debate on the entitlement of the members listed in Schedules A, B and C to receive their monthly SERPs payments from the proceeds of the letter of credit, and in view of the advanced age of many of these members, it is appropriate to order the provisional execution of this Judgment notwithstanding appeal.

2. AMENDMENTS TO THE TRUST AGREEMENT

[107] In the Motion, BCFPI asks the Court to also authorize it to amend the Trust Agreement entered into with RTC, notably to dissociate itself from all of its obligations under the Trust Agreement.

[108] There is no provision in the Trust Agreement dealing with amendments and the interested parties, including BCFPI, RTC or, for that matter, the members listed in Schedules A, B and C to the Motion, do not agree on the nature, extent or wording of the amendments sought.

[109] Under these circumstances, the Court considers that the Trust Agreement entered into between BCFPI and RTC cannot be amended and that BCFPI cannot ask the Court to modify it. This negotiation belongs to the parties themselves. It is not for the Court to substitute itself to this process.

[110] It is inappropriate for a Court to attempt to draw up a contract for the parties when these parties do not agree to modify its contractual terms. Contracts represent a law which private parties have agreed applies to them and they normally cannot be varied by the Courts. This remains true as well in the context of a *CCAA* restructuring[28].

[111] Without RTC's consent, BCFPI cannot have the Trust Agreement amended to remove all of its rights and obligations and give those rights and obligations to a committee of beneficiaries.

[112] For the time being, the Trust Agreement entered into between BCFPI and RTC is still in force and has not been terminated.

[113] Although BCFPI contemplates terminating the SERPs to replace them with new SERPs that are described in section 6.9 of the Plan of Arrangement[29], and argues that the termination of the SERPs entails the termination of the Trust Agreement, this Plan of Arrangement is yet to be voted upon and sanctioned by the Court.

[114] Indeed, based on the representations made at hearing, it appears that the interested parties do not even agree on the impact of the potential termination of the SERPs upon the Trust Agreement.

[115] This issue, if it ever arises, will have to be dealt with in due course. For the purposes of this Judgment, it is not necessary to decide this question and rule upon the potential consequences that may follow from any answer.

[116] For now, it will suffice to state that RTC will continue the monthly payments of SERPs benefits from the proceeds of the letter of credit in conformity with the terms of

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[28] *Allarco Entertainment Inc. (Re)*, 2009 CarswellAlta 1458 (Alta. Q.B.).
[29] Exhibit R-32.

this Judgment up until the earlier of the date on which the Trust Agreement is terminated or a further order of the Court.

[117] That said, in its contestation to the amendments sought by the Petitioners to the Trust Agreement, RTC itself seeks declarations that the RCA Plan Trust Fund were properly invested in 30-day Government of Canada Treasury Bills and that it shall not be liable for any damage or complaint relating to these investments.

[118] These declarations are not necessary. The provisions of the Trust Agreement govern the rights and obligations of the interested parties. Short of any difficulties or disagreements that no one alluded to, it is not for the Court to give advanced rulings on potential future disputes.

[119] RTC also seeks declarations that it shall not be liable for any delays caused by the filing of the Motion, in a context where no one appears to raise any issue in that regard. This declaration is again unnecessary.

[120] Finally, RTC wants a declaration that it cannot be held liable for any consequence of its reliance upon the decision to be rendered by the Court on the Motion. The Court's conclusions are, of course, binding upon those that are subject to their terms. They are quite sufficient as they stand for any concerned parties to conduct themselves accordingly. It is not the role of the Court to go any further than that.

FOR THESE REASONS, THE COURT:

[1] **GRANTS, BUT IN PART ONLY,** the Re-Amended Motion for Directions on the Identity of the Persons Whose Benefits Under the Bowater Supplemental Executive Retirement Plans Were Secured by a Letter of Credit (the "**Motion**");

[2] **EXEMPTS**, if applicable, the Petitioners from any further service of the Motion and from any further notice or delay of presentation;

[3] **DECLARES** that the service of the Motion by registered mail or mail to the SERPs members, who are not represented by attorneys, is valid;

[4] **DECLARES** that this Judgment is binding on all members of the SERPs and their beneficiaries;

[5] **DECLARES** that only the following members of the SERPs benefit from the letter of credit (Exhibit R-7) and are entitled to receive, from May 1, 2009, monthly SERPs payments from the proceeds of the letter of credit (Exhibit R-7) held by The Royal Trust Company ("RTC"):

a) The Canadian resident members of the SERPs who retired before December 31, 2003 (listed in Schedule A to the Motion);

b) The Canadian resident members of the SERPs who retired after December 31, 2003 but before May 26, 2009, including Mr. Donald Campbell (listed in Schedule B to the Motion), but only on the value of their SERPs benefits accrued up to December 31, 2003; and

c) The U.S. members of the SERPs, including Mr. Jerry Soderberg (listed in Schedule C to the Motion);

[6] **DECLARES** that the Active Employees and the Deferred Vested Employees whose names are listed in Schedules D and E to the Motion are not entitled to have the value of their accrued benefits under the SERPs secured by the amount held by RTC and that no person other than the persons referred to in the preceding paragraph is entitled to have the value of his or her accrued benefits under the SERPs secured by the amount held by the RTC, nor to receive any monthly SERPs payment from the proceeds of the letter of credit (Exhibit R-7) held by RTC;

[7] **ORDERS** RTC, up until the earlier of the date on which the Trust Agreement (Exhibit R-5) is terminated or a further order of the Court, to continue the monthly SERPs payments, without interest, from the proceeds of the letter of credit (Exhibit R-7), in conformity with the terms of this Judgment;

[8] **DECLARES** that, for the purpose of the Trust Agreement (Exhibit R-5), RTC acting in accordance with this Judgment shall be construed and have the same effect as if RTC relied and acted upon the written instructions of Bowater Canadian Forest Products Inc;

[9] **ORDERS** the provisional execution of this Judgment notwithstanding any appeal and without the necessity of furnishing any security;

[10] **WITHOUT COSTS.**

CLÉMENT GASCON, J.S.C.

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Me Raymond Hébert
DE GRANDPRÉ JOLI-COEUR
Attorneys for some of the members listed in Schedules D and E of the Motion

Dates of hearing: August 30 and 31, 2010

SCHEDULE "A"

ABITIBI PETITIONERS

1. ABITIBI-CONSOLIDATED INC.
2. ABITIBI-CONSOLIDATED COMPANY OF CANADA
3. 3224112 NOVA SCOTIA LIMITED
4. MARKETING DONOHUE INC.
5. ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.
6. 3834328 CANADA INC.
7. 6169678 CANADA INC.
8. 4042140 CANADA INC.
9. DONOHUE RECYCLING INC.
10. 1508756 ONTARIO INC.
11. 3217925 NOVA SCOTIA COMPANY
12. LA TUQUE FOREST PRODUCTS INC.
13. ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED
14. SAGUENAY FOREST PRODUCTS INC.
15. TERRA NOVA EXPLORATIONS LTD.
16. THE JONQUIERE PULP COMPANY
17. THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY
18. SCRAMBLE MINING LTD.
19. 9150-3383 QUÉBEC INC.
20. ABITIBI-CONSOLIDATED (U.K.) INC.

SCHEDULE "B"

BOWATER PETITIONERS

1. BOWATER CANADIAN HOLDINGS INC.
2. BOWATER CANADA FINANCE CORPORATION
3. BOWATER CANADIAN LIMITED
4. 3231378 NOVA SCOTIA COMPANY
5. ABITIBIBOWATER CANADA INC.
6. BOWATER CANADA TREASURY CORPORATION
7. BOWATER CANADIAN FOREST PRODUCTS INC.
8. BOWATER SHELBURNE CORPORATION
9. BOWATER LAHAVE CORPORATION
10. ST-MAURICE RIVER DRIVE COMPANY LIMITED
11. BOWATER TREATED WOOD INC.
12. CANEXEL HARDBOARD INC.
13. 9068-9050 QUÉBEC INC.
14. ALLIANCE FOREST PRODUCTS (2001) INC.
15. BOWATER BELLEDUNE SAWMILL INC.
16. BOWATER MARITIMES INC.
17. BOWATER MITIS INC.
18. BOWATER GUÉRETTE INC.
19. BOWATER COUTURIER INC.

SCHEDULE "C"

18.6 CCAA PETITIONERS

1. ABITIBIBOWATER INC.
2. ABITIBIBOWATER US HOLDING 1 CORP.
3. BOWATER VENTURES INC.
4. BOWATER INCORPORATED
5. BOWATER NUWAY INC.
6. BOWATER NUWAY MID-STATES INC.
7. CATAWBA PROPERTY HOLDINGS LLC
8. BOWATER FINANCE COMPANY INC.
9. BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED
10. BOWATER AMERICA INC.
11. LAKE SUPERIOR FOREST PRODUCTS INC.
12. BOWATER NEWSPRINT SOUTH LLC
13. BOWATER NEWSPRINT SOUTH OPERATIONS LLC
14. BOWATER FINANCE II, LLC
15. BOWATER ALABAMA LLC
16. COOSA PINES GOLF CLUB HOLDINGS LLC

TAB8

Case Name:

Canadian Airlines Corp. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985; c. C-36
AND IN THE MATTER OF the Business Corporations Act (Alberta) S.A. 1981, c. B-15, As Amended; Section 185
AND IN THE MATTER OF Canadian Airlines Corporation and Canadian Airlines International Ltd.

[2000] A.J. No. 1693

19 C.B.R. (4th) 12

Docket: 0001-05071

Alberta Court of Queen's Bench
Judicial District of Calgary

Paperny J.

Oral Judgment: May 12, 2000.

(52 paras.)

Application by unsecured creditors of corporation for order that unsecured claims held by Air Canada should be placed in separate class from other unsecured creditors, and for order striking portion of reorganization plan.

Counsel:

A.L. Friend. Q.C., H.M. Kay, Q.C, and R.B. Low. Q.C., for Canadian Airlines.

V.P. Lalonde and Ms M. Lalonde, for AMR Corporation.

S. Dunphy, for Air Canada.

P.T McCarthy, Q.C., for PricewaterhouseCoopers.

D. Nishimura, for Resurgence Asset Management LLC.

E. Halt, for Claims Officer.

A.J. McConnell, for Bank of Nova Scotia Trust Company of New York and Montreal Trust Co. of Canada.

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1 **PAPERNY J.** (orally):-- Resurgence Asset Management LLC "Resurgence" appeared on behalf of holders of approximately 60 percent of the unsecured notes issued by Canadian Airlines Corporation in the total amount of $100 million U.S. These unsecured note holders are proposed to be classified as unsecured creditors in the plan that is the subject of these proceedings.

2 Resurgence applied for the following relief:

1. An order lifting the stay of proceedings against Canadian Airlines Corporation and Canadian Airlines International Ltd. (respectively "CAC" and "CAIL" and collectively called "Canadian") to permit Resurgence to commence and proceed with an oppression action against Canadian, Air Canada and others.
2. Further, and in the alternative, Resurgence sought the same relief described in item one above in the context of the C.C.A.A. proceedings.
3. An order that any and all unsecured claims held or controlled, directly or indirectly by Air Canada shall be placed in a separate class and either not allowed to be voted of all, or, alternatively, allowed to be voted in separate class from all other affected unsecured claims.
4. An order that there be a separation in class between creditors of CAC and CAIL
5. An order striking Section 6.2(2)(ii) of the plan on the basis that it is contrary to the C.C.A.A.

3 Resurgence abandoned the application described in item 1 above, and the application in item 2 was addressed in my ruling given May 8, 2000, in these proceedings.

Standing

4 Prior to dealing with the remaining issues of classification, voting and Section 6.2(2)(ii) of the plan, the issue of standing needs to be addressed. This was a matter of some debate, largely in the context of the first two applications. Canadian argued that Resurgence was only a fund manager and did not hold the unsecured notes, beneficially or otherwise; and accordingly, did not have standing to make any of the applications. The evidence establishes that Resurgence is not the legal owner and the evidence of beneficial ownership is equivocal.

5 Canadian has not raised this issue on any of the previous occasions on which Resurgence has been before the court in these proceedings. There has been a consent order involving Resurgence and Canadian.

6 In my view, it is not appropriate now for Canadian to suggest that Resurgence does not represent the interests of the holders of 60 percent of the unsecured notes add essentially seek a declaration that Resurgence is a stranger to these proceedings.

7 I am not prepared to dismiss the applications of Resurgence on classification voting and amending the plan out of hand on the basis of standing.

8 Resurgence was also supported in these applications by the senior secured note holders. For the purposes of these applications, I accept that Resurgence is representing the interests of 60 percent of the unsecured note holders.

Classification of Air Canada's Unsecured Claim

9 By my April 14, 2000 order in these proceedings, I approved transactions involving CAIL, a large number of aircraft lessors and Air Canada, which achieved approximately $200 million worth of concessions for CAIL. In exchange for granting the concession, each creditor received a guarantee from Air Canada and the assurance that the creditor would immediately cease to be affected by the C.C.A.A. proceedings.

10 These concessions or deficiency claims were quantified and reflected in promissory notes which were assigned to Air Canada in exchange for its guarantee of the aircraft leases. The monitor approved the method of quantifying these claims and recognized the value of the concessions to Canadian. In that order I reserved the issue of classification and voting to be determined at some later date. The plan provides for two classes of creditors, secured and unsecured.

11 The unsecured class is composed of a number of types of unsecured claims, including aircraft financing, executory contracts, unsecured notes, litigation claims, real estate leases and the deficiencies, if, any, of the senior secured note holders.

12 In one portion of the application, Resurgence seeks to have Air Canada vote the promissory notes in separate class and relied on several factors to distinguish the claims of other Affected, Unsecured Creditors from Air Canada's unsecured claim, including the following:

1. The Air Canada appointed board caused Canadian to enter into these C.C.A.A. proceedings under which Air Canada stands to gain substantial benefits in its operations and in the merged operations and ownership contemplated after the compromise of debts under the plan.
2. Air Canada is providing the fund of money to be distributed to the Affected Unsecured Creditors and will, therefore, end up paying itself a portion of that

money if it is included in the Affected Unsecured Creditors' class and permitted to vote.

3. Air Canada gave no real consideration in acquiring the deficiency claims and manufactured them only to secure a 'yes' vote.

13 Air Canada and Canadian argue, that the legal right associated with Air Canada's unsecured promissory notes and with the other Affected, Unsecured Claims are the same and that the matters raised by Resurgence, as relating to classification are really matters of fairness more appropriately dealt with at the fairness hearing. Air Canada and the Canadian emphasized that classification must be determined according to the rights of the creditors not their personalities.

14 The starting point in determining classification is the statute under which the parties are operating and from which the court obtains its jurisdiction. The primary purpose of the C.C.A.A. is to facilitate the re-organization of insolvent companies, and this goal must be given proper consideration at every stage of the C.C.A.A. process, including classification of claims see for example, Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 72 C.B.R. (N.S.) 20 (Alta Q.B.)

15 Beyond identifying secured and unsecured classes the C.C.A.A. does not offer any guidance to the classification of claims. The process, instead, has developed in the case law.

16 A frequently cited description of the method of classification of creditors for the purposes or voting on a plan, under the C.C.A.A., is Sovereign Life Assurance Co. v. Dodd (1891) [1892] 2 Q.B. 573, (Eng. C.A.).

17 At page 583 (Q.B.), Bowen L.J. stated:

> The word class is vague and to find out what is meant by it, we must look at the scope of the section which is a section enabling, the court to order a meeting of a class of creditors to be called. It seems plain that we must give such a meaning to the term 'class' as will prevent the section, being so worked as to result in confiscation and injustice, and that it must be confined to those persons, whose rights are not so dissimilar as to make it impossible for them to consult together with the view to their common interest.

This test has been described as the "commonality of interest" test. All counsel agree that this is the test to apply to classification of claims under the C.C.A.A. However, there is a dispute on the types of interests that are to be considered in determining commonality.

18 Generally, the cases hold that classification is a fact-driven determination unique, to the circumstances of every case, upon which the court should be loathe to impose rules for universal application, particularly in light of the flexible, and remedial jurisdiction involved: see, for example, Re Fairview Industries Ltd. (1991) 11 C.B.R. (3d) 71 (N.S.T.D.)

19 The majority of the cases presented to me, held that commonality of the interest is to be determined by the rights the creditor has a vis-vis the debtor. Courts have also found it helpful to consider the context of the proposed plan and treatment of creditors under a liquidation scenario. In the absence of bad faith, motivation for supporting or rejecting a plan is not a classification issue in the authorities.

20 In considering what interests are included in the commonality of interest test, Forsyth J., in Norcen Energy Resources Ltd. (Supra) had to determine whether all the secured creditors of the company ought to be included in one class. The creditors all had first-charge security and the same method of valuation was applied to each secured claim in order to determine security value under the plan. The distinguishing features were submitted to be based on the difference in the security held, including case of marketability and realization potential. In holding that a separate class was not necessary, Forsyth J., said at page 29:

> Different security positioning and changing security values are a fact of life in the world of secured financing. To accept this argument would again result in a different class of creditor for each secured lender.

In doing so, Forsyth J. rejected the "identity of the interest" approach in which creditors in a class must have identical interests.

21 It was also submitted in Norcen Energy Resources Ltd. that since the purchaser under the plan had made financing arrangements with the Royal Bank the bank had an interest not shared by the other secured creditors. Forsyth J., held that in the absence of any allegation that the Royal Bank was not acting bona fide in considering the benefit of the plan, the secured creditors could not be heard to criticize the presence of the Royal Bank in their class.

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

23 The Norcen Energy Resources Ltd., approach was specifically adopted in British Columbia in Northland Properties Ltd., v. Excelsior Life Insurance Co. of Canada (1989), 73 C.B.R. (N.S.) 195 (B.C.C.A.), where it was held that various mortgages with different mortgages against different properties were included in the same class.

24 In Savage v. Amoco Acquisition Co. (1988), 68 C.B.R. (N.S.) 154 (Alta. C.A.) the Alberta Court of Appeal rejected the argument that shareholders who have private arrangements with the applicant or who are brokers or offices or otherwise in a special position vis-a-vis the debtor

company, should be put in a special category.

25 At page 158 the court stated in regard to the test applied to classification:

> We do not think that this rule justifies the division of shareholders into separate classes on the basis of their presumed prior commitment to a point of view. The state of facts, common to all, is that they are all offered this proposal, face as an alternative the break-up of this apparently insolvent company and hold shares that appear to be worthless on break-up. In any event, any attempt to divide them on the basis suggested, would be futile. One would have as many groups as there are shareholders.

The commonality of interest test was addressed by the British Columbia Supreme Court in Re Woodward's Ltd. (1993), 84 B.C.L.R. (2d) 206 (B.C.S.C.). Tysoe J. rejected the identity of interest approach and held that it was permissible to include creditors with different legal rights in the same class, so long as their legal rights were not so dissimilar that it was still possible for them to vote with a common interest.

26 Tysoe J. went on to find that legal interest should be considered in the context of the proposed plan and that it was also necessary to examine the legal rights of creditors in the context of the possible failure of the plan.

27 In other words, "interest" for the purpose of classification does not include the personality of identity of the creditor, and the interests it may have in the broader commercial sphere that might influence its decision or predispose it to vote in a particular way; rather, "interest" involves the entitlement of the debt holder viewed within the context of the provisions of the proposed plan. In that regard, see Woodward's Ltd. at page 212.

28 In Fairview Industries Ltd., the court held that in classification there need not be a commonality of interest of debts involved, so long as the legal interests were the same. Justice Glube (as she then was) stated that it did not automatically follow that those with different commercial interest, for example, those with security on "quick" assets, are necessarily in conflict with those with security on "fixed" assets. She stated that just saying there is a conflict is insufficient to warrant separation.

29 In Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia (1991), 86 D.L.R. (4th) 621 (Ont. Gen. Div.) at 626 like Norcen Energy Resources Ltd., the "identity of interest" approach was rejected. The court preserved a class of creditors which included debenture holders, terminated employees, realty lessors and equipment lessors.

30 Borins J. held that not every difference in the nature of the debt warrants a separate class and that in placing a broad and purposive interpretation on the C.C.A.A., the court should "take care to resist approaches which would potentially jeopardize a potentially viable plan." He observed that

"excessive fragmentation is counterproductive to the legislative intent to facilitate corporate re-organization" and that it would be "improper to create a special class simply for the benefit of an opposing creditor which would give that creditor the potential to exercise an unwarranted degree of power." (p. 627).

31 In summary, the cases establish the following principles applicable to assessing commonality of interest:

1. Commonality of interest should be viewed on the basis of the non-fragmentation test, not on an identity of interest test;
2. The interest to be considered are the legal interest the creditor hold qua creditor in relationship to the debtor company, prior to and under the plan as well as on liquidation;
3. The commonality of these interest are to be viewed purposively, bearing in mind the object of the C.C.A.A., namely to facilitate reorganizations if at all possible;
4. In placing a broad and purposive interpretation on the C.C.A.A., the court should be careful to resist classification approaches which would potentially jeopardize potentially viable plans.
5. Absent bad faith, the motivations of the creditors to approve or disapprove are irrelevant.
6. The requirement of creditors being able to consult together means being able to assess their legal entitlement as creditors before or after the plan in a similar manner.

32 With this background, I will make several observations relating to the reasons asserted by Resurgence that distinguish Air Canada from the rest of the Affected Unsecured Creditors.

33 The first two reasons given relate to interests of Air Canada extraneous to its legal rights as a unsecured creditor. The third reason related largely to the further assertion that Air Canada should not be allowed to vote at all. The matter of voting is addressed more specifically late in these reasons.

34 The factors described by Resurgence distinguish between Air Canada and other unsecured creditors relate largely to the fact that Air Canada is the assignee of the unsecured debt. In my view, that approach is to be is to be discouraged at the classification stage. To require the court to consider who holds the claim, as distinct from what they hold, at that point would be untenable. I note that Mr. Edwards recognizes in 1947 in his article, "Reorganizations under the Companies Creditors Arrangement Act", (1947), 25 Cdn. Bar Rev. 587, and observe this concern is heightened in the current commercial reality of debt trading.

35 Resurgence also asserted that a court should avoid placing creditors with a potential conflict of interest in the same class and relies on Re NsC Diesel Power Inc. (1990), 79 C.B.R. (N.S.) 1 (N.S.T.D.), a case in which the court considered a potential conflict of interest between

subcontractors and direct contractors. To the extent this case can be seen as decided on the basis of the distinct legal rights of the creditors of the creditors, I agree with the result. To the extent that the case determined that a class could be separated based on a conflict of interest not based on legal right, I disagree. In my view, this would be the sort of issue the court should consider at the fairness hearing.

36 Resurgence also relied on the decision of the British Columbia Supreme Court in Re Northland Properties Ltd. (1988), 73 C.B.R. (N.S.) 166 (B.C.S.C.), a case decided prior to Norcen Energy Resources Ltd.. In that case the court held that a subsidiary wholly owned by Northland Bank was incorporated to purchase certain bonds from Northland in exchange for preferred shares and was not entitled to vote. The court found that would be tantamount to Northland Bank voting in its reorganization and relied in Re Wellington Building Corp., [1934] O.R. 653, 16 C.B.R. 48 (Ont. S.C.) In this regard. I would note that the passage relied upon at page 5 in that case, in Wellington Building Corp (Supra) dealt with whether the scheme, as proposed, was unfair.

37 All creditors proposed to be included in the class of Affected, Unsecured Creditors, are all unsecured and are treated the same under the plan. All would be treat similarly under the BIA. The plan provides that they will receive 12 cents on the dollar. The Monitor opined that in liquidation unsecured creditors would realize a maximum of 3 cents on the dollar. Their legal interests are essentially the same. Issue is taken with the presence of Air Canada, supporter and funder of the plan, also having taken an assignment of a substantial, unsecured claim. However, absent bad faith, who creditors are is not relevant. Air Canada, supporter and funder of the plan, also having taken an assignment of a substantial, unsecured claim. However, absent bad faith, who creditors are is not relevant. Air Canada's mere presence in the class does not in and of itself constitute bad faith.

38 Further, all of these methods of distinguishing Air Canada's unsecured claim at their core are fundamentally issues of fairness which will be addressed by the Court at the fairness hearing on June 5, 2000. I am prepared to give serious consideration to these matters at that time and direct that there be a separate tabulation of the votes cast by Air Canada arising from any assignments of promissory notes they have taken, so that there is an evidentiary record to assist me in assessing the fairness of the vote when and if I am called upon to sanction the plan. This approach was taken by Justice Forsyth in Norcen Energy Resources Ltd., and in my view is consistent with the underlying purpose of the C.C.A.A. I wish to emphasize that the concerns raised by Resurgence will form part of the assessment of the overall fairness of the plan.

39 Permitting the classification to remain intact for voting purposes will not result in a confiscation of rights of or injustice to the unsecured note holders. Their treatment does not at this point depart from any other Affected based on different legal instruments, the legal rights of the unsecured note holders and Air Canada are essentially the same. Neither has security, nor specific entitlement to assets. Further, the ability of all of the Affected Unsecured Creditors to realize their claims against the debtor companies, depend in significant part, on the company's ability to continue as a going concern.

40 The separate tabulation of votes will allow the "voice" of unsecured creditors to be heard, while at the same time, permit rather than rule out the possibility that a plan might proceed.

41 It is important to preserve this possibility in the interests of facilitating the aim of the C.C.A.A. and protecting interests of all constituents. To fracture the class prior to the vote, amy have the effect of denying the court jurisdiction to consider sanctioning a plan which may pass the fairness test but which has been rejected by one creditor. This would be contrary to the purpose of the C.C.A.A.

Separating the Claims Against CAC and CAIL

42 Resurgence briefly argued that since Air Canada's debt is owed by CAIL only, it could only look to CAIL's assets in a bankruptcy and would not be able to look to any CAC assets. In contrast, Resurgence suggested that the unsecured note holders are creditors of both CAIL under a guarantee, and CAC under the notes. Resurgence submitted that the resulting difference in legal rights destroys the commonality of interest.

43 There is insufficient evidence to suggest that the unsecured note holders are also creditors of CAIL. Counsel referred only to a statement made by Mr. Carty on cross-examination that there was an "unsecured guarantee". However, no documents have been brought to my attention that would support this statement and, in of itself, the statement is not determinative. In any case, I do not have sufficient evidence before me to conclude that there would be a meaningful difference in recoveries for unsecured creditors of CAC and CAIL in the event of bankruptcy. I, therefore, cannot conclude on this basis that rights are being confiscated, unlike Tysoe J.'s ability to do so in Re Woodward's Ltd. Simply looking to different assets or pools of assets will not alone fracture a class; some unique additional legal right of value in liquidation going unrecognized in a plan and not balanced by others losing rights as well is needed on the analysis of Tysoe J.

44 I recognize the struggle between the unsecured note holders, represented by Resurgence on one side, and Air Canada and Canadian on the other. Resurgence fears the inclusion of Air Canada and the Affected Unsecured Creditor's class will swamp the vote. Air Canada and Canadian fear that exclusion of Air Canada will result in the voting down of a plan which, in their view, otherwise stands a realistic chance of approval. As unsecured creditors, they do share similar legal rights. As supporters or opponents of the plan, they may well have distinctly different financial or strategic interests. I believe that in the circumstances of this case, these other interests and their impact on the plan, are best addressed as matters of fairness at the June 5, 2000 hearing, and in this way, the concerns will be heard by the court without necessarily putting an end to the entire process.

Voting

45 Although my decision on classification makes it clear that I will permit Air Canada to vote on the plan, I wish to comment further on this issue. Air Canada submitted that it should be entitled to vote the face value of the promissory notes which represent deficiency claims assigned to it from

aircraft lessors in the same fashion as any other creditor who has acquired the claims by assignment. All parties accept that deficiency claims such as these would normally be included and voted upon in an unsecured claims class. The request by Resurgence to deny them a vote would have the effect of varying rights associated with those notes.

46 The concessions achieved in the re-negotiation of the aircraft leases, represent value to CAIL. The methodology of calculation of the claims and their valuation was reviewed by the Monitor and this is not being challenged. Rather,it is because it is Air Canada that now holds them, that it is objectionable to Resurgence. Resurgence asserts that Air Canada manufactured the assignment so it could preserve a 'yes' vote. This, in my view, is a matter going to fairness. Is it fair for Air Canada to vote to share in the pool of cash funded by it for the benefit of unsecured creditors? That matter is best resolved at the fairness hearing.

47 Resurgence relied on Northland Properties Ltd. in which a wholly owned subsidiary of the debtor company was not allowed to vote because to do so would amount to the debtor company voting in its own reorganization. The corporate relationship between Air Canada and CAIL can be distinguished from the parent and wholly owned subsidiary in Northland Properties Ltd.. Air Canada is not CAIL's parent and owns 10 percent of a numbered company which owns 82 percent of CAIL. Further, as noted above, the court in Northland Properties Ltd. apparently relied on the passage from Wellington Building Corp which indicated in that case the court was being asked to approve a plan as fair. Again, the basis on which Resurgence seeks to deprive Air Canada of its vote is really an issue of fairness.

Section 6(2)(2) of the Plan

48 Resurgence wishes me to strike out Section 6(2)(2) of the plan, which essentially purports to provide a release by affected creditors of all claims based in whole or in part on any act, omission transaction, event or occurrence that took place prior to the effective date in any way relating to the debtor companies and subsidiaries, the C.C.A.A. proceeding or the plan against:

1. The debtor companies and its subsidiaries;
2. The directors, officers and employees;
3. The former directors, officers and employees of the debtor companies and its subsidiaries; or
4. The respective current and former professionals of the entities, including the Monitor, its counsel and its current officers and directors, et cetera. Resurgence submits that this provision constitutes a wholesale release of directors and other which is beyond that permitted by Section 5.1 of the C.C.A.A. CAIL and CAC submit that the proposed release was not intended to preclude rights expressly preserved by the statute and are prepared to amend the plan to state this.

49 Section 5.1(3) of the C.C.A.A. provides that the court may declare that a claim against directors shall not be compromised it is satisfied that the compromise would not be fair and

reasonable in the circumstances.

50 In this application of Resurgence, the court must deal with two issues: One, what releases are permitted under the statute; and, two, what releases ought to be permitted, if any, under the plan.

51 In my view, I will be in a better position to assess the fairness of the proposed compromised of claims which is drafted in extremely broad terms, when I consider the other issues of fairness raised by Resurgence. Accordingly, I leave that matter to the fairness hearing as well.

52 In summary, the application contained in paragraph (d) of the Resurgence Notice of Motion is dismissed. The application in paragraph (e) is adjourned to June 5, 2000.

Application dismissed.

PAPERNY J.

cp/s/qw/qlmmm

TAB9

Case Name:

Dylex Ltd. (Trustee of) v. Westwood Mall (Mississauga) Ltd.

IN THE MATTER OF the Bankruptcy of Dylex Limited, a company incorporated pursuant to the laws of Canada, having its head office in the City of Toronto, in the Province of Ontario
Between
Richter & Partners Inc., Trustee in Bankruptcy of Dylex Limited, moving party, and
Westwood Mall (Mississauga) Limited and the other parties listed in Appendix A, respondents

[2001] O.J. No. 5021

[2001] O.T.C. 910

33 C.B.R. (4th) 292

110 A.C.W.S. (3d) 418

Court File No. 01-CL-4216

Ontario Superior Court of Justice
Commercial List

Spence J.

Heard: November 8, 9, 28, 29, December 5, 6 and 12, 2001.
Judgment: December 19, 2001.

(93 paras.)

Landlord and tenant -- Assignment of lease -- Landlord's consent, whether reasonably withheld -- By court order -- Approval of assignment made by trustee in bankruptcy.

Motions by the trustee of Dylex for orders approving lease assignments. The trustee sought orders

permitting the assignment to Dollarama of 11 leases between the landlords and the BiWay division of Dylex. The court approved the sale of leases to Dollarama. Dollarama had proposed to covenant to carry on a Dollarama store selling a wide variety of general merchandise, and, to observe and perform the terms of the lease. The landlords refused to consent to the assignment on the ground that the proposed use of the premises was contrary to the use provision of the existing leases.

HELD: Motions dismissed. The assignments to Dollarama were not approved. Dollarama was not in a position to covenant to observe and perform the terms of the leases. The use intended by Dollarama would be a change from those contemplated by the use clauses in the leases. The references in the clauses to BiWay in connection with incidental items and the store name, indicated an intention that the store was to be similar type of store, rather than one which merely sold certain kinds of goods that BiWay sold. The fact that Dollarama sold socks and underwear for under $1 as six per cent of overall sales did not reach a level of materiality that would satisfy the principal use requirement.

Statutes, Regulations and Rules Cited:

Commercial Tenancies Act, s. 38, 38(2).

Counsel:

R.M. Slattery, A. Kauffman and Katherine McEachern, for the moving party.
Counsel for the respective respondents, as listed in Appendix A.

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1 SPENCE J.:-- These reasons relate to the above motion and to the motions and cross-motions listed in Appendix A. These motions were heard at the same time and on the basis that, subject to appropriate exceptions, all the evidence properly before the court on each motion and cross-motion applies, as appropriate, to all of them. Certain motions and cross-motions were settled during the hearing and are therefore not reflected in these reasons.

2 In the proceedings, the Trustee in Bankruptcy of Dylex Limited (the "Trustee"), seeks orders permitting the assignment to Dollar A.M.A. ("Dollarama") of 11 separate leases and/or offers to lease made between the respondents, respectively, as landlords and the BiWay Division of Dylex Limited ("BiWay"), pursuant to s. 38(2) of the Commercial Tenancies Act (the "Act" or the "CTA"). The court approved the sale of leases to Dollarama by order dated September 4, 2001.

Background

3 There are before the court 11 separate motions for approval in respect of Landlords who have refused to provide their consent to the assignment. There are essentially three separate reasons given

by the Landlord for the refusals.

* The proposed use of the Premises by Dollarama is contrary to the provisions of the use provision of the existing Dylex leases;
* The existence of a dollar store will upset the "merchandise mix" plan of the Landlord to its detriment;
* The Landlord has granted exclusive rights to other tenants to carry on a dollar store business in the respective premises.

4 The Trustee's position is that the proposed use by Dollarama is essentially the same as the previous BiWay use, consisting of the sale of family apparel and general merchandise. The Trustee says that the new dollar store will enhance, not detract from the merchandise mix. The exclusivity provisions with other tenants are said not to be binding on the Trustee. It is submitted there is no evidence filed to suggest that Dylex ever assented to or had any notice of the provisions of the other leases.

5 Richter is the Trustee in Bankruptcy appointed initially by order of the court as interim receiver and subsequently as Trustee of Dylex Limited. Dylex was adjudged to be bankrupt by receiving order issued by this court on September 28, 2001.

6 A substantial percentage of the Landlords have consented to the assignment. Others have refused. The Trustee brings this application for an Assignment Approval Order as authorized and directed by the Order of this court dated September 4, 2001.

7 Prior to the bankruptcy, Dylex was a well-established Canadian retailer. BiWay was an unincorporated division of Dylex which operated 259 retail outlets. The Trustee is of the opinion that Dollarama is a fit and proper person, within the definition of the Commercial Tenancies Act, to take over the Leased Premises.

8 The motions before the court relate to 10 separate locations. A separate motion record has been filed in respect of each location.

Section 38(2) of the Commercial Tenancies Act

9 Section 38(2)provides as follows:

> (2) Despite any provision, stipulation or agreement in any lease or agreement or the legal effect thereof, in case of an assignment for the general benefit of creditors, or an order being made for the winding up of an incorporated company, or where a receiving order in bankruptcy or authorized assignment has been made by or against a tenant, the person who is assignee, liquidator or trustee may at any time within three months thereafter for the purposes of the trust estate and before the person has

> given notice of intention to surrender possession or disclaim, notice in writing elect to retain the leased premises for the whole or any portion of the unexpired term and any renewal thereof, upon the terms of the lease and subject to the payment of the rent as provided by the lease or agreement, and the person may, upon payment to the landlord of all arrears of rent, assign the lease with rights of renewal, if any, to any person who will covenant to observe and perform its terms and agree to conduct upon the demised premises a trade or business which is not reasonably of a more objectionable or hazardous nature than that which was thereon conducted by the debtor, and who on application of the assignee, liquidator or trustee, is approved by a judge of the Ontario Court (General Division) [Superior Court of Justice] as a person fit and proper to be put in possession of the leased premises. R.S.O. 1980, c. 232, s. 38(2), revised.

10 According to the case law, the factors which the court should consider in coming to its decision include:

(a) Whether the proposed tenant will be motivated and able to honour the covenants in the lease and the covenant it is required to give under s.38(2) of the Act;
(b) Whether the tenant will make fit and proper use of the Premises;
(c) The tenant's reputation in the community and creditworthiness;
(d) The status of the bankrupt estate.

11 Based on the case law, s. 38(2) overrides the considerations that apply in a simple Landlord and Tenant relationship. When a tenant goes bankrupt, other parties have an interest to be protected. The section is designed to permit a trustee to make a realization for creditors from an asset of the bankrupt, and to that extent, this section should be given a liberal interpretation.

Issues

12 The following issues, stated in the terms used in s. 38(2), are raised in the motion:

(1) is Dollarama "a person who will covenant to observe and perform the terms of the lease"?
(2) is Dollarama "a person who will agree to conduct upon the premises a trade or business which is not reasonably of a more objectionable or hazardous nature than that which was conducted" by the bankrupt on the same premises, to the extent this requirement is applicable?
(3) may Dollarama properly be approved by the court as "a person fit and proper to be put in possession of the leased premises"?
(4) what effect is to be given to restrictive covenants in other leases of any of the landlords that would prohibit the landlord from leasing to Dollarama?

Fit and Proper Person

13 The Trustee's submission is that Dollarama is a fit and proper person as provided in s. 38 of the Commercial Tenancies Act to assume the interests of the Trustee in the leases, for the reasons set out below.

14 Dollarama has shown a strong financial position and a motivation to observe the covenants in the leases. It intends to carry on a business that is similar to that of the bankrupt. It clearly meets the standards set out in the Commercial Tenancies Act which require a business that is not reasonably of a more objectionable or hazardous nature than carried on by the bankrupt.

15 Dollarama traces its roots back to 1910 in the province of Quebec. It currently operates approximately 233 leased stores in five provinces. In its fiscal year 2001 gross sales increased to in excess of $58 million with net earnings of $2.7 million.

16 The Dollarama stores offer a wide assortment of quality, everyday, general merchandise including family clothing, house-wares, seasonal goods, food, toys, health and beauty aids, gifts, party goods, stationary, books, hardware and other consumer items.

17 Dollarama intends to carry on a business in each of the premises within the uses permitted by the lease. Dollarama agrees to observe and perform the terms of the leases.

18 Dollarama stores are one of many formats of general merchandising and family clothing stores. They are similar to BiWay in the range of products they carry.

Objection to Dollarama as a Fit & Proper Person

19 To satisfy the court that Dollarama is a fit and proper person to be put in possession of the BiWay premises, the Trustee must demonstrate that:

a) Dollarama will be motivated and able to honour the terms of the lease; and
b) Dollarama will make a fit and proper use of the premises.

20 Westwood Mall (Mississauga) Limited ("Westwood") and other respondent landlords submit that Dollarama cannot meet the foregoing two tests. They say that the Trustee cannot demonstrate that Dollarama will be either able or motivated to honour the terms of its BiWay lease. Not only has Dollarama already signalled its intention not to comply with the use clause in the lease, but Dollarama is not in the business of using premises to operate family clothing stores as described in the use clause. Dollarama's only business is running "dollar stores" and it is not reasonable to expect that Dollarama will suddenly change its business model and use the BiWay premises for the sale of family clothing. There is no evidence that Dollarama is either able or motivated to do so. Dollarama has specifically stated what type of goods it will sell at the BiWay premises, and no reference is made to the sale of family clothing.

21 The objecting landlords say that the Trustee has not demonstrated that Dollarama will make a fit and proper use of the BiWay premises. In considering whether the use proposed by Dollarama is "fit and proper", the court must consider the impact of the assignment upon the landlord and the other tenants, as outlined above. Also, in determining whether the use is "fit and proper" the court should interpret and apply s. 38(2) in a manner that minimizes the impact upon the rights of the landlord. The prejudice to the landlords and their tenants arising from the use proposed by Dollarama is such that it is not a "fit and proper" use within the meaning of s. 38(2),

22 These objections go in part to the question of the use to which Dollarama proposes to put the premises. In principle, if the use which Dollarama intends is the same as the business it conducts elsewhere and if that use is a permitted use under the lease, then prima facie it would have been demonstrated that Dollarama would be motivated and able to carry on the lease. This issue is deferred to the consideration below of the issue as to whether the proposed use is a permitted use.

Proposed Change from Permitted Use

23 Dollarama submits that, to the extent that its proposed use would constitute a change from the permitted use in an affected lease, the court may approve such a variance.

24 Section 38(2) commences with the phrase "despite any provision... in any lease" and goes on to provide that the trustee may assign the lease. On the basis of this opening phrase, it is argued that s. 38(2) sets aside all the provisions of the lease for purposes of the operation of s. 38(2). On this basis, the only issues that would need to be addressed where there is a proposed change from the permitted use are whether the proposed use is "not reasonably of a more objectionable or hazardous nature" and whether the proposed assignee is a "fit and proper person".

25 The opening phrase of s. 38(2) could alternatively be interpreted as meaning only "despite any provision of the lease which would otherwise restrict the right of the tenant to assign the lease". This interpretation would gain support from the fact that the opening phrase is referable to the operative provision, which is an authorization to make assignments. Moreover, the section provides in effect that the lease may only be assigned to "any person who will covenant to observe and perform its terms" which would seem to include the permitted use clause. It is argued that this latter inference is not warranted because the provision goes on to say, with respect to the assignee, that the assignee must also "agree to conduct ... a business which is not reasonably more objectionable etc", so the matter of type of use has been dealt with, separately, by this latter clause.

26 An alternative interpretation is that the section in effect makes a distinction between the requirement to "covenant to observe the terms of the lease" which includes its terms as to permitted use, and the requirement to "agree to conduct a trade or business which is not reasonably of a more objectionable or hazardous nature ...". The point of the first requirement is said to be that a permitted use clause is directed to the type of business use that is permitted and the proposed actual use is therefore required to be a use of the permitted type.

27 On this basis, assuming that more than one particular business could satisfy the requirement as to the type of use that is permitted, it is understandable that the statutory provision, in allowing an assignment contrary to the assignment provisions of the lease, would require that the business to be carried on must not only be of the permitted type but must also not be more objectionable or hazardous than the one actually carried on by the tenant.

28 This issue was considered by Henry J. in Micro Cooking Centres (CAN) Inc. (Trustee of) v. Cambridge Leaseholds Ltd. (1988), 48 R.P.R. 32. His remarks at pages 66, 67 and 77 and pages 91 and 92 were as follows:

> While, therefore, the statute overrides restrictions upon assignment by the tenant of the lease, it is my opinion that that is as far as it goes. If the trustee elects to retain the remainder of the term he is by the section bound by the terms of the lease thereafter. If he assigns the lease the assignee must, as s. 38(2) says, covenant to observe and perform the terms of the lease. The statute does not provide for any exceptions to that covenant. As the Alberta Court of Appeal said in Robinson, Little & Co. (Trustee of) v. Block Bros. Contri. Ltd., 67 C.B.R. (N.S.) 23, [1988] 2 W.W.R. 183, 56 Alta. L.R. (2d) 319, 83 A.R. 254, in relation to the similar Alberta statute, the purpose of the legislation (p. 188):
>
> > ... is to permit the trustee to put his assignee in the same legal position vis-à-vis the landlord under the lease as that held by the bankrupt lessee immediately before bankruptcy. The intent is to enable the trustee ... to obtain maximum realization of the bankrupt estate for the benefit of creditors without putting the landlord in a worse position under the lease than it would have been in vis-à-vis its lessee before bankruptcy. The landlord's protection is in the requirement ... that the assignee be a person found by the court to be fit and proper to take the position of the former lessee. The trustee is but a conduit in effecting this substitution.
>
> That seems to me to be a fair analysis of the objective of s. 38(2) (although the result does not appear to me to conform to it). I emphasize, however, that inevitably the application of this section must have regard to the facts of the particular case (pp. 66 and 67).
>
> Mr. Rotsztain submits that the language opens the way for the court to permit the proposed assignees to override by force of law the user provisions of the lease. I do not agree. While it may be that in some other situations a court may find some latitude to allow the assignee to escape from the strict terms of the lease, this is

> not such a case. The user provisions in the cases at bar are so fundamental that the language ought not to be used as a device to impair the overall intention of the legislature, as I view it, which imposes a mandatory condition that the assignee must covenant to observe and comply with the terms of the lease. In my opinion it is essentially a safeguard to the landlord that, absent a specific restraint on user in the lease, the assignee will not exceed the limits expressed in the language (p. 77).
>
> I have set out the difficulty in applying a practical meaning to the ambiguous phrase "a trade or business which is not reasonably of a more objectionable or hazardous nature than that which was thereon conducted by the debtor". I do not here decide whether this language provides any latitude to permit the assignee to depart from some terms of the lease, as the trustee would have it. I decide only that it does not permit the user clause in each case before me to be overridden under s. 38(2) (pp. 91 and 92).

29 For Dollarama it was submitted that the interpretation it advances would deal with the problem of a permitted use clause drafted so narrowly that only the business carried on by the bankrupt could satisfy it, such as a permitted use "as a typical BiWay store" but the alternative interpretation outlined above would preclude any other use. It appears to me that the court could properly make a distinction, in respect of a permitted use clause, between the kind of use permitted in terms of activity and the kind of use in terms of the identity of the tenant. Obviously if the user clause was tantamount to a statement that "the premises can only be used by the tenant itself", that would preclude any assignment on any basis and the whole point of s. 38(2) is to override restrictions on assignment. But s. 38(2) can be given reasonable effect without taking it to the point of overriding use provisions which do not require the identity of the tenant not to change.

30 In this regard reference may be made to the decision of Farley J. in Palate Yorkdale Inc. (Trustee of) v. Bramalea Centres Ltd. [1994] O.J. 2202. The case concerned a proposed trustee assignment under s. 38(2) to a new company (referred to as "No. Company") of a lease to the bankrupt company (Palate Yorkdale) which provided that the store business was to be conducted only under the trade name "The Palate". Farley J. referred to the comments of Henry J. in Micro Cooking (above) and said at paragraphs 13 and 14:

> 13. I am of the view that this is such a case to look at what is material in the lease and to in effect ignore what is mere surplus window dressing. There was nothing in the material before me which could lead me to the conclusion that the landlord had been persuaded that PY was a suitable tenant by reason of it having the then right to use the trademark. I pause to note that this specific trademark would not appear to be on the record as being of the same league as some of the heavyweight trademarks (such as

> Coca-Cola, IBM, McDonalds) which may possibly be taken as of intrinsic value as readily recognized by the consuming public and verified as such by survey ...
>
> 14. While something may be pleasing to the palate, I do not understand that what was pleasing or essential to the landlord in its relationship with PY was this particular trademark. Rather it would seem to me that what would be important to the landlord was that the business in the premises would be conducted under a name which was suitable for the nature of the operations. I would not think it would be difficult for the landlord and No. Company to come to agreement on a new suitable name.

31 For the reasons given above, the interpretation advanced by Dollarama goes further than is necessary to give proper effect to the provisions of s. 38(2). The alternative interpretation offered above gives adequate and proper effect to those provisions. A user clause may be unduly restrictive for purposes of s. 38(2), as discussed above, but in those circumstances, the court can make the necessary adjustment, as indicated in Palate Yorkdale.

Use Not More Objectionable or Hazardous

32 Dollarama submits that, under s. 38(2) the court need address this question only where the proposed use would not satisfy the permitted use clause in the lease. If the existing tenant wished to vary its business in a manner that did not breach the use clause, it could do so (subject to other relevant provisions of the lease) even if that variation resulted in the business being more objectionable or hazardous than before. So, the argument goes, the same flexibility ought to be available to the proposed assignee, particularly having regard to the purpose of s. 38(2) to assist the trustee in realizing on assets for the benefit of creditors.

33 However, s. 38(2) by its terms requires the assignee to be prepared to covenant to perform the lease terms and to agree not to conduct a more objectionable business. There are two tests presented in these terms and it gives the fullest possible effect to the provision to treat them as such and there is no reason not to do so. Accordingly, the Dollarama position on this point is not acceptable.

The Permitted Use Clauses

34 The permitted use clauses under the leases are of various types or models.

35 Model 1: Store #17, leased from Westwood Mall (Mississauga) Limited has the following use clause in the lease:

> The Leased Premises shall be used or occupied for the purpose of a retail store for the sale of family clothing and general merchandise. As incidental to such principal use, the Tenant shall be entitled to sell such items as are sold from time to time in a majority of the Tenant's other BiWay stores in the province of

> Ontario ...
>
> The Tenant shall carry on business in the Leased Premises under the trade name "BiWay" and under no other name whatsoever, without the prior written approval of the Landlord, which approval shall not be unreasonably withheld, provided that the Tenant shall not require consent to a change of name in the event that the Tenant changes the name of a majority of its stores in the Province of Ontario to the same name.

36 There are three parts to this use clause: (1) "retail store for the sale of family clothing and general merchandise"; (2) "as incidental, ... [to] sell items ... as in a majority of ... BiWay stores ..." and (3) "to carry on business ... under the trade name BiWay ...".

37 Store #209, (Revenue Properties) has a similar restriction to Model 1, Parts 1 and 2, with a restriction as to food.

38 Store #29, (Sun Life Assurance of Canada) has as its permitted use, a variation on Model 1, part 1: "for the purpose of a retail store for the sale generally of family clothing together with incidental related and unrelated products". Section 6.00 of the Lease provides that the premises shall not be used for any other purpose than the permitted use.

39 Store #31, (Halloway Holdings) has a variation on Model 1, parts 1 and 2, with a restriction as to food items as follows:

> The purpose of a retail store for the sale of family clothing, shoes, packaged foods, tobacco products, over-the-counter drugs, health and beauty aids, linens, housewares, small appliances, watches, and costume jewellery, and, as an ancillary use only, such other items as are sold from time to time in BiWay stores in the province of Ontario. Food items, excluding confectionery items, shall comprise not more than ten percent (10%) of the gross leasable area of the Premises. Notwithstanding the foregoing, the Tenant shall not sell fresh meat, fresh fish, fresh poultry, fresh dairy products or freshly-baked goods from the Premises.

40 Store #189 (A & P Properties) has a clause which is practically the same.

41 Store #174 (Riocan Holdings Inc.) has something of a hybrid between Model 1, Parts 1and 2 and a provision for pharmaceuticals, as follows:

> The Tenant shall use the premises for the purpose of a retail store for the sale generally of family clothing together with incidental related and unrelated items and including the dispensing and sale of pharmaceutical items including

> prescription and non-prescription drugs, as are sold from time to time by BiWay Stores in the province in which the Premises are situated.

42 Model 2: Store #87 (Churchill Plaza Holdings) has the following "junior department store" clause:

> The Tenant covenants and agrees with the Owner that the Leased Premises shall be used and occupied only for the purpose of carrying on the business of a junior department store including footwear and for no other business and that the Tenant will not use, permit or suffer the use of the Leased Premises or any part thereof by the Tenant or any assignee, subtenant, licensee, concessionaire or other person whatsoever for any other business or purpose.

43 Model 3: Store #129 (Saultax Ltd.) has the following "typical BiWay store" clause:

> The Tenant shall use the Leased Premises for a typical BiWay Store.

44 Store #171 (Petrovec Investments Ltd.) has a variation on Model 3 as follows:

> A typical BiWay store, selling a range of products as are sold from time to time in other BiWay stores in the province of Ontario.

> Store #302 (Acktion Capital Corporation and Bramalea City Centre Equities Inc.) has a very similar clause.

45 Store #376 (Woodside Square) has a further variation on Model 3, "typical BiWay store" as follows:

> The Tenant shall use the premises for a typical Bi-Way Store and for no other purpose provided the Tenant's business does not contravene any agreements, covenants, or restrictions the Landlord may be bound by at the time of Commencement of the Tenant's lease.

Dollar Price Point Stores; Change in Use; Preliminary Considerations

46 The Dollarama stores sell goods for one dollar or less. BiWay stores do not limit their prices to the dollar price point. The issue is how, if at all, this practice affects whether Dollarama stores are to be considered to be stores that comply (or would comply) with the permitted use clauses.

47 Part of the difficulty in deciding whether dollar price point selling is included in the permitted use clauses has to do with deciding what the clauses constitute as the permitted use in generic terms, or what might called "the permitted generic use" For example, if the permitted generic use in the case of Model 1 part 1 is to be considered to be "family clothing and general merchandise of any

kind but not other kinds of goods", it can be seen how stores that sell only such goods might qualify, even if they only sell a limited range of such goods and such goods are priced at $1 or less. It appears that Dollarama stores sell socks and underwear. On the other hand, if the generic use is "a wide range of family clothing and general merchandise" the answer might well be different, because the dollar price point might be considered too limiting.

48 The wording of the clause may resolve the issue quite readily. For example, if the permitted use is "family clothing and general merchandise as sold in BiWay stores" such a description would seem to identify the BiWay store sales practice as the type or generic use. It could be called a "BiWay-type store".

49 A related question with a description like "family clothing and general merchandise" is whether the sales of family clothing must be a significant part of overall sales or whether it is sufficient if there are regular sales of some articles of family clothing but not as a material percentage of overall sales.

50 If the generic type intended is a "BiWay type store", would a dollar price point store qualify? It is reasonable to conclude that a customer who wishes to shop in a store with the comparatively wide range of family clothing available in a BiWay store would not shop in a dollar store. There was some evidence to this effect.

51 Is customer disposition an appropriate factor to take into account in order to make such an assessment? In principle, it can be defended on the ground that it is consistent both with the interest of the tenant in being able to carry on its characteristic business and the interest of the landlord in focussing on the type of customer to be attracted to the store and the adequacy of the store to the overall merchandise mix of the mall. The considerations relating to shopping centre lease use clauses are addressed further below.

52 This analysis suggests the approach to be followed is to assess whether the use clause contemplates the offering of the range of goods characteristic of a BiWay store or merely the offering of goods of one kind or another that are included within that range.

53 As noted, the range of goods sold in BiWay stores is prima facie different from that sold in Dollarama stores. The BiWay stores sold a range of family clothing, including coats and boots, at various prices. The sales of family clothing constituted in the order of 60% of sales. Dollarama stores sell family clothing, mainly socks and underwear, at prices of $1 or less. These sales constitute less than 10% and perhaps about only 6% of Dollarama store sales.

Interpreting a Shopping Centre Lease

Use Clause

54 It is well established that, in order to interpret a contract, the court is to address itself first to

the plain meaning of the words and it is only in the event that the meaning cannot be determined in that manner (i.e. where the words are not plain but in fact ambiguous) that the court is to resort to extrinsic evidence, i.e. evidence beyond the instrument in question, for assistance in reaching a proper interpretation.

55 This principle of interpretation does not begin with a consideration of the particular words or provision regarded in a vacuum but rather with the words or provision taken in the context of the instrument of which they form part. This in turn means that it is necessary, in order to interpret properly a provision in a lease, to take account that it is such a provision and the character of the lease of which it forms part.

56 The courts have recognized that a shopping centre lease is a lease that is typically designed to address a number of commercial considerations that are special to the organization of shopping centres. These considerations include, with respect to the use clause in the lease, the matter of the selection and location of the various different uses to be accommodated in the centre, i.e. the so-called "merchandise mix".

57 In the decision of the Supreme Court of Canada in Russo et al v. Field et al (1973), 34 D.L.R. (3d) 704, Spence J, writing for the court, said as follows:

> It has been said that covenants such as those under consideration in this action are covenants in the restraint of trade and therefore must be construed restrictively. I am quite ready to recognize that as a general proposition of law and yet I am of the opinion that it must be considered in the light of each circumstance in each individual case. The mercantile device of a small shopping centre in a residential suburban area can only be successful and is planned on the basis that the various shops therein must not be competitive. Since the shopping centre is a local one and not a regional shopping centre, the prospective purchasers at the various shops which it is planned to attract are residents in the neighbourhood. They are, of necessity, limited in number and therefore the business which they bring to the shopping centre is limited in extent. The prospective purchaser attracted to shop A in the plaza may well turn from shop A to shop B to purchase some other kind of his or her needed goods or service but if the limited number of prospective purchasers are faced in the same small shopping centre with several prospective suppliers of the same kind of goods or service then there may not be enough business to support several suppliers. They will suffer and the operator of the shopping plaza will suffer.
>
> I am therefore of the opinion that the disposition as a matter of public policy to restrictively construe covenants which may be said to be in restraint of trade has but little importance in the consideration of the covenants in the particular case.

58 The significance of the shopping centre context, and its implication as to the onus on this issue, were addressed by Henry J. in Micro Cooking supra, at page 77 as follows:

> There is no question that by imposing a new tenant upon the landlord, particularly in the context of a shopping mall operation involving a multiplicity of tenants, the statute interferes with the landlord's ordinary right to use his property to best advantage and with his contractual arrangements with others. The statute should therefore be strictly construed so as to minimize any adverse effect on the landlord's rights. At the same time the court must also apply the law so as to maximize within its framework the realization for the trustee of the bankrupt's leasehold assets for the benefit of the bankrupt's creditors.
>
> The onus is on the applicant trustee to satisfy the court on the facts and law that the approval sought ought to be granted, having regard to the conflicting interests involved.

59 The proper approach to the interpretation of a commercial contract was considered in Bank of British Columbia v. Turbo Resources Ltd. (1983), 148 D.L.R. (3d) 598, (Alta C.A.) at pages 607 to 608. Laycroft J.A. writing for the court referred to a judgment of Lord Wilberforce in 1976 in which he had said:

> No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as "the surrounding circumstances" but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

60 Laycroft J.A. continued:

> Consideration of the commercial setting in which a contract is made is not, of course, to be confused with parol evidence of the intention of the parties. That is not admissible. But the commercial setting of the contract assists in ascertaining the intention of the parties from the language they have used.

61 The following remarks of the court in the decision in Market Mall Ltd. v. McLeod-Stedman Inc. 1989 CarswellSask 437, 78 Sask. R. 179 (Sask. C.Q.B.) are helpful:

> During the course of this trial a number of witnesses, qualified as experts for the purpose, gave their opinions on the meaning to be ascribed to the term "Department Store". These views varied. In some cases rather substantially. As

> well, counsel referred me to, filed as exhibits, dictionary, encyclopaedic and other definitions of that term. Each has made verbal and written submissions on the meaning to be given to the term. It is not, however, in the present circumstances, necessary that I make a comparative review of the definitions testified to, or filed, or urged upon me. Nor is it necessary that I indicate a preference for one view or another. This is so because that which was intended by the parties themselves by their use of the term is clearly ascertainable from that which was in fact done pursuant thereto.

62 From these remarks, it is to be taken that the court may properly take into account the actual use carried on by the tenant in considering the meaning of the scope clause.

63 It would ordinarily be reasonable to do so. Based on what the cases have recognized about the operation of shopping malls, and subject to evidence to the contrary, it is reasonable to proceed on the basis that, in coming to agreement on the use clause, the landlord and tenant seek to settle on wording that will, from the tenant's point of view, ensure that it can carry on its ordinary business, and from the landlord's point of view, ensure that that is what the tenant is required to do.

64 This would be the commercially reasonable way for the parties to act in the ordinary situation. The particular situation might in fact not be ordinary but special. The landlord and the tenant might agree to provide greater flexibility for the tenant, e.g. because the tenant contemplated making certain changes in its operations or wished to be able to do so. Whether they have so agreed would depend on a consideration of the terms of the lease and of any admissible extrinsic evidence.

65 There is no extrinsic evidence as to any particular or special intentions in respect of the leases in issue except for the fact that the landlord in certain of the leases had a dollar store tenant and in some cases had granted exclusives to such tenant. What the Trustee requires is extrinsic evidence that tends to show flexibility was intended, so the evidence about the existing dollar store tenants, whether or not it helps the landlord's case, does not help the case for the Trustee.

The Proposed Dollarama Covenant

66 Dollarama proposes to provide to the respective landlords a covenant that Dollarama will:

> (a) conduct upon the Premises a trade or business which is not reasonably of a more objectionable or hazardous nature than that which was thereon conducted by Dylex and, in particular, to use the premises to carry on the business of the retail sale of a wide variety of general merchandise, typically found in a Dollarama store, under the name Dollarama; and
> (b) subject to covenant (a) above, observe and perform the terms of the Lease.

67 Section 38(2) of the Act provides that the Trustee may assign the lease to a person "who will covenant to observe and perform its terms ...". Westwood Mall and other respondent landlords

object that the proposal by Dollarama to provide the above covenant shows that Dollarama is not prepared to provide the covenant required by s. 38(2) and it cannot therefore satisfy the requirements of the section.

68 Paragraph (b) of the proposed Dollarama covenant sets out a covenant to observe and perform the terms of the lease. That covenant is stated to be subject to the covenant in the preceding paragraph (a). This provision makes the covenant of Dollarama to perform a conditional covenant. The condition is set out in the preceding paragraph (a). In paragraph (a) Dollarama covenants to conduct a "business which is not reasonably of a more objectionable or hazardous nature ...". This covenant is obviously uncontroversial. Dollarama also covenants in paragraph (a), in effect, to use the premises to operate a Dollarama store. It is this covenant which prompts the objections of the landlords.

69 Taking paragraphs (a) and (b) together, it is hard to see how to attribute proper meaning to them other than that they express a covenant to carry on a Dollarama store as described, and subject to doing so, to observe and perform the lease terms and not to carry on a business of a more objectionable or hazardous nature than BiWay.

70 The submission is that this covenant ipso facto falls short of the existing covenant. On this basis it would not be necessary to consider whether a Dollarama store is a permitted use under the use clause; the inquiry would stop before reaching that stage. But if it is assumed for the moment that to "use the premises to carry on the business of the retail sale of a wide variety of general merchandise, typically found in a Dollarama store, under the name of Dollarama" is, as presently conducted or as it might be conducted, a use that falls within the existing clause, this exclusive specification of the use would not seem, at least prima facie, to be a departure from or on a falling short of the existing use.

71 So, if it is now a permitted use to carry on a Dollarama store as now carried on and as it might be carried on, as a retail store to sell general merchandise, the specification of those uses would not alter the use clause to permit business activities not now permitted.

72 What the foregoing analysis shows - and all that it shows - is that the proposed covenant of Dollarama cannot be said to be inadequate per se. The question depends on whether the proposed use, including the variation or development that it would allow in the future, is permitted under the existing use clause by reason of being within the permitted use described by that clause.

73 If the use which the Dollarama clause provides for is a change from the use permitted by the lease clauses, then the covenant that it offers would necessarily be considered inadequate.

Analysis of the Use Clauses

74 Based on the above considerations the question to be asked is whether the description in the use clause contemplates that the business is to be the kind of retail store typically operated by

BiWay or that the business may be one that sells only certain kinds of goods that BiWay sells or could sell, such that it could not fairly be said to be the kind of retail store typically operated by BiWay.

75 The Westwood Mall clause contemplates the sale of family clothing and general merchandise as the principal use. This is typical of BiWay. The references to BiWay in connection with incidental items and the store name are consistent with an intention that the store is to be a BiWay-type store. Nothing in the clause read as a whole suggests otherwise. Selling socks and underwear for under $1 as 6% of overall sales does not reach a level of materiality that would satisfy the "principal use" requirement. So the use intended by Dollarama would be a change from the use clause.

76 The same reasoning applies, although there is no similar name requirement, to the leases of Revenue Properties, Sun Life and Riocan Holdings.

77 Halloway Holdings and A & P Properties each have a longer list of the kinds of items that are permitted to be sold. The lists are similar but not identical. Both clauses include family clothing and items that might be considered "general merchandise". Both clauses include reference to "items sold from time to time in BiWay stores in the province of Ontario". The implication is that the store is to be a BiWay-type store.

78 The Churchill Plaza lease requires that the premises be used for "the business of a junior department store including footwear and for no other business". The term "junior department store" is not defined.

79 Counsel provided an excerpt from "The Commercial Lease" by Harvey M. Haber, Q.C. which says that "some have said that such a store sells all the items sold by a department store except for hard goods such as stoves, refrigerators and such other large items".

80 There is no evidence to show that some other meaning would be more usually attributed to the term "junior department store". The concept of a department store clearly contemplates a range of goods for family use and the addition of the word "junior" does not suggest that merely offering a line of goods that can be priced at one dollar would be sufficient to satisfy the retained notion of a department store operation.

81 The leases of Saultax Limited, Petrovec Investments Ltd., Acktion Capital Corporation and Bramalea City Centre Equities Inc. and Woodside Square each provide for a typical BiWay store.

Conclusion as to Change in Use

82 For the above reasons the proposed Dollarama use would constitute a change from the use contemplated by the use clauses in each of the leases in question.

83 Reference was made to the decision of Tidan Inc. v. Dylex Limited, [2001] N.B. Q.B. 115. The issue was whether Dylex could change its BiWay store to "a dollar-type store" under the terms of the applicable lease. The use clause was to the same effect as the clause in the A & P Properties lease. The court considered that the clause was "permissive and not prohibitive"; and noted that there was no express prohibition (except with respect to sales of packaged food) and the word "solely" was not used: (paragraphs 22, 23 and 24). The court also took into account that BiWay proposed to "convert" all its stores in Ontario to dollar stores so, in the view of the court the clause in question would permit the proposed use because it would be a use for the sale of "such other items as are sold from time to time in BiWay stores in Ontario", and this phrase was part of the permitted use in the clause in question.

84 Since what is now proposed is an assignment of the lease rather than a change by BiWay in its use, the last point mentioned from the Tidan decision does not apply. While it is true that at least some of the clauses now in issue, like the clause in the lease before the court in Tidan, may not be expressly prohibitive, each of such clauses is, in its context, a direction as to the use that is to be made of the premises and in that sense it constitutes an implied prohibition against a different use. Accordingly, to the extent that the Tidan decision could be said to stand for a contrary view, I do not think it should be followed in this case.

85 Since the proposed Dollarama use would be a change from the uses permitted in the use clauses in the leases, Dollarama is not in a position to covenant to observe and perform the terms of the leases. Accordingly, the proposed assignment to Dollarama cannot be approved by the court.

Other Matters

86 A member of other issues were raised, principally relating to the effect that the proposed Dollarama use would reasonably be expected to have on a number of the shopping malls and as to the effect of exclusivity clauses given by certain of the landlords to Buck or Two stores. Since it has been possible to decide the motion on the grounds set out above, it is not necessary to deal with those other matters. However, it might be helpful to the parties for me to make an observation about the prima facie impression I gained about those other matters. It was that, overall, they were largely helpful to the position of the landlords.

87 The final day of the hearing dealt with the Bramalea City Centre lease. The issues raised concerned principally the effect of the exclusivity clause in the lease of the tenant, Everything For A Dollar and the effect that an assignment of the BiWay lease to Bramalea would have on the shopping mall and on the tenant. The landlord did not oppose the assignment and its submissions effectively supported an assignment in terms of the effect on the mall and the tenant. The tenant opposed the assignment. The positions taken by the landlord and the tenant do not give me reason to alter my assessment of the issues which I have found to be determinative of the motions.

The Cross-Motions

88 Three landlords, Westwood Mall, Saultax and Churchill Plaza brought cross-motions against Denninghouse Inc.

89 By reason of the disposition made above of the main motions, the issues in the cross-motions are moot and no decision is required on them. One counsel volunteered that the argument on the issues was approaching the realm of the legendary question about how many angels can dance on the head of a pin. That question can be left unanswered by this court.

Identity and Change

90 This case prompts the following observation by way of obiter. The issue as to whether the proposed use would constitute a change from the use contemplated by the lease terms is an instance, in the world of practical legal concerns, of the more general question that has commanded the attention of philosophers since ancient times: how much variation may occur in respect of something without that thing changing into a different thing. Most of the time this question can be left to the realm of philosophical consideration but sometimes, as in the present case, it calls for attention in legal decision making.

91 For those who are obliged to turn their minds to this question, edification and relief may be found in the decision attributed by H. Pomerantz and S. Breslin to one Blue J. and published as Regina v. Ojibway in 8 Criminal Law Quarterly 137-9 (1965) (reprinted in Daniel R. White: Trials and Tribulations, Plume Books 1989).

Disposition

92 For the reasons given above, the motions are dismissed. Counsel may consult me about costs if necessary.

93 I wish to express my appreciation to all counsel for the excellent cooperation and assistance they provided throughout the hearing of the motions and the cross-motions.

SPENCE J.

* * * * *

APPENDIX A

	Respondent	Counsel
1.	Westwood Mall (Mississauga) Limited	Mr. Scott Maidment

2.	Sunlife Assurance Company of Canada	Mr. David W. Foulds
3.	Halloway Holdings Limited	Mr. Michael Sterlin
4.	Churchill Plaza Holdings Inc.	Mr. Michael Farace
5.	Rosgate Holdings Ltd. & Riocan Holdings Inc.(Landlords for The Westgate Shopping Centre In Ottawa) and The Commissioners Road Site in London, Ont. (Landlord for 151516 Canada Inc.)	Mr. Martin Kaplan
6.	Saultax Ltd.	Mr. Graham David Smith
7.	Petrovec Investments Ltd.	Mr. James Cooke
8.	Revenue Properties Company Ltd.	Mr. Robert J. Arcand & Ms. Sharon Addison
9.	Denninghouse Inc.	Mr. John Porter & Mr. Alan B. Merskey
10.	Dollar Plus Bargain Centre Ltd.	Mr. Scott Turton
11.	Dollar Bazaar	Mr. A. Paul Gribilas
12.	Woodside Square Ltd.	Mr. Wolfgang Kaufmann &

		Ms. Joanna Board
13.	Acktion Capital Corporations and Bramalea City Centre Equities Inc.	Mr. Wolfgang Kaufmann
14.	Everything For A Dollar Store (Canada) Inc.	Mr. Steven F. Rosenhek

cp/d/qlala/qlmjb/qlkjg/qlmjb

TAB10

HMANALY N§63
Houlden & Morawetz Analysis N§63

Houlden and Morawetz Bankruptcy and Insolvency Analysis

Companies Creditors Arrangement Act
Sections 11-11.11

L.W. Houlden and Geoffrey B. Morawetz

N§63 — Stay of Proceedings, Generally

N§63 — Stay of Proceedings, Generally

See s. 11.11

The stay created by s. 11 is a stay of proceedings by creditors against the debtor company; it has no application to proceedings taken by the debtor either before or after the commencement of proceedings under the *CCAA*: see *Dinovitzer v. Weiss* (1957), 1957 CarswellQue 32, 37 C.B.R. 160, [1958] Que. S.C. 133 (Que. S.C.).

Section 11 provides the court with a general power to make any order that it considers appropriate in of the circumstances of the *CCAA* proceeding. It distinguishes between stays under the initial application and stays other than under the initial application.

Section 11.01 sets out the rights of suppliers, specifying that no order under s. 11 or s. 11.02 has the effect of prohibiting a person from requiring immediate payment for goods and services provided after the order is made or requiring the further advance of money or credit.

Section 11 is constitutionally valid, even though it may be used to stay the claims of persons who are not creditors: *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 1988 CarswellAlta 318, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B.).

The stay restrains judicial or extra-judicial conduct that could impair the ability of the debtor company to continue in business and the debtor's ability to focus and concentrate its efforts on the negotiating of a compromise or arrangement: *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303, 1992 CarswellOnt 185, [1992] O.J. No. 1946 (Ont. Gen. Div.). See also *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, [1991] 2 W.W.R. 136, 51 B.C.L.R. (2d) 84, 1990 CarswellBC 394 (B.C.C.A.) and *Re Air Canada [Always Travel Inc. — Leave to Proceed Motion]* (2004), 47 C.B.R. (4th) 177, 2004 CarswellOnt 481 (Ont. S.C.J. [Commercial List]).

The purpose of s. 11 is to maintain the *status quo* for a period of time so that proceedings can be taken under the *CCAA* for the good welfare and well-being of the debtor company and of its creditors: *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 141 (B.C. S.C.); *Sairex GmbH v. Prudential Steel Ltd.* (1991), 8 C.B.R. (3d) 62, 1991 CarswellOnt 215 (Ont. Gen. Div.). The stay order prevents any creditor from obtaining an advantage over other creditors while the company is attempting to reorganize its affairs: *Re Woodward's Ltd.* (1993), 17 C.B.R. (3d) 236, 79 B.C.L.R. (2d) 257, 1993 CarswellBC 530 (S.C.). It enables the debtor to have some breathing room in the face of pending and potential proceedings against it, in order to give it time and uninterrupted opportunity to attempt to work out a restructuring: *Re Philip Services Corp.* (1999), 13 C.B.R. (4th) 159, 1999 CarswellOnt 4673 (Ont. S.C.J. [Commercial List]); *Toronto Stock Exchange Inc. v. United Keno Hill Mines Ltd.* (2000), 48 O.R. (3d) 746, 19 C.B.R. (4th) 299, 7 B.L.R. (3d) 86, 2000 CarswellOnt 1770 (S.C.J. [Commercial List]). See also *Milner Greenhouses Ltd. v. Saskatchewan* (2004), 2004 CarswellSask 280, [2004] 9 W.W.R. 310, 50 C.B.R. (4th) 214, 2004 SKQB 160 (Sask. Q.B.).

A stay should be ordered if there is a reasonable chance that the debtor company can continue to operate its business as a going concern: *Re Stephanie's Fashions Ltd.* (1990), 1 C.B.R. (3d) 248, 1990 CarswellBC 373 (B.C. S.C.). A dogmatic approach taken by creditors in the first instance, that they will not approve of any proposal, should be given little weight if there is reasonable hope that matters can be salvaged and no undue prejudice caused. The length of a stay will depend on surrounding circumstances, and no particular set time period is necessarily applicable to all cases. Where the applicant received the benefit of a stay exceeding five months and it was uncertain whether the applicant was any further advanced in making a firm proposal at this time than it was five months earlier, the stay was lifted to permit the creditors to take whatever action they deemed necessary: *Timber Lodge Ltd. v. Imperial Life Assurance Co.* (1992), 17 C.B.R. (3d) 126, 1992 CarswellPEI 15, (sub nom. *Timber Lodge Ltd. v. Montreal Trust Co. of Canada (No. 2)*) 104 Nfld. & P.E.I.R. 104, 329 A.P.R. 104 (P.E.I. T.D.).

The Ontario Court of Appeal held that s. 11 of the *CCAA* provides a broad jurisdiction to impose terms and conditions on the granting of the stay and s. 11(4) includes the power to vary the stay and allow the company to enter into agreements to facilitate the restructuring, provided that the creditors have the final decision under s. 6 whether or not to approve the plan. The point of the *CCAA* process is not simply to preserve the *status quo* but to facilitate restructuring so that the company can successfully emerge from the process and it is important to take into account the dynamics of the situation: *Re Stelco Inc.* (2005), 2005 CarswellOnt 6283, 15 C.B.R. (5th) 288 (Ont. C.A.); affirming (2005), 2005 CarswellOnt 5023, 15 C.B.R. (5th) 279 (Ont. S.C.J. [Commercial List]).

In *Always Travel Inc. v. Air Canada* (2003), 43 C.B.R. (4th) 163, 2003 CarswellNat 1763, 2003 FCT 707, Hugessen J. of the Federal Court of Canada was of the view that a stay order under s. 11 of the *CCAA* did not have the effect of automatically staying proceedings in the Federal Court. However, he held that, as a matter of comity, in virtually every case where a stay order is given by a provincial court in the course of its *CCAA* jurisdiction, the Federal Court will observe the stay order and grant aid on a proper application being made. This approach does not prevent a person from opposing the recognition of a stay order, or if a stay order has been granted by the Federal Court, applying to have it lifted. After the Plaintiffs sought for the fifth time, in one court or another, to lift the stay, Hugessen J. confirmed that it would take very exceptional circumstances for a Federal Court judge to interfere with proceedings being administered by the Ontario Superior Court of Justice: *Always Travel Inc. v. Air Canada* (2004), 2004 CarswellNat 2866, 2004 CarswellNat 1362, 2004 CF 675, 2004 FC 675, 49 C.B.R. (4th) 1 (F.C.).

The stay provisions under a *CCAA* order apply to post-filing creditors with claims asserted against the debtor company; there are no words in the statute limiting the stay to debts or claims in existence at the time of the initial order: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 2007 CarswellSask 324, 33 C.B.R. (5th) 50, 2007 SKCA 72, [2007] S.J. No. 313 (Sask. C.A.).

Where there were partnerships related to the debtor and a dispute arose as to whether the partnerships should be stayed, the Alberta Court of Queen's Bench held that while the *CCAA* does not grant the court express power to stay proceedings against non-corporate entities, the court has jurisdiction to grant a stay of proceedings where it is just and convenient to do so. The court concluded that given the complex corporate and debt structure of the Calpine group, the cross-border nature of the proceedings, and the evidence before it that irreparable harm could accrue to the Calpine group if the stay was not granted, it was just and reasonable to stay the proceedings against the partnerships: *Re Calpine Canada Energy Ltd.* (2006), 2006 CarswellAlta 446, 19 C.B.R. (5th) 187, 2006 ABQB 153 (Alta. Q.B.).

Madam Justice Barbara Romaine of the Alberta Court of Queen's Bench declined to grant an initial *CCAA* order where there was no evidence to suggest that there was any possibility of the debtor restructuring its affairs. The court observed that while the burden is placed on an applicant for an initial *CCAA* order to show that it has a reasonable possibility of restructuring, the burden is not an onerous one. Here, there was no evidence that any of the debtor's efforts had resulted in a refinancing source stepping forward; and there were substantial builders' liens and corporate governance problems such that the prospect of any successful refinancing looked unlikely. The court held that if what is really more likely is a liquidating *CCAA*, the consideration becomes whether such a resolution is better advanced through existing management in a *CCAA* proceeding, or through a receivership. Here, the CEO was likely to be terminated and a board of directors was under threat of replacement from a major shareholder,

and the balance of efficient resolution tipped in favour of a receivership: *Matco Capital Ltd. v. Interex Oilfield Services Ltd.* (1 August 2006), Docket No. 060108395, Oral Reasons for Judgment, Romaine, J. (Alta Q.B.).

In order to obtain a stay under s. 11, it is not necessary to have first made an arrangement with secured creditors. If a pre-arrangement were required, the approval or rejection of the plan would be in the control of secured creditors, not in the control of the court: *Taché Construction Ltée c. Banque Lloyds du Canada* (1990), 5 C.B.R. (3d) 151, 1990 CarswellQue 39 (Qué. C.S.).

The *CCAA* should not be used where it will put the financial well-being of the majority of the creditors at risk. A stay of proceedings should not be granted under the *CCAA* where it would only prolong the inevitable, or where the position of the objecting respondents would be unduly jeopardized. Where no plan will be acceptable to the required percentage of creditors, the *CCAA* application should be refused: *Re Hunters Trailer & Marine Ltd.* (2000), 2000 CarswellAlta 1776, [2000] A.J. No. 1550, 5 C.B.R. (5th) 64, 2000 ABQB 952 (Alta. Q.B.).

Where there was no reasonable possibility of the company continuing to operate for the benefit of itself and its creditors, an application for a stay was refused: *851820 N.W.T. Ltd. v. Hopkins Construction (Lacombe) Ltd.* (1992), 12 C.B.R. (3d) 31, 1992 CarswellNWT 4 (N.W.T. S.C.).

In appropriate cases, the court, while the plan of reorganization is being worked out, may make a stand still order against the debtor company prohibiting the issue of further shares, bonds, etc., the disposing of assets, the incurring of debts, or applying cash flow other than in the ordinary course of business: *Re Northland Properties Ltd.* (1988), 69 C.B.R. (N.S.) 266, 1988 CarswellBC 531, 73 C.B.R. (N.S.) 146, 29 B.C.L.R. (2d) 257 (S.C.).

In making a stay order, although a court can prohibit a person from taking a particular action, it cannot make an order permanently taking away an alleged legal cause of action: *Re Quinsam Coal Corp.* (2000), 20 C.B.R. (4th) 145, 2000 BCCA 386, 2000 CarswellBC 1262 (C.A. [In Chambers]).

The Ontario Superior Court of Justice held that, despite opposition from a main secured creditor, it is appropriate to grant a "two track approach" under the *BIA* and *CCAA* in which a proposal trustee is appointed under the *BIA* and the same entity is appointed as a monitor under the *CCAA* and to authorize debtor-in-possession ("DIP") financing to a debtor company for an initial 30-day period where allowing the debtor company to attempt to restructure for at least 30 days provides an opportunity to generate greater value to the stakeholders of the debtor company than an immediate liquidation; the benefits of the proposed DIP financing outweigh the prejudice to the largest secured creditor of the debtor company; and there is a limitation on the draw-down of the DIP financing: *Re Manderley Corp.* (2005), 2005 CarswellOnt 1082, 10 C.B.R. (5th) 48 (Ont. S.C.J.).

The Ontario Superior Court of Justice held that a monitor should not be enjoined from proceeding with an offer submitted as part of a court-approved sale process, even where a new offer arising following the bid deadline may preserve jobs, since this would amount to an unfairness in the working out of the sale process to the detriment of the current purchaser and the secured creditors; interfere with the efficacy and integrity of the sale process; and prefer the interests of one party (i.e. the new prospective purchaser or the union representing the employees), over others: *Re Tiger Brand Knitting Co.* (2005), 2005 CarswellOnt 1240, 9 C.B.R. (5th) 315 (Ont. S.C.J.). For tests for approval of process, see N§56 "Court Approved Sale Process".

In considering a motion seeking to extend the closing date of a court-approved sale pending an application for review of a share ownership decision, the Ontario Superior Court of Justice held that Ontario cases have recognized the concept of provisional execution such that it is not only a concept applicable in Québec; and that it has the jurisdiction to make an order subject to provisional execution, which, pursuant to s. 195 of the *BIA*, operates as an exception to the automatic stay of an order appealed from unless varied by the Court of Appeal; but such discretion should only be exercised sparingly and with caution: *Century Services Inc. v. Brooklin Concrete Products Inc.* (2005), 2005 CarswellOnt 1248, 10 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice held that it is not necessary to amend a *CCAA* claims procedure order to redefine "restructuring claim" to specifically exclude a claim arising under an agreement entered into with the debtor company subsequent to the *CCAA* proceedings where the debtor company has previously acknowledged that such creditor's claim is a

post-filing claim that is stayed until the *CCAA* proceedings are terminated. In such circumstances, the debtor company is not to treat the creditor's claim as a "restructuring claim" subject to compromise under a *CCAA* plan; rather, such claim is stayed to be addressed in the ordinary course of litigation after termination of the *CCAA* proceedings: *Re Stelco Inc.* (2005), 2005 CarswellOnt 5024, 15 C.B.R. (5th) 283 (Ont. S.C.J. [Commercial List]).

If, prior to the taking of proceedings under the *CCAA*, an action has been commenced jointly against the debtor and a third party, the court can restrain the proceedings against the debtor under s. 11, and, if it deems appropriate, against the third party under the general power possessed by the court in civil matters: *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303, 1992 CarswellOnt 185 (Ont. Gen. Div.).

Since the *Act* is a federal *Act*, a stay order made under the *Act* in one province will be binding in other provinces: *Lehndorff United Properties (Canada) Ltd. v. Confederation Life Insurance Co.* (1993), 17 C.B.R. (3d) 198, 82 Man. R. (2d) 286, 1993 CarswellMan 25 (Q.B.).

Since the purpose of the stay order is to maintain the *status quo*, no interest will be payable on secured or unsecured claims during the period of the stay without court order: *Re Philip's Manufacturing Ltd.*, 12 C.B.R. (3d) 133, 68 B.C.L.R. (2d) 162, [1992] 5 W.W.R. 537, 91 D.L.R. (4th) 105, 1992 CarswellBC 488 (S.C.); additional reasons at (1992), 91 D.L.R. (4th) 766, 1992 CarswellBC 1150 (S.C.); affirmed 12 C.B.R. (3d) 149, 69 B.C.L.R. (2d) 44, [1992] 5 W.W.R. 549, 92 D.L.R. (4th) 161, 15 B.C.A.C. 247, (sub nom. *Philip's Manufacturing Ltd. v. Coopers & Lybrand Ltd.*) 27 W.A.C. 247, 1992 CarswellBC 490 (C.A.).

No provisions under the *CCAA* address or contemplate court applications for exemption from filing requirements under securities legislation, and the court's discretionary power under s. 11 of the *CCAA* cannot be used to override provincial statutes: *Re Richtree Inc.* (2005), 2005 CarswellOnt 255, [2005] O.J. No. 251, 7 C.B.R. (5th) 294, 74 O.R. (3d) 174, 13 C.B.R. (5th) 111, 10 B.L.R. (4th) 334 (Ont. S.C.J. [Commercial List]).

A prescription period does not run while a stay is in effect under s. 11: *Conserverie Girard & Beaudin Inc. v. Bellavance* (1991), 12 C.B.R. (3d) 46, (sub nom. *Conserverie Girard & Beaudin Inc., Re*) [1991] R.S.Q. 2906, 1991 CarswellQue 23 (C.S.).

In *Crane Canada Inc. v. McCain Foods Ltd.* (1992), 14 C.B.R. (3d) 106, 1 C.L.R. (2d) 16, 127 N.B.R. (2d) 219, 319 A.P.R. 219, 1992 CarswellNB 35 (Q.B.), it was held that the enforcement of a mechanics' lien on the property of a third party was not affected by a stay order.

In *Milner Greenhouses Ltd. v. Saskatchewan* (2004), 2004 CarswellSask 280, [2004] 9 W.W.R. 310, 50 C.B.R. (4th) 214, 2004 SKQB 160 (Sask. Q.B.), the court observed that legislation expressly exempted by Parliament from the operation of the *CCAA* is commercial in nature and that the *CCAA* stay is directed to commercial as opposed to penal activities. Accordingly, the court held that the prosecution of offences under the *Occupational Health and Safety Act*, S.S. 1993, c. O-1.1 was not stayed by s. 11, although the stay would apply to the enforcement of any fines imposed following a successful prosecution.

The stay of proceedings is a basic component of the maintenance of the *status quo*. Staying the proceedings means to suspend or freeze not only actual or potential litigation, but likewise any type of manoeuvres for positioning among creditors, including the possibility of creditors seeking to repossess their goods in the hands of the debtor company who, to the contrary, should be allowed to continue operating as a going concern while protected under the *CCAA*. The restructuring process in the general interest of all the creditors should always be preferred over the particular interests of individual creditors: *Re Boutiques San Francisco Inc.* (2004), 2004 CarswellQue 300, 5 C.B.R. (5th) 174, [2004] R.J.Q. 986 (Que. S.C.).

The Alberta Court of Queen's Bench affirmed the use of inherent jurisdiction to impose a stay on third parties, finding that although the *CCAA* does not give a court the power to stay proceedings against non-corporate entities, the court has the inherent jurisdiction to grant a stay of proceedings where it is just and convenient to do so. Here, given the extremely complex corporate and debt structure, the cross-border nature of the proceedings, and the evidence before the court on the value of the partnership assets, the court was satisfied that irreparable harm may accrue to the debtor group of companies if the stay was not granted; and on balance, it was just, reasonable and appropriate to exercise the court's jurisdiction to stay proceedings against the partnerships: *Re Calpine Canada Energy Ltd.* (2006), 2006 CarswellAlta 446, 19 C.B.R. (5th) 187, [2006] A.J. No. 412 (Alta. Q.B.).

The Alberta Court of Queen's Bench, in dismissing an application by the trustees of an income fund to lift the stay of proceedings imposed by the *CCAA* and for extensive relief that would have the result of giving the trustees substantial control over certain tolling arrangements, held that existing administration and management agreements precluded the relief sought by the trustees and that the protocol proposed by the existing manager of the entities adequately protected the interests of all interested persons. The court rejected the assertion by the trustees that it is an inappropriate role for the monitor to be put in a supervisory position under the protocol with respect to the tolling process: *Re Calpine Canada Energy Ltd.* (2006), 2006 CarswellAlta 277, 19 C.B.R. (5th) 177, 2006 ABQB 177 (Alta. Q.B.).

The Ontario Superior Court of Justice held that the stay of proceedings in respect of a debtor under the *CCAA* should not be lifted to permit litigation in respect of a conspiracy claim to proceed against the debtor where a claims process for determining the conspiracy claim has been previously established by a claims officer. In these circumstances, the claims officer should be permitted to render its decision in respect of the conspiracy claim pursuant to the claims process. If necessary, the claimant may then appeal the claims officer's decision: *Re Stelco Inc.* (2005), 2005 CarswellOnt 1732, 11 C.B.R. (5th) 161 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice held that interested persons who wish to have set aside or varied an initial *CCAA* order granting a stay of proceedings in respect of a debtor, should not feel constrained about relying on the comeback clause in the *CCAA* order to seek same. The court held that the *CCAA* debtor/applicant has the onus on a comeback motion to satisfy the court that the existing terms of the *CCAA* order should be upheld: *Re Warehouse Drug Store Ltd.* (2005), 2005 CarswellOnt 1724, 11 C.B.R. (5th) 323 (Ont. S.C.J. [Commercial List]).

In considering an application under s. 11(b) of the *CCAA* to extend a company's *CCAA* proceedings beyond the initial 30 days, the applicant must satisfy the court that circumstances exist that make such an order appropriate; and the applicant has, and is, acting in good faith and with due diligence. While "good faith" in the context of stay applications is generally focused on the debtor's dealings with stakeholders, concern for the broader public interest mandates that a stay not be granted if the result will be to condone wrongdoing: *Re San Francisco Gifts Ltd.* (2005), 2005 CarswellAlta 174, 10 C.B.R. (5th) 275, 2005 ABQB 91 (Alta. Q.B.). In *Re San Francisco Gifts Ltd.*, the debtor pled guilty to charges under the *Copyright Act* and was fined; the court held that while the conduct was illegal and offensive, the debtor had already been condemned and punishment levied in the appropriate forum, and that in balancing the interests in the *CCAA* proceeding, particularly those of unsecured creditors, a continuation of the stay was appropriate: *Re San Francisco Gifts Ltd.*, *supra*. See also *Re Simpson's Island Salmon Ltd.* (2005), 2005 CarswellNB 781, 2006 NBQB 6, 18 C.B.R. (5th) 182, 294 N.B.R. (2d) 95, 765 A.P.R. 95 (N.B. Q.B.).

Where a company sought and received a stay under the *CCAA* as a means of achieving a global resolution of numerous product liability actions, and a complainant alleged bad faith as to activities of the debtor pre-filing of the *CCAA* application, the Ontario Superior Court held that the good faith test in considering an extension of the stay relates only to the debtor's conduct during the *CCAA* proceeding, not to prior conduct; and the court was satisfied that the debtor was proceeding with due diligence and good faith and extended the stay. The court may, where appropriate, extend a stay of proceedings to third parties, including third parties that are privy to litigation including the *CCAA* Applicant: *Re Muscletech Research & Development Inc.* (2006), 2006 CarswellOnt 720, 19 C.B.R. (5th) 57 (Ont. S.C.J. [Commercial List]).

Atkins Nutritionals, Inc. et al. (collectively, the "Atkins Group") applied to the Ontario Superior Court of Justice under s. 18.6 of the *CCAA* for recognition in Canada of an order obtained by the Atkins Group under Chapter 11 of the U.S. *Bankruptcy Code* granting a stay of proceedings in respect of the Atkins Group in the United States. The operating entity of the Atkins Group (both in the U.S. and in Canada) was a U.S. entity with certain assets located in Canada. The Canadian division of the Atkins Group was dormant and without assets, although with some liabilities totalling only a few hundred thousand dollars: *Re Atkins Nutritionals Inc.* (2005), 2005 CarswellOnt 4371, 14 C.B.R. (5th) 157 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice held that, in the context of a sale of a debtor's business and assets under the *CCAA*, a court should take great caution before vesting free and clear title to the debtor's real property in the purchaser thereof where a restrictive covenant in favour of a third party owner of adjacent real property runs with the land. The court, in drawing a

distinction between the termination of executory contracts in a *CCAA* context, which may be necessary to permit the continued operation of a debtor's business as a going concern, and the discharge of a restrictive covenant, held that a court should not discharge a restrictive covenant running with land where such discharge does not serve to advance the debtor's restructuring; the discharge would have the effect of maximizing value for certain stakeholders of the debtor at the expense of the land owner in whose favour the restrictive covenant was given; and there is no evidence before the court of failed or unreasonable negotiations with the beneficiary of the restrictive covenant: *Re Terastar Realty Corp.* (2005), 2005 CarswellOnt 5985, 16 C.B.R. (5th) 111 (Ont. S.C.J.).

In making an application under the *CCAA*, the debtor corporation does not have to demonstrate at the initial stay application stage that it has a feasible plan, although the courts have held that the debtor corporation is wise to have consulted with major creditors in advance of the application, in order to ascertain their willingness to co-operate in the negotiation of a workout. An early decision of the Québec Court of Appeal in *Groupe Bovac Ltée* held that at the time of the application, the plan must be in existence, although the plan could be modified or varied after that time: *Banque Laurentienne du Canada v. Groupe Bovac Ltée* (1991), 1991 CarswellQue 39, 9 C.B.R. (3d) 248, [1991] R.L. 593 (Que. C.A.). However, the *CCAA* was modified in 1997, introducing a limit on the length of the stay granted on an initial application for a stay order, Parliament recognizing that the debtor might need a period to prepare a plan. As a consequence, it appears that *Groupe Bovac Ltée.* is now not good law as a result of the changes to the *CCAA* in 1997.

The Ontario Superior Court of Justice dismissed a *CCAA* application where the sole purpose of the application was to obtain a stay that was directed at preventing a regulatory tribunal hearing from proceeding. The applicant satisfied the technical requirements of the *CCAA* in that it was insolvent; however, while it had substantial secured and unsecured debt, there was no evidence that any creditors were taking action against the applicant to enforce payment. The principal purpose of the application was to seek a stay of certain licensing proceedings before the License Appeal Tribunal, which were scheduled to commence three days after the *CCAA* application was made. There was no business to protect; there were no employees, nor was there any prospect of a sale of the business to satisfy the creditors that would require *CCAA* protection in order to conduct a sales process: *Re Realtysellers (Ontario) Ltd.* (2008), 2008 CarswellOnt 438, 40 C.B.R. (5th) 154 (Ont. S.C.J.).

Where an application for extending the initial stay was generally opposed by the secured creditors on the basis that performance by the debtor company did not generate confidence that it had turned the corner and was likely to survive and the creditors were concerned about prejudice to their security, the court held that in order to obtain an extension, the applicant debtor must establish three preconditions: that circumstances exist that make the order appropriate; that the applicant has acted and continues to act in good faith; and that the applicant has acted and continues to act with due diligence. The court concluded that the requirements of s. 11(6) of the *CCAA* had been satisfied and the continuation of the stay was supported by the overriding purpose of the *CCAA*, which is to allow an insolvent company a reasonable period of time to reorganize and propose a plan of arrangement to its creditors and the court, and to prevent maneuvers for positioning among creditors in the interim. The court relied on the monitor's assessment that the debtor, by its actions, appeared to be acting in good faith and with due diligence and moving forward towards the preparation of a plan: *Re Federal Gypsum Co.* (November 5, 2007) (2007), 2007 CarswellNS 629, 2007 NSSC 347, 40 C.B.R. (5th) 80 (N.S. S.C.) (November 5, 2007).

The Ontario Superior Court of Justice concurrently considered a receivership motion brought by a secured creditor and a *CCAA* application brought by the debtor. The receivership motion was granted. Morawetz J. was of the view that the loan agreement was in default and had been in default since August 2007 and default had not been waived. The creditor had agreed not to enforce but on terms reflected in the forbearance agreement. An agreement to forbear on terms does not have the effect of reversing or cancelling existing defaults. In addition, there had been a number of recent further defaults. Morawetz J. held that these defaults were material and not merely technical defaults. A receiver can be appointed under s. 47 of the *BIA* provided it is shown to the court to be necessary for the protection of the debtor's estate, or the interests of the creditor who sent a notice under s. 244(1). Here, the appointment of a receiver was justified under both aspects of the *BIA*, as well as under s. 101 of the *Courts of Justice Act*. The *CCAA* application did not proceed; however, there was no prohibition on the management or board of the debtor from continuing ongoing activities to refinance. If a refinancing transaction came forward, the interim receiver was directed to report such developments to the court and seek further direction: *Retail Funding Inc. v. Cotton Ginny Inc.*

(2008), 2008 CarswellOnt 4808, 45 C.B.R. (5th) 250 (Ont. S.C.J. [Commercial List]). [Note: Subsequently, the debtor was able to obtain refinancing and made a new *CCAA* application that was granted; ultimately a plan of arrangement was presented, approved by creditors and sanctioned by the court.]

The British Columbia Court of Appeal overturned an order of the chambers judge extending a stay of proceedings and granting DIP financing under the *CCAA* proceeding for a development project. The Court of Appeal held that the nature and state of a business are simply factors to be taken into account when considering whether it is appropriate to grant a stay under s. 11 of the *CCAA*. The ability of the court to grant or continue a stay is not a free standing remedy, and a stay should only be granted in furtherance of the *CCAA*'s fundamental purpose of facilitating compromises and arrangements between companies and their creditors. A stay should not be granted or continued if the debtor company does not intend to propose a compromise or arrangement to creditors. If it is not clear at the initial application hearing whether the debtor is proposing a true arrangement or compromise, a stay might be granted on an interim basis, with the debtor's intention scrutinized at a comeback hearing. Here, in the absence of an expressed intention to propose a plan to creditors, it was not appropriate for the stay to have been granted or extended under s. 11, and the chambers judge failed to take this important factor into account. While the *CCAA* can apply to a business with a single development, the nature of the financing arrangements may mean that the debtor has difficulty proposing a plan that is more advantageous than the remedies already available to creditors. It continued to be open to the debtor company to propose to its creditors an arrangement or compromise restructuring plan. However, the *CCAA* is not intended to accommodate a non-consensual stay of creditors' rights while a debtor company attempts to carry out a restructuring plan that des not involve an arrangement or compromise on which creditors may vote: *Cliffs OverMaple Bay Investments Ltd. v. Fisgard Capital Corp.* (2008), 2008 CarswellBC 1758, 46 C.B.R. (5th) 7, 2008 BCCA 327 (B.C. C.A.). For a discussion of the standard of review in this case, see: N§85 "Appeals from Stay Orders".

The British Columbia Supreme Court considered the test for setting aside an *ex parte* order for non-disclosure in the context of *CCAA* proceedings. The court will consider whether the facts that were not disclosed might have affected the outcome if they had been known at the time the application was made. In this case, the court found that there was a realistic standard of disclosure met by the petitioner, which resulted in full and fair disclosure. The court also held, in accordance with the principles set out by Tysoe J. in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* (2008), 2008 CarswellBC 1758, 46 C.B.R. (5th) 7 (B.C.C.A.), that the debtor had shown an intention to put a plan before its creditors, and was satisfied that the financing was in place that would allow sufficient time to bring forward a plan for the consideration of the creditors: *Re Hayes Forest Services Ltd.* (2008), 2008 CarswellBC 1946, 46 C.B.R. (5th) 189 (B.C. S.C. [In Chambers]).

The Ontario Superior Court of Justice granted an initial *CCAA* order that also approved an interim financing agreement. The issue that caused concern for the court was that the debtor agreed to guarantee obligations of an affiliated U.S. entity that had concurrently filed for Chapter 11 protection in the U.S. In considering whether approval should be granted, the court observed that if there was a shortfall on the realization of U.S. assets, up to US$5 million of assets of the Canadian debtor would not be available to the current creditors of the Canadian debtor. Justice Morawetz noted that it would have been helpful if the monitor had been involved in this process at an earlier stage as the court would have benefited from an analysis of the situation. On balance, Justice Morawetz concluded that the agreement, combined with the breathing space afforded by *CCAA* protection, would have the greatest potential in an attempt to preserve value for stakeholders of the debtor, including the prospect of preserving over 350 manufacturing jobs, as well as the preservation of the business for customers and suppliers: *Re A & M Cookie Co. Canada* (2008), 2008 CarswellOnt 7136, 49 C.B.R. (5th) 188 (Ont. S.C.J. [Commercial List]).

An initial *CCAA* order covered a debtor and a number of its associated entities, and the court extended the benefit of *CCAA* protection to two Canadian partnerships affiliated with the debtors. Each of these *CCAA* entities had also filed for Chapter 11 protection in the United States the day prior to the *CCAA* proceedings. The court held that the business operated as a North American company rather than as a collection of individual business units. The U.S. and Canadian operations were fully integrated; management decisions were made by a U.S. management team and it would have responsibility for the restructuring plan for the *CCAA* entities; a secured credit facility covered both the Canadian and American operations and the amount outstanding on the pre-filing facility was approximately U.S.$1 billion of which approximately US$367 million was attributable to the Canadian debtor company; and security over all material Canadian assets had been provided as part of the facility. The

proposed outline for a plan included continuing the process of selling and realizing value in respect of closed and discontinued operations and coordinating with the U.S. entities to achieve a balance sheet restructuring. The proposed monitor was also of the view that the restructuring and continuation of the *CCAA* entities as a going concern was the best option available, given that a going concern restructuring would preserve the value of the entities whereas a liquidation and wind-down would likely result in a substantial diminution in value that could ultimately reduce creditors' recoveries: *Re Smurfit-Stone Container Canada Inc.* (2009), 2009 CarswellOnt 391, 50 C.B.R. (5th) 71 (Ont. S.C.J. [Commercial List]).

The British Columbia Court of Appeal dismissed the appeal of a secured creditor from an order of the chambers judge who had extended an initial order granted under the *CCAA*. The appeal raised the issue of the court's jurisdiction to stay proceedings against a partnership, as well as whether the stay ought to have been granted in circumstances where the applicants intended to refinance as opposed to presenting a proposal of a plan of arrangement. The court held that the *CCAA* is appropriate for situations such as this where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of one or more parties. The fundamental purpose of the *CCAA*, to preserve the *status quo* while the debtor prepares a plan that will enable it to remain in business to the benefit of all concerned, will be furthered by granting a stay so that the means contemplated by the *Act*, a compromise or arrangement, can be developed, negotiated and voted on if necessary: *Re Forest & Marine Financial Ltd.* (2009), 2009 CarswellBC 1738, 54 C.B.R. (5th) 201 (B.C. C.A.).

The Ontario Superior Court of Justice held that claims for termination pay and severance pay were unsecured claims that were stayed during a *CCAA* proceeding: *Re Windsor Machine & Stamping Ltd.* (2009), 2009 CarswellOnt 4471, 55 C.B.R. (5th) 241 (Ont. S.C.J. [Commercial List]).

The court has jurisdiction to permit the debtor to refrain from making special payments: *Re Collins & Aikman Automotive Canada Inc.* (2007), 37 C.B.R. (5th) 282, 2007 CarswellOnt 7014, 63 C.C.P.B. 125 (Ont. S.C.J.).

The Québec Superior Court held that it has jurisdiction to authorize the suspension of the debtor's obligation to finance the pension plan by suspending its special payments, distinguishing between rights that flow from a collective agreement and the performance of obligations to give effect to those rights. Mayrand J. determined that the past service contributions or special payments related to services provided prior to the initial order and therefore were not barred by section 11.3 of the *CCAA*: *Re AbitibiBowater inc.* (2009), 74 C.C.P.B. 254, D.T.E. 2009T-434, 2009 QCCS 2028, 2009 CarswellQue 4329, 57 C.B.R. (5th) 285 (Que. S.C.).

The Ontario Superior Court of Justice held that it has jurisdiction in a *CCAA* proceeding to stay the requirement to make special payments required under a pension plan. At the time of the initial application, the debtor's request for an order that the stay applied to special payments in respect of unfunded and going concern and solvency deficiencies with respect to certain pension plans was adjourned. This motion sought to suspend past service contributions or special payments to fund any going concern unfunded liability or solvency deficiencies of certain pension plans during the stay period. Current service payments or normal cost contributions were not in issue. In the circumstances of the case, the court grant the stay. Justice Pepall noted that the evidence was that the payments related to services provided in the period prior to the initial order, and the collective agreements did not change this fact. The court was not being asked to modify the terms of the pension plan or the collective agreements. In the court's view, the operative word was suspension, not extinction. In addition, the actuarial filings were current and the relief requested was not premature. The court held that the failure to stay the obligation to pay the special payments would jeopardize the business and the debtor's ability to restructure. The opportunity to restructure is for the benefit of all stakeholders including the employees. That opportunity should be maintained. Justice Pepall also granted ancillary relief by ordering that the officers and directors should not have any liability for failure to pay special payments during the same period: *Re Fraser Papers Inc.* (2009), 2009 CarswellOnt 4469, 55 C.B.R. (5th) 217 (Ont. S.C.J. [Commercial List]).

The Alberta Court of Queen's Bench denied a *CCAA* application of a real estate company that purchased, held and sold properties. The debtor had applied for *CCAA* protection as it was unable to make all of its mortgage payments as a result of the economic downturn, which meant that several tenants had defaulted on their lease. As part of its application, the debtor sought approval of DIP financing for $3.5 million with the first draw being up to $1.5 million with an interest rate of 15%

plus other fees. The application was opposed by the majority of first mortgagees, who wanted to proceed with their foreclosure remedies. Justice Kent concluded that it was not appropriate to grant relief under the *CCAA*; it appeared highly unlikely that any compromise or arrangement would be acceptable to creditors; the proposed costs of the proceeding were not appropriate given the circumstances; and there were not a large number of employees or significant unsecured debt in relation to the secured debt: *Re Octagon Properties Group Ltd.* (2009), 2009 CarswellAlta 1325, 58 C.B.R. (5th) 276, 2009 ABQB 500 (Alta. Q.B.).

The court held that representative counsel should be appointed pursuant to s. 11 of the *CCAA* and the Ontario Rules of Civil Procedure. Employees and retirees not otherwise represented were a vulnerable group who required assistance in the restructuring process, and it was beneficial that representative counsel be appointed. The balance of convenience favoured the granting of such an order, and it was in the interests of justice to do so. Once commonality of interest has been established, other factors to be considered in the selection of representative counsel include: the proposed breadth of representation; evidence of a mandate to act; legal expertise; jurisdiction of practice; the need for facility in both official languages; and estimated costs. The court held that the objective of the order was to help those who were otherwise unrepresented, but to do so in an efficient and cost effective manner and without imposing an undue burden on the insolvent entities struggling to restructure. In the event that a real, as opposed to a hypothetical or speculative, conflict would arise at some point in the future, the parties could seek directions from the court. In the result, the representation requests for two unions and one other representative counsel were granted, with funding ordered for the representative counsel of the non-unionized employees and retirees: *Re Fraser Papers Inc.* (2009), 2009 CarswellOnt 6169 (Ont. S.C.J. [Commercial List]).

The Québec Superior Court declined the request of the Province of Newfoundland and Labrador to gain access to the electronic data rooms set up in the *CCAA* restructuring proceedings of the debtor company. Justice Gascon held that the *CCAA*'s purpose is to facilitate compromises and arrangements between an insolvent debtor company and its creditors; and this case was not one where judicial discretion should be exercised in the manner sought by the Province as there was no reasonable or reasoned justification that would support it. Justice Gascon found that the Province failed to produce any reliable or admissible evidence to establish that it was a creditor of the debtor; there was no evidence to establish the nature of the payments made or any lawful assignment of the related claims of the employees. The Province also did not provide the court with any convincing evidence in support of its alleged status of potential creditor for environmental problems resulting from the debtor's economic activities. The court held that to conclude that the Province was a creditor would, in essence, substitute speculation for reason and guesswork for proof. Access to the data rooms at that point had only been provided to secured creditors whose assets were being used in the restructuring process, and to committees of unsecured creditors whose status was officially recognized in the U.S. proceedings or whose support was essential to the outcome of the restructuring because of the amount of debt owed to them. There was no evidence to suggest that potential or contingent creditors such as the Province had been given the kind of access it was seeking. Justice Gascon held that the debtor company could, for legitimate business reasons and through the exercise of reasonable business judgment, restrict access to its data rooms when the access would not further its restructuring process. In this case, Gascon J. noted that the Province wanted access to the data room not to enhance the restructuring process, but to assess the extent of the debtor's present and future ability to cover the Province's undetermined and potential environmental claims. It was reasonable for the debtor to deny access to its data rooms to a stakeholder with whom it has a legitimate debate and reasonable expectations of upcoming litigation. In such a situation, the *CCAA* process should not be used to further a collateral objective that, in the end, is not consistent with the ultimate goal of the *CCAA*: *Re AbitibiBowater inc.* (2009), 2009 CarswellQue 11821 (Que. S.C.).

The stay performs the initial function of keeping stakeholders at bay in order to give the debtor a reasonable opportunity to develop a restructuring plan: *Re Canwest Global Communications Corp.* (2009), 2009 CarswellOnt 7882 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice approved a series of agreements that provided the debtors with certainty with respect to ongoing funding, resolution of inter-company issues, and a settlement with taxing authorities. The agreements were entered into after extensive negotiations among the debtor companies, the monitor, the joint administrators, the official committee of unsecured creditors, the bondholders committee and the creditors' committee. The trustees of the pension plan objected. The court held that in considering the funding arrangements of the debtor entities, which operate globally with numerous

international subsidiaries, the scope of review must take account of the complex and inter-related funding agreements that had been developed over a period of years. It was appropriate to place reliance on the views of the monitor who had the benefit of intensive involvement for over a year and was active in the negotiations leading up to the proposed settlement. There was considerable downside risk for the Canadian estate if the settlement was not approved. The terms of the settlement had been thoroughly canvassed not only by the applicants and the monitor, but also by the creditor groups; and there were a number of checks and balances in the system, that when considered together, provided the court with reasonable comfort that the settlement was fair and reasonable. The court was satisfied that the financial stability of the Canadian debtor was in jeopardy and the situation would not improve without the approval of the proposed settlement: *Re Nortel Networks Corp.* (2010), 2010 CarswellOnt 1044 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice appointed representative counsel to act on behalf of the former salaried employees and retirees of the debtor company, notwithstanding that the funding of fees for representative counsel would contravene the provisions of the support agreement. Factors that the courts consider in granting representation orders include: the vulnerability and resources of the group sought to be represented; any benefit to the companies under *CCAA* protection; any social benefit to be derived from representation of the group; facilitation of the administration; avoidance of a multiplicity of legal retainers; the balance of convenience and whether it is fair and just for parties including the creditors of the estate; whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and the position of other stakeholders and the monitor. In this case, the primary objection to the relief requested was prematurity; and Justice Pepall was of the view that this "watch and wait suggestion" was unhelpful to the needs of the salaried employees and retirees and to the interests of the applicants. The individuals in issue may be unsecured creditors, and they are all individuals who find themselves in uncertain times facing legal proceedings of significant complexity. There was evidence that members of the group were unable to afford proper legal representation. Further, Justice Pepall noted that the monitor already had very extensive responsibilities and that it was unrealistic to expect that it could be fully responsive to the needs and demands of these many individuals in an efficient and timely manner. It would be of considerable benefit to have representatives and representative counsel who could interact with the applicants and represent their interests. The court directed counsel to ascertain how best to structure the funding and report back to court: *Re Canwest Publishing Inc.* (2010), 2010 CarswellOnt 1344 (Ont. S.C.J. [Commercial List]).

The court granted an extension of a stay under the *CCAA* on the basis that the debtors had proved they were acting in good faith and with due diligence, and the extension would allow the debtor companies the opportunity to present a plan of arrangement for the benefit of all creditors. The debtor required equipment to complete its contract and the court declined to allow the secured creditor to lift or terminate the stay and seize the equipment: *Re Clayton Construction Co.* (2009), 2009 CarswellSask 690, 59 C.B.R. (5th) 213 (Sask. Q.B.).

The Ontario Superior Court of Justice, over the objections of the largest unsecured creditor, approved the payment by the debtors of a contribution to the settlement of an action against the debtors and others, as well as the payment of legal fees relating to the action. The creditor of the debtor commenced *CCAA* proceedings, which were recognized under Chapter 15 of the U.S. *Bankruptcy Code*, and which had the effect of staying a lawsuit against the debtor companies. The Texas court, however, refused to stay the entire action and severed the other defendants. Trial was set; however, the action was settled on behalf of all defendants. The Ontario court authorized the debtor companies to enter into the settlement agreement. As a result of the sale, two secured creditors were paid in full and the monitor estimated that there would be a dividend of 20% to 40% for the unsecured creditors. Justice Karakatsanis noted that under s. 11 of the *CCAA*, a court may approve material agreements, including settlements, before the filing of any plan of compromise, if it is fair and reasonable and will be beneficial to the debtor and its stakeholders generally. After reviewing a number of factors, the court concluded that it was in the best interests of the debtor companies and its creditors generally and specifically that the debtor make a 25% contribution to the settlement of the lawsuit: *Return on Innovation Capital Ltd. v. Gandi Innovations Ltd.* (2010), 2010 CarswellOnt 2084, Ont. S.C.J..

The court granted an extension of a stay under the *CCAA*, on the basis that the community served by the debtor was huge, given that the debtor was the largest publisher of daily English language newspapers in Canada and the debtor employed 5,300 employees. The granting of the order was premised on an anticipated going concern sale of the newspaper business, which would

serve the interests of the debtor, stakeholders and the community at large. The stay order would provide stability and enable the debtor to pursue restructuring and preserve enterprise value for stakeholders. Without the benefit of the stay, the debtor would be required to pay approximately 1.4 billion CAD and would have been unable to continue operating the business. The court endorsed a credit acquisition process: *Re Canwest Publishing Inc./Publications Canwest Inc.* (2010), 2010 CarswellOnt 212, 63 C.B.R. (5th) 115, 2010 ONSC 222, [2010] O.J. No. 188 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice, on the debtor's motion, terminated *CCAA* proceedings, court-ordered charges and the stay of proceedings, and discharged the monitor. The applicant had sought *CCAA* protection as a result of the issuance by the Minister of Revenue for the Province of Québec ("MRQ") of a notice of assessment against the debtor. The MRQ also had commenced an oppression application against the applicant and others relating to alleged contraband tobacco activities, which mirrored claims asserted by the Attorney General of Canada against the applicant and others. The sole purpose of the *CCAA* proceedings was to deal with the claims of the MRQ in respect of contraband activities. Following extensive discussions, the debtor and the governments agreed to settle all of the contraband claims. Coincident with the settlement, the debtor pleaded guilty to a regulatory infraction under the *Excise Act* (Canada) and paid a fine of $150 million. As part of the settlement, the debtor and its affiliates were released from all contraband claims. The termination of proceedings order sought was supported by the monitor and was either supported or not opposed by the federal government and those of the provinces and territories appearing. The court accepted the recommendations of the monitor and concurred with its report that the relief sought did not unduly prejudice the stakeholders. The court was satisfied that the debtor would continue to meet its debt and trade obligations as they come due, and termination of the *CCAA* proceedings was likely to improve the operating cash flow. In these unique circumstances, the court was satisfied that the debtor no longer required *CCAA* protection: *Re JTI-MacDonald Corp.* (2010), 2010 CarswellOnt 5934, 70 C.B.R. (5th) 310, 2010 ONSC 4212 (Ont. S.C.J. [Commercial List]).

The British Columbia Supreme Court gave directions as to the most appropriate process for employees to follow in filing claims against directors and officers of an estate that first filed under the *CCAA* and then under the *BIA*. In making its decision, the court also considered whether it had jurisdiction under s. 11 of the *CCAA* or whether it had to consider the statutory preconditions under s. 119(2) of the *CBCA*: *Re Pope & Talbot Ltd.* (2010), 2010 CarswellBC 3648, 74 C.B.R. (5th) 210, 2010 BCSC 1902 (B.C.S.C.).

The British Columbia Supreme Court granted initial *CCAA* protection to a group of entities involved in the business of designing, manufacturing, and selling custom super yachts. The initial application was opposed by certain creditors on the basis that the B.C. court had no jurisdiction to stay *in rem* maritime law proceedings in the Federal Court. The initial order granted by the B.C. court included, as a matter of comity, a request for recognition and aid of the Federal Court with respect to the initial order. The court was of the view that priority issues as they related to claims of maritime lien holders did not have to be addressed on the initial application: *Sargeant III v. Worldspan Marine Inc.* (2011), 2011 CarswellBC 1444, 2011 BCSC 767 (B.C.S.C. [In Chambers]). For further discussion of this case, see N§59 "Jurisdiction of Courts".

The Ontario Superior Court of Justice and the United States Bankruptcy Court for the District of Delaware referred certain issues to mediation. The courts noted that the issue of allocation of assets among various debtor entities, together with the resolution of claims including claims in the U.K. proceedings, had to be resolved before there could be any meaningful distribution to creditors. The allocation issue before the U.S. Court and the Ontario Court was complicated by the fact that it was a multi-jurisdictional issue: *Re Nortel Networks Corp.* (2011), 2011 CarswellOnt 5175, 2011 ONSC 3805; additional reasons at (2011), 2011 CarswellOnt 5740, 2011 ONSC 4012 (Ont. S.C.J.). For a detailed discussion of this case, see N§223 "Protocols".

Notwithstanding objections raised by two secured creditors, the British Columbia Supreme Court granted an order extending the stay in a *CCAA* proceeding, and also increased the administration charge and imposed a director's charge. Justice Fitzpatrick found that there was no doubt that the applicants were insolvent and that they faced substantial challenges in a restructuring. However, for the purposes of this application, it was evident that there were substantial assets that would be a potential source of refinancing or sale with respect to both resort projects. After reviewing concerns raised by the creditors, Fitzpatrick J. did not accept their submissions that there was any justification for their lack of faith in management. Fitzpatrick J. was satisfied that there was a *bona fide* intention to present a plan, and that although the secured creditors claimed they would not vote in favour of any plan, the actions of the creditors in the circumstances indicated that they were open to negotiations and that those

negotiations could possibly result in a refinancing of the debt that would allow the debtors to go forward on some restructured basis. Fitzpatrick J. considered the provisions of s. 11.2 of the *CCAA*, and in particular, the factors set forth in s. 11.2 (4). She was satisfied that the requested DIP financing order was appropriate. The court distinguished the instant circumstance from cases in which there were undeveloped or partially completed real estate projects where the courts have drawn a distinction between such situations and one where there is an active business being carried on within a complicated corporate group, since as here. In Fitzpatrick J.'s view, the debtors were a highly integrated group and the protections under the *CCAA* must be for the entire group in order that they can seek a solution to their financial problems as a whole. It may be that individual solutions will be found for particular assets or debts, but that could be accommodated within the CCAA proceedings as currently sought by the applicants for that integrated group. Justice Fitzpatrick observed that there were a substantial number stakeholders involved: the applicants, the secured creditors, the unsecured creditors, the owner groups and strata corporations, the thousands of homeowners and the hundreds of employees. There could be no doubt that a receivership would result in a complete obliteration of every financial interest save for the first and possibly second secured lenders. The prejudice to the other stakeholders was palpable in the event of a receivership. In the result, the applicants had satisfied the onus of establishing that they were acting in good faith and with due diligence and that the making of a further order extending the stay was appropriate. The order was granted as sought, including a DIP financing charge, an increased administration charge, and a directors' charge up to $700,000. The creditor's application to appoint a receiver was dismissed: *Re Pacific Shores Resort & Spa Ltd.* (2011), 2011 CarswellBC 3500, 75 C.B.R. (5th) 248, 2011 BCSC 1775 (B.C.S.C. [In Chambers]).

The Ontario Superior Court of Justice addressed a contest between two competing *CCAA* applications. The contest was between the debtor and noteholders under a trust indenture. The court made an initial order in the application brought by the debtor and dismissed the noteholders' application. The principal asset of the debtor was its right to develop a gold mine in Venezuela, one of the largest undeveloped gold deposits in the world, the asset being in the form of an international arbitration claim. The debtor submitted that a settlement of the arbitration claim or recovery on an arbitration award would result in it receiving cash far in excess of what was required to pay all of its creditors in full. In its *CCAA* application, the debtor sought the authority to file a plan, in order that it remain in possession of its assets with the authority to continue to pursue the arbitration and continue to retain all the experts necessary for that purpose, a directors' and officers' indemnity and charge not exceeding $10 million, and an administration charge of $3 million, as well as authority to pursue all avenues of interim financing or a refinancing of its business and to conduct an auction to raise interim or DIP financing pursuant to procedures approved by the monitor. Expressions of interest had already been received with respect to DIP financing. Justice Newbould observed that the intention of the *CCAA* to provide a structured environment for negotiation of compromises between a debtor company and its creditors for the benefit of both; and that the *CCAA* serves the interests of a broad constituency of investors, creditors and employees. Justice Newbould was of the view that to cancel the shares of the existing shareholders at this stage was premature. There was also evidence that Venezuela had a history of settling arbitrations. Newbould J. was also of the view that the debtor's application and the terms of the initial order were not prejudicial to the legitimate interests of the noteholders. The debtor's proposed initial order was in keeping with the objectives of the *CCAA* and would permit a fair and balanced process at this initial stage. Newbould J. also approved the directors' and officers' charge and the administration charge: *Re Crystallex International Corp.* (2011), 2011 CarswellOnt 15034, 89 C.B.R. (5th) 313, 2011 ONSC 7701 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice granted a receivership order and dismissed the debtors' cross-application for an initial order under the *CCAA*. There had been ongoing default by the debtors in respect of their obligations to the secured creditors; and at the time of one advance, the debtors were in breach of their representations in a credit facility agreement. Justice Mesbur noted that a forbearance agreement also contained a promise from the debtors not to commence any restructuring or reorganization proceedings under the *BIA* or *CCAA*. Since the forbearance agreement, the debtors' financial position had deteriorated further, and the creditor terminated the forbearance agreement and advised that it would apply to court to have a receiver appointed. In determining whether a receiver should be appointed, the court will consider all the circumstances of the case, particularly, the effect on the parties of appointing the receiver, including potential costs and the likelihood of maximizing return on and preserving the subject property; the parties' conduct; and the nature of the property and the rights and interests of all parties in relation to it. The fact that the creditor has a right to appoint a receiver under its security is an important consideration. Generally, a court will appoint a receiver when it is necessary to enforce rights between the parties or to preserve assets pending judgment. Receivers will also be appointed where there is a serious apprehension about the safety of the assets. In this case,

the credit agreement itself specifically contemplated appointing a receiver. Given the debtors' failure to come up with even a rudimentary restructuring plan, the court found that it was time for a receiver to take control and manage the business to the extent necessary to result in an orderly liquidation to protect the interests of all stakeholders: *Callidus Capital Corp. v. Carcap Inc.* (2012), 2012 CarswellOnt 480, 84 C.B.R. (5th) 300 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice lifted a stay of proceedings to permit the filing of a leave application to the Supreme Court of Canada, but dismissed the motion of the class action plaintiff to proceed further on the basis that the motion was premature, as the debtor should focus on the sales process. A delay in the sales process could have a negative impact on the creditors of the debtor. Conversely, the court held that the time sensitivity of the class action had been, to a large extent, alleviated by the lifting of the stay so as to permit the filing of the leave application to the Supreme Court of Canada. Justice Morawetz noted that it was also significant to recognize the position put forth by one of the defendants in the class action, that the claims were only equity claims, and as such would be subordinated to any creditor claims. The motion was dismissed without prejudice to the rights of the plaintiff to renew his request no sooner than 75 days after the date of the endorsement: *Re Timminco Ltd.* (2012), 2012 CarswellOnt 5390, 2012 ONSC 2515 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice lifted the stay in a *CCAA* proceeding to permit a class action plaintiff to file leave materials to the Supreme Court of Canada, but not otherwise. The class action was commenced several years prior to commencement of the *CCAA* proceedings and a number of steps had been taken in the litigation. The Court of Appeal had previously set aside a superior court decision declaring that s. 28 of the Ontario *Class Proceedings Act* suspended the running of the three year limitation period under s. 138.14 of the Ontario *Securities Act*. The plaintiff's counsel received instructions to seek leave to appeal to the Supreme Court of Canada, and Morawetz J. lifted the stay of proceedings such that the leave materials could be filed on time. The plaintiff submitted that the principal objectives of the *Class Proceedings Act* are judicial economy, access to justice and behaviour modification under the *Securities Act*, citing *Western Canadian Shopping Centres Inc. v. Dutton* (2001), 2001 CarswellAlta 884, 2001 CarswellAlta 885, [2001] 2 S.C.R. 534. Justice Morawetz held that the party seeking to lift the stay bears a heavy onus as the practical effect of lifting the stay is to create a scenario where one stakeholder is placed in a better position than other stakeholders, rather than treating stakeholders equally in accordance with their priorities. Justice Morawetz observed that courts will consider a number of factors in assessing whether it is appropriate to lift a stay, but those factors can generally be grouped under three headings: the relative prejudice to parties; the balance of convenience; and where relevant, the merits. Morawetz J. was of the view that the primary focus of the management group at the time had to be on the sales process under the *CCAA*, and held that the time sensitivity of the class action had been, to a large extent, alleviated by the lifting of the stay so as to permit the leave application to the Supreme Court of Canada. The motion was dismissed without prejudice to the rights of the plaintiff to renew his request no sooner than 75 days after the date of the endorsement: *Re Timminco Ltd.* (2012), 2012 CarswellOnt 5390, 2012 ONSC 2515 (Ont. S.C.J. [Commercial List]).

The Supreme Court of Canada in *Re AbitibiBowater Inc.* held that regulatory bodies may become involved in reorganization proceedings when they order the debtor to comply with statutory rules. As a matter of principle, reorganization does not amount to a licence to disregard rules. Yet there are circumstances in which valid and enforceable orders will be subject to an arrangement under the *CCAA*. One such circumstance is where a regulatory body makes an environmental order that explicitly asserts a monetary claim. The Supreme Court held that not all orders issued by regulatory bodies are monetary in nature and thus provable claims in an insolvency proceeding, but some may be, even if the amounts involved are not quantified at the outset of the proceedings. The Court held that in the environmental context, the *CCAA* court must determine whether there are sufficient facts indicating the existence of an environmental duty that will ripen into a financial liability owed to the regulatory body that issued the order. The Court held that subjecting such orders to the claims process does not extinguish the debtor's environmental obligations; it merely ensures that the creditor's claim will be paid in accordance with insolvency legislation: *Re AbitibiBowater Inc.*, 2012 CarswellQue 12490, 2012 CarswellQue 12491, 95 C.B.R. (5th) 200, 2012 SCC 67 (S.C.C.). For a full discussion of this judgment, see N§78 "Regulatory Bodies".

The Ontario Superior Court of Justice dismissed a motion brought by former directors and officers for an interim order restraining the Director appointed pursuant to the Ontario *Environmental Protection Act* from issuing a Director's order. The debtor had notified the MOE in 1995 that a spill at a manufacturing site had contaminated groundwater that ran beneath hundreds

of residential properties in the surrounding area. Since that time, the debtor had conducted various investigation, remediation and monitoring activities in conjunction with the MOE and local authorities. The MOE issued a Director's order in 2012 ordering the debtor to develop and implement a plan to clean up contaminated groundwater ("first order"). The MOE issued a second Director's order, ordering the debtor to provide financial assistance to the MOE in the amount of $10 million. The debtor filed for *CCAA* protection and subsequently completed a court-approved sale of substantially all of its assets; the sale transaction did not include the site. On closing, the debtor was adjudged bankrupt and had no funds to continue the remediation efforts of the site. Subsequently, the Minister issued a direction pursuant to section 146 of the *EPA* directing the MOE to perform the work required by the first Director's order, and as a result, the MOE had taken over the remediation activities on the site. The bankruptcy order permitted the continuation of the *CCAA* proceedings to allow the completion of the claims process. The claims bar date for all claims under the *CCAA* process was set and the MOE filed a claim under the *CCAA* claims process. The starting point for Morawetz J. was s. 14 of the *Proceeding Against the Crown Act*, which establishes the general rule that an injunction against the Crown is prima facie impermissible; the two exceptions being when the Crown is acting *ultra vires* or is deliberately flouting the law and when the court issues injunctive relief where it is necessary to preserve the *status quo* and protect the court's process. In the circumstances, Morawetz J. was not persuaded that the *status quo* exception had application; there was no evidence that there was government wrongdoing. The exception also has application where restricting injunctive relief against the Crown to the *ultra vires* principle would leave serious gaps; however, Morawetz J. held that the *EPA* sets a complete statutory scheme for the issuance of environmental orders, including provisions for the issuance, and appeal of those orders. In view of this scheme, there was not a serious gap such that an interim order was required to ensure the effectiveness of the disposition of the issue. Further, even if the argument of the former D&O group was placed at its highest, there was still the necessity to satisfy the three-part test for injunctive relief set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CarswellQue 120F, 1994 CarswellQue 120, [1994] 1 S.C.R. 311. In the circumstances, there was no serious issue to be tried because the former D&O group's motion constituted a collateral attack on the administrative process set out in the *EPA*. It had been established that the validity of the Director's order to be issued under the *EPA* against the directors/officers must be determined by the tribunal. On the second issue of the demonstration of irreparable harm, Morawetz J. was not persuaded by the submissions put forth by the former D&O group to the effect that their professional reputations would be harmed if the Director's order was issued, as the mere risk of damage to reputation or other harm was not sufficient to establish irreparable harm: *Re Northstar Aerospace Inc.*, 2012 CarswellOnt 14149, 2012 ONSC 6362 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice dismissed a debtor's application for an initial order under the *CCAA* and instead granted a receivership order. The court was not satisfied that a successful plan could be developed that would receive creditor approval. The applicant sought *CCAA* protection to enable an orderly liquidation of the assets and property of the various companies and proposed interim financing and an administrative charge to secure the fees of professionals and expenses associated with *CCAA* administration. The application was opposed by approximately 75% in value of the secured creditors on the basis that: (i) in many instances the properties over which security was held were sufficiently discrete with specific remedies including sale being more appropriate than the "enterprise" approach posed by the applicants; (ii) the proposed interim financing and administration charges were an unwarranted burden to the equity of specific properties; (iii) individual receivership orders for many of the properties was a more appropriate remedy; (iv) the creditors had lost confidence in the family owners of the corporate group; and (v) it was evident that the applicants would be unable to propose a realistic plan that was capable of being accepted by creditors. Justice Campbell accepted the general propositions of law that pursuant to s. 11.02 of the *CCAA*, the court has wide discretion on any terms it may impose to make an initial order and that the breadth and flexibility of the *CCAA* to not only preserve and allow for restructuring of the business as a going concern but also to permit a sale process or orderly liquidation to achieve maximum value and achieve the highest price for the benefit of all stakeholders. Justice Campbell also accepted the general proposition that given the flexibility inherent in the *CCAA* process and the discretion available that an initial order may be made in the situation of "enterprise" insolvency where as a result of a liquidation crisis not all of the individual entities comprising the enterprise may be themselves insolvent but a number are and the purpose of the restructuring plan is to restore financial health or maximize benefit to all stakeholders by permitting further financing. The court further observed that although the *CCAA* can apply to companies whose sole business is a single land development as long as the requirements set out in the *CCAA* are met, it may be that, in view of the nature of its business and financing arrangements, such companies would have difficulty proposing an arrangement or compromise that was more advantageous than the remedies available to its creditors. Justice Campbell dismissed the request for an initial order as he was not satisfied that a successful plan could be developed that

would receive approval in any meaningful fashion. Campbell J. noted that to a large extent, the principal of the applicants was the author of his own misfortune not just for the liquidity crisis in the first place but also for a failure to engage with creditors as a whole at an early date. Campbell J. was of the view that a receivership order would achieve an orderly liquidation of most of the properties and protect the revenue from the operating properties with the hope of potential of some recovery of the debtor's equity. He also observed that the use of the *CCAA* for the purpose of liquidation must be used with caution when liquidation is the end goal, particularly when there are alternatives such as an overall less costly receivership that could accomplish the same overall goal: *Re Dondeb Inc.*, 2012 CarswellOnt 15528, 97 C.B.R. (5th) 264, 2012 ONSC 6087 (Ont. S.C.J. [Commercial List]).

The Manitoba Court of Queen's Bench lifted a *CCAA* stay of proceedings to enable certain suppliers to initiate an action against the *CCAA* applicants in which they claimed priority over some of the proceeds of sale of the assets of the applicants. Leave was also granted to the suppliers to initiate proceedings against the directors and officers. The restructuring essentially involved the sale of substantially all of the debtor's assets on a going-concern basis. As part of the order approving the sale, Dewar J. ordered that the proceeds be paid to the monitor to be held pending receipt of a distribution order, and subsequently granted an order authorizing the distribution of most of the net proceeds from the sale of the assets. The monitor retained $6.75 million from the net proceeds to serve as a general holdback pending completion of the *CCAA* proceedings, including a resolution of the dispute with the purchaser and potential legal actions. In considering the balance of convenience, the relative prejudice to the parties, and the merits of the proposed action, Dewar J. noted that the same request may very well receive a different reception in the case of an application for the lifting of a stay early in a *CCAA* proceeding that contemplates a true restructuring than in the case of an application brought in a *CCAA* proceeding that involves only the sale of assets. In the former situation, the existence of a contemporaneous action might jeopardize the ability of the company to restructure. In the latter case, the restructuring, such as it is, has been accomplished and the only issue being left to sort through is who is entitled to the money. Dewar J. was of the view that a court may be more receptive to lifting the stay in the latter case than in the former. Justice Dewar concluded that any prejudice created by the delay in distribution of funds could be alleviated by requiring each named plaintiff to file an undertaking as to damages for its *pro rata* share of any damages arising from any delay in the distribution: *Re Puratone Corp.*, 2013 CarswellMan 360, 2013 MBQB 171 (Man. Q.B.).

The British Columbia Supreme Court declined to lift the stay of proceedings in a *CCAA* application. An equipment supplier argued that its loan agreement with the debtor had been voided by the actions of the debtor and that title to the equipment remained with the supplier. The parties who opposed the motion argued that under the *PPSA*, title does not determine the rights and obligations of the parties. Brown J. concluded that it would not be appropriate to lift the stay as regard to one secured creditor. The lifting of a stay is discretionary and an opposing party faces a very heavy onus to persuade the court to grant such an order. In making a determination as to whether to lift a stay, the court should consider, together with the good faith and due diligence of the debtor company, whether there are sound reasons for doing so consistent with the objectives of the *CCAA*, including a consideration of the balance of convenience, the relative prejudice to the parties, and where relevant, the merits of the proposed action. Here, there was no sound reason to lift the stay. The creditor retained its security over the assets and had a claim against those assets, and to lift the stay would adversely affect the interests of all stakeholders: *Re 505396 B.C. Ltd.*, 2013 CarswellBC 2638, 2013 BCSC 1580 (B.C. S.C.).

The Ontario Superior Court of Justice lifted the *CCAA* stay of proceedings with respect to proceedings by a subcontractor of the debtor. The subcontractor was involved on a project that would not form part of a restructured or reorganized debtor. Justice Morawetz held that the purpose of a stay of proceedings issued pursuant to s. 11 of the *CCAA* is to maintain the *status quo* for a period of time so that proceedings can be taken under the *CCAA* for the wellbeing of the debtor company and of the creditors. The stay order is intended to prevent any creditor from obtaining an advantage over other creditors while the company is attempting to reorganize its affairs: *Re Comstock Canada Ltd.*, 2013 CarswellOnt 13598, 2013 ONSC 6043 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice approved a settlement agreement with respect to the remaining funds available to the creditors of the debtor Indalex. Priority claims had been asserted by the U.S. Trustee, the pension administrator of the retirement plans for both salaried and executive employees and Sun Indalex Finance, LLC. After the Supreme Court of Canada rendered its judgment in *Re Indalex Ltd.*, 2013 CarswellOnt 733, 2013 CarswellOnt 734, (sub nom. *Sun Indalex Finance LLC v. United*

Steelworkers) [2013] 1 S.C.R. 271, 96 C.B.R. (5th) 171, 2013 SCC 6, [2013] S.C.J. No. 6, the monitor paid the U.S. Trustee approximately US$10.75 million pursuant to an approval order. In late 2013, the monitor was holding approximately $5 million available for distribution to the creditors of the estate, subject to administration costs. The monitor was faced with a number of parties asserting priority claims: the U.S. Trustee for US$5.4 million; the salaried plan for $5 million; the executive plan for $3. 3 million; and Sun Indalex Finance, LLC for $38 million. Priority for the claims by the salaried plan and the executive plan rested on the deemed trust, lien and charge provisions of the Ontario *Pension Benefits Act*. In addition, 347 creditors had filed claims of approximately $33.8 million. The monitor secured a li tigation timetable order to determine threshold issues relating to the distribution of estate funds. The issues related to the claims advanced by the two pension plans included whether the deemed trust claim by the executive plan was enforceable against the debtor's accounts or inventory; the effect of a bankruptcy order on the existence, enforceability and priority of both plans' deemed trust claims; and whether the beneficiaries of the plans were "secured creditors" of Indalex for purposes of the *BIA*. In September 2013, the parties reached a settlement agreement under which the funds would be distributed. The monitor recommended approval of the settlement agreement because costly and lengthy litigation would be required to determine the outstanding competing claims against the estate funds. This recommendation was accepted by Brown J., who noted that no interested party voiced any opposition to the approval order sought. He held that the settlement agreement was a reasonable, proportional resolution of the outstanding claims: *Re Indalex Ltd.*, 2013 CarswellOnt 18028, 9 C.B.R. (6th) 270, 2013 ONSC 7932 (Ont. S.C.J. [Commercial List]).

The British Columbia Supreme Court considered competing applications relating to the debtor. One group sought protection under the *CCAA*. The other group applied for the appointment of a receiver. The project involved the development of a small scale LNG liquefaction facility which was planned to be in operation for the gas year 2015-16. Justice Masuhara held that in regard to obtaining a stay and the appointment of a monitor under the *CCAA*, the test generally is where the circumstances exist that make the order appropriate. As stated in s. 11, the debtor is required to show that there is a reasonable possibility of a restructuring. Masuhara J. was of the view that an opportunity to form a plan was warranted. The application for a stay of the initial one-month period was granted. Masuhara J. noted that certain entities did not neatly fit within the definitions of the *CCAA*; however, the court exercised its broad authority to include those entities under an initial order. Masuhara J. observed that resolution would probably have to occur within a narrow window. Therefore, the inclusion of these entities would be appropriate and Masuhara J. was not aware of any prejudice at this point that would affect the inclusion. The Court concluded that there was a reasonable possibility for a restructuring and *CCAA* protection was granted: *Douglas Channel LNG Assets Partnership v. DCEP Gas Management Ltd.*, 2013 CarswellBC 3990, 2013 BCSC 2358 (B.C. S.C.).

The Ontario Superior Court of Justice granted protection under the *CCAA* to a debtor holding company and its subsidiaries to effect a recapitalization that was supported by 93% of noteholders who held the bulk of the debt. The court was satisfied that the debtor was a company to which the *CCAA* applied; the debtor had greater than $5 million in debts, was insolvent, was facing a looming liquidity crisis, had assets in Canada, and had its registered office in Canada. It was appropriate to extend the stay to the debtor's U.S. subsidiaries as the debtor was dependent on them for income, and absent a stay, various creditors would be in a position to enforce claims, which could conceivably lead to a failed restructuring that would not be in the best interests of the debtor's stakeholders: *Re Jaguar Mining Inc.*, 2013 CarswellOnt 18630, 12 C.B.R. (6th) 290, 2014 ONSC 494 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice lifted the stay of proceedings in a *CCAA* proceeding to permit a class action that had not been filed by the claims bar date, to be dealt with on its merits. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so, consistent with the objectives of the *CCAA*, including a consideration of the balance of convenience; the relative prejudice to the parties; and where relevant, the merits of the proposed action. Morawetz J. held that there is an additional factor to be taken into account, namely, no *CCAA* plan or plan for one. In addressing the prejudice experienced by a director in not having a final resolution to the proposed class action, Morawetz J. noted that it had to be weighed as against the rights of the class action plaintiff to have this matter heard in court. To the extent that time constituted a degree of prejudice to the defendants, it could be alleviated by requiring the parties to agree on a timetable to have this matter addressed on a timely basis with case management: *Re Timminco Ltd.*, 2014 CarswellOnt 9328, 14 C.B.R. (6th) 113, 2014 ONSC 3393 (Ont. S.C.J.). See also the discussion of claims bar date in this judgment under N§143(1) "Scope of Claims of Creditors — Claims Barring Procedure".

End of Document

TAB11

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Asset Engineering LP v. Forest & Marine Financial Limited Partnership,* 2009 BCCA 319

Date: 2009/07/07

Dockets: CA037097; CA037098

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36

and

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT,* S.B.C. 2002, c. 57

and

IN THE MATTER OF FOREST & MARINE FINANCIAL CORPORATION (in its own capacity, in its capacity as general partner of FOREST & MARINE FINANCIAL LIMITED PARTNERSHIP and its capacity as manager of FOREST & MARINE INVESTMENT TRUST), FOREST & MARINE INVESTMENTS LTD., FOREST & MARINE CAPITAL LTD., FOREST & MARINE INSURANCE SERVICES LTD. and TREESEA HOLDINGS INC.

Docket: CA037097

Between:

Asset Engineering LP

Appellant
(Plaintiff)

And:

Forest & Marine Financial Limited Partnership, Forest & Marine Financial Corporation, Forest & Marine Investments Ltd., Forest & Marine Capital Ltd., Forest & Marine Insurance Services Ltd., Treesea Holdings Inc.

Respondents
(Defendants)

– and –

Docket: CA037098

Between:

Forest & Marine Financial Corporation (in its own capacity, in its capacity as general partner of Forest & Marine Financial Limited Partnership and in its capacity as manager of Forest & Marine Investment Trust), Forest & Marine Investments Ltd., Forest & Marine Capital Ltd., Forest & Marine Insurance Services Ltd. and Treesea Holdings Inc.

Respondents
(Petitioners)

And

Asset Engineering LP

Appellant
(Respondent)

And

Wolrige Mahon Limited, Ad Hoc Committee of Investment Receipt Holders, Barry Kenna, Her Majesty the Queen in Right of the Province of British Columbia as Represented by the Financial Institutions Commission and Superintendent of Financial Institutions, Her Majesty the Queen in Right of the Province of British Columbia

Respondents
(Respondents)

Before: The Honourable Mr. Justice Donald
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Chiasson

On appeal from the Supreme Court of British Columbia, May 1, 2009,
Dockets S092160 and S092244

Counsel for the Appellant, Asset Engineering LLP:	R.A. Millar
Counsel for the Respondents, Forest & Marine Financial Limited Partnership, Forest & Marine Financial Corporation, Forest & Marine Investments Ltd., Forest & Marine Capital Ltd., Forest & Marine Insurance Services Ltd., and Treesea Holdings Inc.:	A.H. Brown

Place and Date of Hearing:	Vancouver, British Columbia June 8, 2009
Place and Date of Judgment:	Vancouver, British Columbia July 7, 2009

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Mr. Justice Donald
The Honourable Mr. Justice Chiasson

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] We heard this appeal on June 8, 2009 and advised counsel that it was dismissed, with reasons to follow.

[2] The appeal was taken by Asset Engineering LP ("AE"), a secured creditor of Forest & Marine Financial Limited Partnership, a limited partnership under the laws of British Columbia. Its general partner is Forest & Marine Financial Corp. (the "General Partner"). The Partnership is in the business of providing financing and investment services to companies engaged in the forest and marine industries in British Columbia and is part of a group of related investors and corporations referred to informally as the "F & M Group". The Partnership is the main operating entity of the Group, and (according to the petition) owns the operating assets of the Group, which consist largely of a loan portfolio and an office building in Nanaimo. The Partnership's main liabilities are the debt owing to AE in the amount of some $13 million and a series of "investment receipts" held by public investors in the total amount of some $10 million.

[3] The order appealed from was granted by Mr. Justice Masuhara on May 1, 2009. This was a "comeback" order that extended his initial order, made March 26, granting a stay of proceedings to the petitioners pursuant to s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*") and to the Partnership pursuant to the court's inherent jurisdiction. (It will be noted that the petitioners include the General Partner but not the Partnership *per se*.) The initial order appointed Wolrige Mahon Ltd. as the monitor of the petitioners' property and the conduct of their business, and ordered that AE's consultant, Ernst & Young Inc., be given access to their property, books and records. The comeback order extended the initial order to July 31, 2009.

[4] AE acquired its loan position from the original lender, "CIT", which had entered into an agreement with the Partnership, represented by the General Partner, to provide up to $50 million in financing in 2004. The agreement established a revolving loan facility that was subject to margin requirements dependant on the

value of unimpaired loans owing to the Partnership. The obligation to repay was secured by a general security agreement ("GSA") over the Partnership's loans and accounts receivable, and a second mortgage on the Nanaimo building, and was guaranteed by other members of the Group, who granted collateral security for their guarantees.

[5] Evidently, the Partnership soon went into default under some of the financial covenants in the financing agreement, and CIT and the Partnership entered into a series of forbearance agreements which were renewed, at considerable cost to the borrower, from time to time until September 2008. The final agreement expired on March 15, 2009. One of the terms of the agreements was that upon its expiration, CIT would be entitled to enforce its security immediately, without any further demand or notice, and that the Group would not oppose the appointment of a receiver. On the other hand, according to the affidavit of Mr. Hitchock, the president of the General Partner, CIT had assured the Group that once the loan was paid down to below $20 million, the lender would reduce the covenants to ones the Group "could live with." Mr. Hitchcock deposes that the Partnership paid the loan down from $35 million to $13 million by early 2009 and paid AE approximately $2.8 million between the initial hearing and the comeback order.

[6] Notwithstanding that the Partnership was in default in 2008, AE had begun to acquire "participation interests" in the credit facility from March of that year onwards. In March 2009, it acquired all of CIT's interest in the facility. A few days later, it demanded payment in full of the Partnership's indebtedness in the amount of $13,257,123.31 and delivered notices of its intention to enforce security as required under the *Bankruptcy and Insolvency Act*. When the General Partner advised AE that it would not adhere to a "blocked account" agreement, the lender advised that it intended to apply for the appointment of an interim receiver over the Partnership and the related guarantors – hence Supreme Court Docket S092160. The Group told AE that they opposed the liquidation of the Partnership's portfolio and that they would apply for *CCAA* protection – hence Supreme Court Docket S092244. The two proceedings were heard together, and although no order has been filed in the

receivership action, counsel agreed in this court that we may assume the chambers judge intended to dismiss AE's application for the appointment of a receiver.

[7] In his reasons of May 1, Matsuhara J. noted that a report prepared by Ernst & Young indicated a "net equity deficiency in its high and low case of $7.7 million and $16.6 million, respectively, indicating the difficult circumstances in which the Group finds itself." Ernst & Young estimated the net realizable value of the Group's assets at between $13.2 million and $22 million, while the monitor estimated net realizable values to be between $22 million and $28.5 million respectively, on a going concern basis. Thus as the chambers judge noted, even on the low estimate suggested by Ernst & Young, AE's loan position was fully secured. (Counsel for AE told this court that his client disputes the assumptions underlying Ernst & Young's report.) The chambers judge also noted that the monitor's cash-flow analysis anticipated AE would receive payments totalling $5.5 million towards its loan by the end of August, with $2.56 million of that amount being paid in May. Ernst & Young estimated that AE would receive $3.3 million, and both consultants projected that AE would continue to receive its "significant charges under the facility in excess of $21,000 per month." (Para. 18.)

[8] The Court below had affidavit evidence of a "concerted effort" on the part of the Group to find refinancing to replace AE's position. Mr. Hitchcock deposed that an unnamed financial institution had carried out its due diligence in connection with a possible refinancing that would discharge AE's debt position completely. From what was said by counsel on the appeal hearing, the Group is still focussing on a possible refinancing that would either precede or take place at the same time as a simplification of the cumbersome corporate structure now in place. One suggestion was that the members of the Partnership would receive shares in the General Partner in return for their partnership interests, such that the Partnership would cease to exist. However, no specific "plan" in this regard was in evidence. One of the central arguments raised by counsel for AE in opposition to the stay is that the *CCAA* cannot be used simply to "buy time" for refinancing that will not involve a compromise or arrangement that would have to be voted on by creditors. In any

case, AE says it would not vote in favour of any compromise or arrangement, so that any such plan would be doomed to fail.

[9] The first issue confronting the chambers judge, however, was the "jurisdictional" one of whether, in his words, a limited partnership qualifies for protection under the *CCAA*. The Act applies generally to debtor companies. In particular, s. 11 provides in material part:

> 11(1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.
>
> 11(3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,
>
> (*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
>
> (*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (*c*) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company. [Emphasis added.]

The Act defines "company" as "... any company, corporation or legal person incorporated by or under an Act of Parliament or the legislature of a province, and any incorporated company having assets or doing business in Canada wherever incorporated ...".

[10] The chambers judge agreed with the holding of Farley J. in *Re Lehndorff General Partner Ltd.* (1993) 9 B.L.R. (2d) 275 (Ont. Gen.Div.) that a limited partnership is not a "qualifying entity" under the statute; but that it lay within the inherent jurisdiction of the court to 'sweep in' a partnership where the business of the corporate petitioners was closely connected to and intertwined with that of the partnership. On this point, Matsuhara J. stated:

> ... in the absence of a jurisdiction under the *CCAA,* it is agreed by counsel that the court can exercise its inherent jurisdiction. The question that arises is then under what circumstances and to what extent can it do so. The limits have been reviewed, particularly where a *CCAA* proceeding is in effect. In cases such as *Skeena Cellulose Inc. v. Clear Creek Contracting Ltd.,* 2003 BCCA 344 and *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 C.A. which circumscribe the court's ability to rely upon inherent jurisdiction, it is obvious that these limits are even greater when a focus is on a non-qualifying party. However, nonetheless, the courts have exercised that inherent jurisdiction in a *CCAA* setting, dealing with non-qualifying entities, and have imposed stays of proceedings against related non-qualifying entities. In *Calpine Canada Energy Ltd. (Re)*, 2006 ABQB 153 the court stated that it had inherent jurisdiction against a non-corporate entity where it was just and convenient to do so. This case relied upon an earlier case of *Lehndorff,* which I have already mentioned. The court, in extending the stay, stated that:
>
> > It is clear that Calpine has a more than arguable case that a stay involving the Partnerships is necessary and appropriate. It is also likely, given the extremely complex corporate and debt structure of the Calpine group, the cross-border nature of these proceedings, and the evidence I have heard so far in the proceedings of the value of partnership assets, that irreparable harm may accrue to the Calpine group if the stay is not granted. The balance of convenience certainly favours a stay. I find that it is just, reasonable and appropriate in this case to exercise this court's inherent jurisdiction to stay proceedings against the Calpine partnerships. [At para. 12.]

[11] The chambers judge then turned to consider the various factors relating to the exercise of his discretion in this case, concluding that:

> In terms of refinancing, though Asset Engineering points out the lack of production of specifics indicating the potential for this occurring, there is evidence of a concerted effort to find refinancing in the materials. As well, Mr. Hitchcock, on the last day, in an affidavit, identified a recognized financial institution that has performed its due diligence over the course of two days over the FM group in furtherance of a potential financing, which Mr. Hitchcock says would satisfy the debt to Asset Engineering completely. He attached an email that supports a serious initiative by that institution to examine Forest & Marine. Moreover, it is now clear from the commentary from counsel that refinancing is the primary focus of the FM group.
>
> Given that there is a broad constituency of interest at play; that at this point the financial analysis supports the view that Asset Engineering's position is secured; that further payments to reduce the outstanding indebtedness to Asset Engineering are projected – and in this regard I would note that there appears to be government interest in FM's continued operation; that continued payments to Asset Engineering's significant monthly fees are projected to continue; that though Asset Engineering has forcefully

> argued its right for the appointment of a receiver based on contractual and equitable considerations, there has been some indications of some flexibility, but not much, with respect to timing; that this would also equally be contained within the comments of the investment receipt holders; that there is also sufficient reality of the potential for refinancing from a recognized institution; that refinancing is a primary focus for the FM group; and that the imposition of a receiver would impair the ability of the *CCAA* eligible entities from restricting; in assessing the competing interests relative to the prejudice to each, I conclude that an extension of the stay of proceedings is in order. [At paras. 21-2.]

As I have already mentioned, the stay was extended by the comeback order to July 31, and it is from that second order that AE appeals.

On Appeal

[12] AE's grounds of appeal as stated in its factum are as follows:

> 1) "inherent jurisdiction" was not a proper basis upon which to found a stay of proceedings brought by AE against the [Partnership];
>
> 2) a stay of proceedings brought by AE against the [Partnership] is contrary to the principles set forth in this Court's judgment in *Cliffs*; and
>
> 3) a stay ought not to have been granted before permitting a vote by creditors on a process that would suspend AE's rights pending refinancing and where critical prerequisites to the formulation of a plan had to be fulfilled by the debtor companies.

The Inclusion of the Partnership in the Stay

[13] I must confess that I found counsel's submissions on the first ground difficult to follow. Mr. Millar submitted that the Partnership itself, rather than the General Partner, is the "primary business actor" and was the borrower from CIT. In his analysis, the assets which secure AE's position are assets of the Partnership and since the Partnership is not entitled to invoke the *CCAA*, it was an improper use of the court's inherent jurisdiction to grant a stay in the Partnership's favour. When we pressed counsel as to why it would be necessary to refer to the Partnership at all in the order, he responded that limited partners themselves do not own partnership assets directly, since they are not entitled to the return of their capital contributions unless all the liabilities of the partnership have been paid: see s. 62 of the

Partnership Act, R.S.B.C. 1996, c. 348. If the partners do not own the assets (at least directly), he suggested, then it is the Partnership itself that owns them. Underlying his submission was the proposition that a limited partnership is a legal entity – as shown, for example, by the fact that it was the Partnership that issued a prospectus in connection with investment receipts "of the Partnership" in May 2008. But although it is, in counsel's view, an entity, it is not an entity entitled to invoke the *CCAA*. Instead, Mr. Millar said, a partnership must seek an "insolvency remedy" in the *Bankruptcy & Insolvency Act,* s. 85(1) of which states that when a general partner becomes bankrupt, the property of the partnership vests in the trustee.

[14] Mr. Brown, counsel for the petitioners, did not take issue with the fact that a limited partnership does not *per se* come within the definition of "company" in the *CCAA*. He argued, however, that the Partnership is not a legal entity, and that "its" assets are in fact the assets of the partners themselves, although usually they are held in the name of the General Partner, which must manage the Partnership's business, and the partnership's debts must be paid before partners may share in its assets on a termination. He noted that the General Partner in this case executed the finance agreement with CIT and the forbearance and related agreements that are in evidence, on behalf of the Partnership. As well, he noted that the stay granted by Masuhara J. on March 26, 2009 prohibited the commencement or continuation of any action or proceeding against the petitioners or any of them, or affecting the Business or Property. The order defined "Property" to include all current and future assets, undertakings and properties of any kind in the possession and control of the petitioners, and "Business" to mean the business of the petitioners. The General Partner was one of the petitioners and thus, one assumes, the order applies to any assets it holds on behalf of the partners (or if Mr. Millar is correct, on behalf of the Partnership).

[15] Counsel for AE was not able to refer us to any authority for the proposition that a limited partnership is a legal entity, as opposed to "the relationship which subsists between persons carrying on business", as stated at s. 2 of the *Partnership Act*. The authorities I have located clearly point away from the notion that a limited

partnership is a legal entity. *Halsbury's Laws of England* (4th ed., 1994), for example, states that "A limited partnership, like an ordinary partnership, is not a legal entity." (Vol. 35, at 136). In R.C. Banks, *Lindley & Banks on Partnership* (18th ed., 2002), the author states that "A limited partnership is not a legal entity like a limited company or a limited liability partnership but a form of partnership with a number of special characteristics introduced by the Limited Partnerships Act, 1907." (At 847.) 'Non-personhood' is the reason why partnerships are useful for tax and corporate reasons: they permit investors, as partners, to claim losses, depreciation and other expenses of the partnership business without risking unlimited liability for partnership debts: see Lyle R. Hepburn, *Limited Partnerships* (2002) at 1-12 to 1-12.1; James P. Thomas and Elizabeth J. Johnson, *Understanding the Taxation of Partnerships* (5th ed., 2002) at para. 405.

[16] In *Re Lehndorff General Partner*, *supra*, Farley J. observed that the "case law supports the conclusion that a partnership, including a limited partnership, is not a separate legal entity." He quoted a passage suggesting that if the legislature had intended to create a new legal entity, it would have done so in the *Limited Partnerships Act* of Ontario, as Parliament had in s. 15 of the *Canada Business Corporations Act*. The latter statute provides that a corporation has the capacity and rights, powers and privileges of a natural person. (Para. 27.)

[17] The question of whether a limited partnership is a legal entity was considered at length by the Ontario Court of Appeal in *Kucor Construction & Associates v. Canada Life Assurance Co.* (1998) 167 D.L.R. (4th) 272, where a limited partnership sought to rely on a statutory right of prepayment under a mortgage purported to have been granted by the partnership. The trial judge held that since the partnership was not a legal entity capable of holding title to real property or transferring title under a mortgage, it was incapable of granting a mortgage. He interpreted the mortgage document in question, which had been entered into by the general partner on behalf of the limited partners, and concluded that since the general partner was a corporation, it was precluded by s. 18(2) of the *Mortgages Act,* R.S.O. 1990, c. M. 40, from prepaying under s. 18(1). (Section 18(2) denied the

special right of prepayment under s. 18(1) to any mortgage "given by a joint stock company or other corporation".) The Court of Appeal agreed in the result, concluding in part that:

> (1) A limited partnership, because it is not a legal entity, carries on its business through a general partner which has the power to hold and convey title to real property on behalf of the members of the limited partnership.
>
> (2) A general partner which is a corporation and which gives a mortgage is precluded by s. 18(2) from the operation of s. 18(1) and, therefore, cannot prepay a long-term closed mortgage.
>
> (3) A general partner which is an individual and which gives a mortgage is not subject to the s. 18(2) exemption, and, therefore, is entitled to prepay the mortgage. ... [At para. 49; emphasis added.]

[18] In the course of reaching these conclusions, Borins J.A. for the Court observed that:

> Well respected authorities are uniform in the view that a limited partnership is not a legal entity. ... The concept that neither a general, nor a limited partnership, is a legal entity has been long accepted by Canadian and English law and, no doubt, is why a limited partnership is required by law to have a general partner through which it normally acts: *Limited Partnerships Act*, ss. 2(2), 8 and 13. As for a general partnership, s. 6 of the *Partnerships Act* describes through whom it may act. [At para. 26; emphasis added.]

He also quoted with approval the following passage from *Lehndorff, supra,* in which Farley J. had explained the features of a limited partnership and how its business is generally conducted:

> A limited partnership is a creation of statute, consisting of one or more general partners and one or more limited partners. The limited partnership is an investment vehicle for passive investment by limited partners. It in essence combines the flow through concept of tax depreciation or credits available to "ordinary" partners under general partnership law with limited liability available to shareholders under corporate law. See Ontario LPA sections 2(2) and 3(1) and Lyle R. Hepburn, *Limited Partnerships*, (Toronto: De Boo, 1991), at p. 1-2 and p. 1-12 ... A general partner has all the rights and powers and is subject to all the restrictions and liabilities of a partner in a partnership. In particular a general partner is fully liable to each creditor of the business of the limited partnership. The general partner has sole control over the property and business of the limited partnership: See Ontario LPA ss. 8 and 13. Limited partners have no liability to the creditors of the limited partnership's business; the limited partners' financial exposure is limited to

> their contribution. The limited partners do not have any "independent" ownership rights in the property of the limited partnership. The entitlement of the limited partners is limited to their contribution plus any profits thereon, after satisfaction of claims of the creditors. See Ontario LPA sections 9, 11, 12(1), 13, 15(2) and 24. The process of debtor and creditor relationships associated with the limited partnership's business are between the general partner and the creditors of the business. In the event of the creditors collecting on debt and enforcing security, the creditors can only look to the assets of the limited partnership together with the assets of the general partner including the general partner's interest in the limited partnership. This relationship is recognized under the *Bankruptcy Act* (now the BIA) sections 85 and 142.
>
> ...
>
> It appears to me that the operations of a limited partnership in the ordinary course are that the limited partners take a completely passive role (they must or they will otherwise lose their limited liability protection which would have been their sole reason for choosing a limited partnership vehicle as opposed to an "ordinary" partnership vehicle) ... The limited partners leave the running of the business to the general partner and in that respect the care, custody and the maintenance of the property, assets and undertaking of the limited partnership in which the limited partners and the general partner hold an interest. The ownership of this limited partnership property, assets and undertaking is an undivided interest which cannot be segregated for the purpose of legal process ... [At paras. 17, 20; emphasis added.]

[19] Finally, the Court of Appeal noted at para. 33 of *Kucor* that title to real property owned by the partnership is generally registered in the name of the general partner rather than in the names of the partners themselves, who would thereby risk exposing themselves to unlimited liability. (See s. 64 of the *Partnership Act* of British Columbia.) Whether the general partner holds such property as a true "trustee" or in some lesser fiduciary capacity is another question: see, however, *Molchan v. Omega Oil & Gas Ltd.* [1988] 1 S.C.R. 348 at 368, and *337965 B.C. Ltd. v. Tackama Forest Products Ltd.* (1992) 67 B.C.L.R. (2d) 1, a decision of this court, at para. 77, *per* Southin J.A.; cf. in *King v. On-Stream Natural Gas Mgmt. Inc.* [1993] B.C.J. No. 1302 (S.C.), at para. 32, *per* Shaw J. That question need not be answered here, and I would expect that in most cases, it is addressed expressly in the partnership agreement. (The agreement in the case at bar was not in evidence.)

[20] If (as I believe) Farley J. was correct in *Lehndorff* that the "process of debtor and creditor relationships" associated with the business of a limited partnership is

between the general partner and the creditors, it was unnecessary in my view in substantive terms for the Partnership or the limited partners in this case to be included in the *CCAA* order in order to stay proceedings affecting the Partnership assets or business. A valid charge had been granted on those assets by the General Partner. It was unnecessary for AE to proceed against the limited partners. Had it done so, it would have been met with the fact that under s. 57 of the *Partnership Act,* they are not liable for the obligations of the Partnership above and beyond their capital contributions unless they have participated in the management of the business. (There was no suggestion this has occurred in this case.) It would also have been unnecessary to proceed against the Partnership *per se*, since it is not a legal entity, and the partners are bound by the General Partner's actions on behalf of the Partnership (i.e., all the partners) in carrying on the business. Thus if the *CCAA* process had continued without the Partnership being named in the order, the effect would have been no different, in substantive terms, from what it is now.

[21] But there is a procedural difficulty: as Mr. Brown notes, R. 7 of the *Supreme Court Rules* allows a partnership or "firm" to be sued in its own name. Rule 7(6) provides that where an order is made against a firm, "execution to enforce the order may issue against the property of the firm", and R. 7(7) provides that execution to enforce the order may issue against any person who admitted in a pleading or affidavit that he or she was a partner or who was adjudged to be a partner. Rule 7 is procedural (see *Surrey Credit Union v. Willson* (1989) 41 B.C.L.R. (2d) 43), but the potential for a multiplicity of proceedings in apparent conflict with the *CCAA* order is obvious. Accordingly, to control its own process, the court below had an inherent discretion, confirmed by s. 10 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, to grant a stay in respect of proceedings against the Partnership. This is not the granting of a "freestanding remedy" under the *CCAA* (see *Lehndorff*, discussed below), nor an exercise of discretion under that Act to supplement perceived shortcomings in its application. Rather it is a purely procedural step to forestall a purely procedural problem.

[22] Thus, for different reasons than those of the chambers judge, I concluded the first ground of appeal should be dismissed.

Should a Stay Have Been Granted?

[23] I turn next to AE's second ground of appeal – that no order should have been made in this case, whether under the *CCAA* or otherwise, because the intention of the Group is to refinance AE's loan rather than propose a compromise or arrangement, and in any event, AE "has unequivocally declared that it will oppose any arrangement. There is no utility in a stay where compromise is either futile or doomed to failure." (See also *Re Marine Drive Properties Ltd.* 2009 BCSC 145.) Mr. Millar relies strongly on this court's decision in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* 2008 BCCA 327, 296 D.L.R. (4th) 577, which he says signals a 'retrenchment' from past authorities that have taken a large and liberal view of the scope of the Act: see, e.g., *Chef Ready Foods Ltd. v. Hong Kong Bank of Canada* (1990) 51 B.C.L.R. (2d) 84 (C.A.) at 92-3; *Campeau v. Olympia & York Developers Ltd.* (1992) 14 C.B.R. (3d) 303 (Ont. Gen. Div.), at paras. 17-22; *Re Royal Oak Mines Inc.* (1999) 6 C.B.R. (4th) 314 (Ont. Gen. Div.) at para. 7; *Elan Corp. v. Comiskey* (1990) 1 C.B.R. (3d) 101 (Ont. C.A.); and most recently, *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* 2008 ONCA 587, 296 D.L.R. (4th) 135 (Ont. C.A.) at para. 43, (lve. to app. refused [2008] S.C.C.A. No. 337).

[24] In *Cliffs Over Maple Bay*, the debtor company was a real estate developer whose one project had failed. The company had been dormant for some time. It applied for *CCAA* protection but described its proposal for restructuring in vague terms that amounted essentially to a plan to 'secure sufficient funds' to complete the stalled project. (Para. 34.) This court, per Tysoe J.A., ruled that although the Act can apply to single-project companies, its purposes are unlikely to be engaged in such instances, since mortgage priorities are fairly straightforward and there will be little incentive for senior secured creditors to compromise their interests. (Para. 36.) Further, the Court stated, the granting of a stay under s. 11 is "not a free standing

remedy that the court may grant whenever an insolvent company wishes to undertake a 'restructuring'. ... Rather, s. 11 is ancillary to the fundamental purpose of the *CCAA*, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the *CCAA's* fundamental purpose." That purpose had been described in *Meridian Developments Inc. v. Toronto-Dominion Bank* (1984) 11 D.L.R. (4th) 576 (Alta. Q.B.):

> 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. [At 580.]

[25] The Court was not satisfied in *Cliffs Over Maple Bay* that the "restructuring" contemplated by the debtor would do anything other than distribute the net proceeds from the sale, winding up or liquidation of its business. The debtor had no intention of proposing a plan of arrangement, and its business would not continue following the execution of its proposal – thus it could not be said the purposes of the statute would be engaged. Similarly in this case, Mr. Millar submits that no compromise or arrangement is being proposed, and any compromise the Partnership might propose would be "doomed to failure."

[26] In my view, however, the case at bar is quite different from *Cliffs Over Maple Bay*. Here, the main debtor, the Partnership, is at the centre of a complicated corporate group and carries on an active financing business that it hopes to save notwithstanding the current economic cycle. (The business itself, which fills a "niche" in the market, has been carried on in one form or another since 1983.) The *CCAA* is appropriate for situations such as this where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of one or more parties. The "fundamental purpose" of the Act – to preserve the *status quo* while the debtor prepares a plan that will enable it to remain in business to the benefit of all concerned – will be furthered by granting a stay so that the

means contemplated by the Act – a compromise or arrangement – can be developed, negotiated and voted on if necessary. If the Partnership is ultimately able to arrange a refinancing in respect of which creditors need not compromise their rights, so much the better. At this point, however, it seems more likely a compromise will be necessary and the Partnership must move promptly to explore all realistic restructuring alternatives.

[27] As for AE's insistence that it will refuse to vote in favour of any plan brought to a meeting of creditors under s. 6 of the *CCAA*, I am not aware of any authority that permits a creditor to forestall an application under the Act on this basis, and I doubt Parliament intended that the court's exercise of its statutory jurisdiction could be neutralized in this manner. When the Act is invoked, the court properly considers the interests of many stakeholders, not simply those of the creditor and debtor: see, e.g., *ATB Financial*, *supra*, at paras. 51-2; *Skeena Cellulose Inc. v. Clear Creek Contracting Ltd.* 2003 BCCA 344 at para. 39, quoting with approval from *Re Canadian Airlines Corp.* [2000] 10 W.W.R. 269 (Alta. Q.B.); *Re Marine Drive Properties, supra,* at para. 14. In this case, there are many customers of the Partnership in the coastal marine and forest industries who would be affected if the Group were put into liquidation. The chambers judge noted that the provincial government has expressed interest. Mr. Hitchcock deposes that the employees of various borrowers from the Group, investment receiptholders, unitholders of the investment trust and customers stand to lose a great deal. He acknowledges that refinancing is the "focus" of the Group's efforts and continues:

> The Petitioners have acted diligently and in good faith to put the Petitioners in a position where they can prepare a plan of arrangement for presentation to their creditors. I believe that, given an extension to July 31, 2009 F&M will be able to formulate and prepare a plan of arrangement. During this time F&M intends to:
>
> a) make payments to reduce its indebtedness to Asset Engineering;
>
> b) receive the most recent assessments of the value of its loan portfolio so it can consider presenting some of its loan portfolio to possible purchasers or lenders;

c) receive the expected appraisal on the building so it can consider which alternative(s) outlined above can be implemented;

d) evaluate the current corporate/administrative structure to determine the most efficient structure going forward; and

e) refinance the remaining balance of its loan owed to Asset Engineering.

Mr. Hitchcock also deposes in his March 25 affidavit that the petitioners intend to "prepare a plan of arrangement or compromise and present the same to the creditors".

[28] The chambers judge considered all the evidence before him, noting that there was a "broad constituency of interests at play", that the financial analysis supported the view that AE's position was secured, and that further payments in reduction of the indebtedness to AE were projected. In his words:

> ... I would note that there appears to be government interest in FM's continued operation; that continued payments to Asset Engineering's significant monthly fees are projected to continue; that though Asset Engineering has forcefully argued its right for the appointment of a receiver based on contractual and equitable considerations, there has been some indications of some flexibility, but not much, with respect to timing; that this would also equally be contained within the comments of the investment receipt holders, that there is also sufficient reality of the potential for refinancing from a recognized institution; that refinancing is a primary focus for the FM group; and that the imposition of a receiver would impair the ability of the *CCAA* eligible entities from restructuring; in assessing the competing interests relative to the prejudice to each, I conclude that an extension of the stay of proceedings is in order. [At para. 22.]

[29] I am not persuaded that he erred in law or applied a wrong principle in reaching this conclusion. Nor am I persuaded that as a matter of law, the chambers judge should not have granted a stay "without the immediate entitlement of a vote of creditors where the proposed plan involves the refinancing of a major secured creditor and where there is a critical and central, unfulfilled prerequisite to the proposed plan", as AE suggests in support of its third ground of appeal. As I understand AE's argument, the "prerequisite" being referred to is the alteration or simplification of the Group's corporate structure which the monitor suggested would

be necessary before a plan of arrangement could be presented. Paraphrasing *Cliffs Over Maple Bay*, AE submits that its enforcement proceedings should not be stayed "so as to compel AE to await the outcome of an unduly complex and expensive procedure .... [t]his is a key 'element of the debtor company's overall plan of arrangement' and creditors should be entitled to vote in the circumstances."

[30] I have already explained above that this case is very different from *Cliffs Over Maple Bay*. The Partnership is carrying on its business and hopes to simplify its corporate structure as part of or as a recondition to a refinancing. I know of no authority that suggests that such a restructuring cannot qualify as a "plan of arrangement" under the *CCAA*, or that a refinancing by itself cannot qualify provided in each case a compromise or arrangement between debtor and creditors is contemplated. Masuhara J. was aware of the monitor's advice and concluded that it was appropriate to extend the stay. Although AE objects to the prospect that its "rights would be frozen for such an indeterminate proposition", the chambers judge was not obliged to put the prospect of a refinancing to a vote at a creditors' meeting at this early stage. As the petitioners noted in their factum, if such a vote were insisted upon at this time, it would defeat the purpose of the legislation – "to facilitate the making of a compromise or arrangement between an insolvent company and its creditors to the end that the company is able to continue in business, with regard to the interest of a broad constituency extending beyond any single creditor or class of creditors". The Group now has until July 31 to put forward a workable plan.

[31] For these reasons, I joined in the dismissal of the appeal.

"The Honourable Madam Justice Newbury"

I Agree:

"The Honourable Mr. Justice Donald"

I Agree:

"The Honourable Mr. Justice Chiasson"

TAB12

Indexed as:

Century Services Inc. v. Canada (Attorney General)

Century Services Inc. Appellant;
v.
Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada Respondent.

[2010] 3 S.C.R. 379

[2010] 3 R.C.S. 379

[2010] S.C.J. No. 60

[2010] A.C.S. no 60

2010 SCC 60

File No.: 33239.

Supreme Court of Canada

Heard: May 11, 2010;
Judgment: December 16, 2010.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

(136 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Catchwords:

Bankruptcy and Insolvency -- Priorities -- Crown applying on eve of bankruptcy of debtor company to have GST monies held in trust paid to Receiver General of Canada -- Whether deemed trust in favour of Crown under Excise Tax Act prevails over provisions of Companies' Creditors

Arrangement Act purporting to nullify deemed trusts in favour of Crown -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.3(1) -- Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(3).

Bankruptcy and insolvency -- Procedure -- Whether chambers judge had authority to make order partially lifting stay of proceedings to allow debtor company to make assignment in bankruptcy and to stay Crown's right to enforce GST deemed trust -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Trusts -- Express trusts -- GST collected but unremitted to Crown -- Judge ordering that GST be held by Monitor in trust account -- Whether segregation of Crown's GST claim in Monitor's account created an express trust in favour of Crown.

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Summary:

The debtor company commenced proceedings under the *Companies' Creditors Arrangement Act* ("*CCAA*"), obtaining a stay of proceedings to allow it time to reorganize its financial affairs. One of the debtor company's outstanding debts at the commencement of the reorganization was an amount of unremitted Goods and Services Tax ("GST") payable to the Crown. Section 222(3) of the *Excise Tax Act* ("*ETA*") created a deemed trust over unremitted GST, which operated despite any other enactment of Canada except the *Bankruptcy and Insolvency Act* ("*BIA*"). However, s. 18.3(1) of the *CCAA* provided that any statutory deemed trusts in favour of the Crown did not operate under the *CCAA*, subject to certain exceptions, none of which mentioned GST.

Pursuant to an order of the *CCAA* chambers judge, a payment not exceeding $5 million was approved to the debtor company's major secured creditor, Century Services. However, the chambers judge also ordered the debtor company to hold back and segregate in the Monitor's trust account an amount equal to the unremitted GST pending the outcome of the reorganization. On concluding that reorganization was not possible, the debtor company sought leave of the court to partially lift the stay of proceedings so it could make an assignment in bankruptcy under the *BIA*. The Crown moved for immediate payment of unremitted GST to the Receiver General. The chambers judge denied the Crown's motion, and allowed the assignment in bankruptcy. The Court of Appeal allowed the appeal on two grounds. First, it reasoned that once reorganization efforts had failed, the chambers judge was bound under the priority scheme provided by the *ETA* to allow payment of unremitted GST to the Crown and had no discretion under s. 11 of the *CCAA* to continue the stay against the Crown's claim. Second, the Court of Appeal concluded that by ordering the GST funds segregated in the Monitor's trust account, the chambers judge had created an express trust in favour of the Crown.

Held (Abella J. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ.: The apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA* can be resolved through an interpretation that properly recognizes the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by [page381] Parliament and the principles for interpreting the *CCAA* that have been recognized in the jurisprudence. The history of the *CCAA* distinguishes it from the *BIA* because although these statutes share the same remedial purpose of avoiding the social and economic costs of liquidating a debtor's assets, the *CCAA* offers more flexibility and greater judicial discretion than the rules-based mechanism under the *BIA*, making the former more responsive to complex reorganizations. Because the *CCAA* is silent on what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily provides the backdrop against which creditors assess their priority in the event of bankruptcy. The contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the *CCAA* and the *BIA*, and one of its important features has been a cutback in Crown priorities. Accordingly, the *CCAA* and the *BIA* both contain provisions nullifying statutory deemed trusts in favour of the Crown, and both contain explicit exceptions exempting source deductions deemed trusts from this general rule. Meanwhile, both Acts are harmonious in treating other Crown claims as unsecured. No such clear and express language exists in those Acts carving out an exception for GST claims.

When faced with the apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA*, courts have been inclined to follow *Ottawa Senators Hockey Club Corp. (Re)* and resolve the conflict in favour of the *ETA*. *Ottawa Senators* should not be followed. Rather, the *CCAA* provides the rule. Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so expressly and elaborately. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. The internal logic of the *CCAA* appears to subject a GST deemed trust to the waiver by Parliament of its priority. A strange asymmetry would result if differing treatments of GST deemed trusts under the *CCAA* and the *BIA* were found to exist, as this would encourage statute shopping, undermine the *CCAA*'s remedial purpose and invite the very social ills that the statute was enacted to avert. The later in time enactment of the more general s. 222(3) of the *ETA* does not require application of the doctrine of implied repeal to the earlier and more specific s. 18.3(1) of the *CCAA* in the circumstances of this case. In any event, [page382] recent amendments to the *CCAA* in 2005 resulted in s. 18.3 of the Act being renumbered and reformulated, making it the later in time provision. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*. The conflict between the *ETA* and the *CCAA* is more apparent than real.

The exercise of judicial discretion has allowed the *CCAA* to adapt and evolve to meet contemporary business and social needs. As reorganizations become increasingly complex, *CCAA* courts have been called upon to innovate. In determining their jurisdiction to sanction measures in a *CCAA* proceeding, courts should first interpret the provisions of the *CCAA* before turning to their inherent or equitable jurisdiction. Noteworthy in this regard is the expansive interpretation the language of

the *CCAA* is capable of supporting. The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. The question is whether the order will usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs. Here, the chambers judge's order staying the Crown's GST claim was in furtherance of the *CCAA*'s objectives because it blunted the impulse of creditors to interfere in an orderly liquidation and fostered a harmonious transition from the *CCAA* to the *BIA*, meeting the objective of a single proceeding that is common to both statutes. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of *BIA* proceedings, but no gap exists between the two statutes because they operate in tandem and creditors in both cases look to the *BIA* scheme of distribution to foreshadow how they will fare if the reorganization is unsuccessful. The breadth of the court's discretion under the *CCAA* is sufficient to construct a bridge to liquidation under the *BIA*. Hence, the chambers judge's order was authorized.

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No express trust was created by the chambers judge's order in this case because there is no certainty of object inferrable from his order. Creation of an express trust requires certainty of intention, subject matter and object. At the time the chambers judge accepted the proposal to segregate the monies in the Monitor's trust account there was no certainty that the Crown would be the beneficiary, or object, of the trust because exactly who might take the money in the final result was in doubt. In any event, no dispute over the money would even arise under the interpretation of s. 18.3(1) of the *CCAA* established above, because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount.

Per Fish J.: The GST monies collected by the debtor are not subject to a deemed trust or priority in favour of the Crown. In recent years, Parliament has given detailed consideration to the Canadian insolvency scheme but has declined to amend the provisions at issue in this case, a deliberate exercise of legislative discretion. On the other hand, in upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, courts have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In the context of the Canadian insolvency regime, deemed trusts exist only where there is a statutory provision creating the trust and a *CCAA* or *BIA* provision explicitly confirming its effective operation. The *Income Tax Act*, the *Canada Pension Plan* and the *Employment Insurance Act* all contain deemed trust provisions that are strikingly similar to that in s. 222 of the *ETA* but they are all also confirmed in s. 37 of the *CCAA* and in s. 67(3) of the *BIA* in clear and unmistakeable terms. The same is not true of the deemed trust created under the *ETA*. Although Parliament created a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it did not confirm the continued

operation of the trust in either the *BIA* or the *CCAA*, reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

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Per Abella J. (dissenting): Section 222(3) of the *ETA* gives priority during *CCAA* proceedings to the Crown's deemed trust in unremitted GST. This provision unequivocally defines its boundaries in the clearest possible terms and excludes only the *BIA* from its legislative grasp. The language used reflects a clear legislative intention that s. 222(3) would prevail if in conflict with any other law except the *BIA*. This is borne out by the fact that following the enactment of s. 222(3), amendments to the *CCAA* were introduced, and despite requests from various constituencies, s. 18.3(1) was not amended to make the priorities in the *CCAA* consistent with those in the *BIA*. This indicates a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

The application of other principles of interpretation reinforces this conclusion. An earlier, specific provision may be overruled by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails. Section 222(3) achieves this through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" other than the *BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3). By operation of s. 44(*f*) of the *Interpretation Act*, the transformation of s. 18.3(1) into s. 37(1) after the enactment of s. 222(3) of the *ETA* has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision. This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes other than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

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Cases Cited

By Deschamps J.

Overruled: *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737; **distinguished:** *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862; **referred to:** *Reference re Companies' Creditors*

Arrangement Act, [1934] S.C.R. 659; *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4) 192; *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), leave to appeal granted, 2010 QCCA 183 (CanLII); *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720; *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4) 219; *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513; *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106; *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282; *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134; *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9; *Air Canada, Re* (2003), 42 C.B.R. (4) 173; *Air Canada, Re*, 2003 CanLII 49366; *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4) 158; *Skydome Corp., Re* (1998), 16 C.B.R. (4) 118; *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, aff'g (1999), 12 C.B.R. (4) 144; *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4) 236; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25; *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108.

By Fish J.

Referred to: *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737.

By Abella J. (dissenting)

Ottawa Senators Hockey Club Corp. (Re) (2005), 73 O.R. (3d) 737; *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305; *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862; *Attorney General of Canada v. Public Service Staff Relations Board*, [1977] 2 F.C. 663.

Statutes and Regulations Cited

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and [page386] the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts, S.C. 2005, c. 47, ss. 69, 128, 131.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 67, 81.1, 81.2, 86 [am. 1992, c. 27, s. 39; 1997, c. 12, s. 73; 2000, c. 30, s. 148; 2005, c. 47, s. 69; 2009, c. 33, s. 25].

Canada Pension Plan, R.S.C. 1985, c. C-8, s. 23.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11 [am. 2005, c. 47, s. 128], 11.02 [ad. *idem*], 11.09 [ad. *idem*], 11.4 [am. *idem*], 18.3 [ad. 1997, c. 12, s. 125; rep. 2005, c. 47, s. 131], 18.4 [*idem*], 20 [am. 2005, c. 47, s. 131], 21 [ad. 1997, c. 12, s. 126; am. 2005, c. 47, s. 131], s. 37 [ad. 2005, c. 47, s. 131].

Companies' Creditors Arrangement Act, 1933, S.C. 1932-33, c. 36 [am. 1952-53, c. 3].

Employment Insurance Act, S.C. 1996, c. 23, ss. 86(2), (2.1).

Excise Tax Act, R.S.C. 1985, c. E-15, s. 222.

Income Tax Act, R.S.C. 1985, c. 1 (5 Supp.), ss. 227(4), (4.1).

Interpretation Act, R.S.C. 1985, c. I-21, ss. 2 "enactment", 44(*f*).

Winding-up Act, R.S.C. 1985, c. W-11.

Authors Cited

Canada. Advisory Committee on Bankruptcy and Insolvency. *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency*. Ottawa: Minister of Supply and Services Canada, 1986.

Canada. House of Commons. *Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, 3 Sess., 34 Parl., October 3, 1991, 15:15.

Canada. Industry Canada. Marketplace Framework Policy Branch. *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*. Ottawa: Corporate and Insolvency Law Policy Directorate, 2002.

Canada. Senate. *Debates of the Senate*, vol. 142, 1 Sess., 38 Parl., November 23, 2005, p. 2147.

Canada. Senate. Standing Committee on Banking, Trade and Commerce. *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*. Ottawa: Senate of Canada, 2003.

Canada. Study Committee on Bankruptcy and Insolvency Legislation. *Bankruptcy and Insolvency: Report of [page387] the Study Committee on Bankruptcy and Insolvency Legislation*. Ottawa: Information Canada, 1970.

Côté, Pierre-André. *The Interpretation of Legislation in Canada*, 3 ed. Scarborough, Ont.: Carswell, 2000.

Côté, Pierre-André, avec la collaboration de Stéphane Beaulac et Mathieu Devinat. *Interprétation des lois*, 4e éd. Montréal: Thémis, 2009.

Edwards, Stanley E. "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587.

Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals. Joint Task Force on Business Insolvency Law Reform. *Report* (2002) (online: http://www.cairp.ca/publications/submissions-to-government/law -reform/index.php).

Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals. Legislative Review Task Force (Commercial). *Report on the Commercial Provisions of Bill C-55* (2005).

Jackson, Georgina R. and Janis Sarra. "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2007*. Toronto: Thomson Carswell, 2008, 41.

Jones, Richard B. "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2005*. Toronto: Thomson Carswell, 2006, 481.

Lamer, Francis L. *Priority of Crown Claims in Insolvency*. Toronto: Carswell, 1996 (loose-leaf updated 2010, release 1).

Morgan, Barbara K. "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 *Am. Bankr. L.J.* 461.

Sarra, Janis. *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations*. Toronto: University of Toronto Press, 2003.

Sarra, Janis P. *Rescue! The Companies' Creditors Arrangement Act*. Toronto: Thomson Carswell, 2007.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5 ed. Markham, Ont.: LexisNexis, 2008.

Waters, Donovan W. M., Mark R. Gillen and Lionel D. Smith, eds. *Waters' Law of Trusts in Canada*, 3 ed. Toronto: Thomson Carswell, 2005.

Wood, Roderick J. *Bankruptcy and Insolvency Law*. Toronto: Irwin Law, 2009.

[page388]

History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Tysoe and Smith JJ.A.), 2009 BCCA 205, 98 B.C.L.R. (4) 242, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, [2009] G.S.T.C. 79, [2009] B.C.J. No. 918 (QL), 2009 CarswellBC 1195, reversing a

judgment of Brenner C.J.S.C., 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, dismissing a Crown application for payment of GST monies. Appeal allowed, Abella J. dissenting.

Counsel:

Mary I. A. Buttery, *Owen J. James* and *Matthew J. G. Curtis*, for the appellant.

Gordon Bourgard, *David Jacyk* and *Michael J. Lema*, for the respondent.

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ. was delivered by

1 DESCHAMPS J.:-- For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In that respect, two questions are raised. The first requires reconciliation of provisions of the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency [page389] Act*, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

2 Ted LeRoy Trucking Ltd. ("LeRoy Trucking") commenced proceedings under the *CCAA* in the Supreme Court of British Columbia on December 13, 2007, obtaining a stay of proceedings with a view to reorganizing its financial affairs. LeRoy Trucking sold certain redundant assets as authorized by the order.

3 Amongst the debts owed by LeRoy Trucking was an amount for Goods and Services Tax ("GST") collected but unremitted to the Crown. The *ETA* creates a deemed trust in favour of the Crown for amounts collected in respect of GST. The deemed trust extends to any property or proceeds held by the person collecting GST and any property of that person held by a secured creditor, requiring that property to be paid to the Crown in priority to all security interests. The *ETA*

provides that the deemed trust operates despite any other enactment of Canada except the *BIA*. However, the *CCAA* also provides that subject to certain exceptions, none of which mentions GST, deemed trusts in favour of the Crown do not operate under the *CCAA*. Accordingly, under the *CCAA* the Crown ranks as an unsecured creditor in respect of GST. Nonetheless, at the time LeRoy Trucking commenced *CCAA* proceedings the leading line of jurisprudence held that the *ETA* took precedence over the *CCAA* such that the Crown enjoyed priority for GST claims under the *CCAA*, even though it would have lost that same priority under the *BIA*. The *CCAA* underwent substantial amendments in 2005 in which some of the provisions at issue in this appeal were renumbered and reformulated (S.C. 2005, c. 47). However, these amendments only came into force on September 18, 2009. I will refer to the amended provisions only where relevant.

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4 On April 29, 2008, Brenner C.J.S.C., in the context of the *CCAA* proceedings, approved a payment not exceeding $5 million, the proceeds of redundant asset sales, to Century Services, the debtor's major secured creditor. LeRoy Trucking proposed to hold back an amount equal to the GST monies collected but unremitted to the Crown and place it in the Monitor's trust account until the outcome of the reorganization was known. In order to maintain the *status quo* while the success of the reorganization was uncertain, Brenner C.J.S.C. agreed to the proposal and ordered that an amount of $305,202.30 be held by the Monitor in its trust account.

5 On September 3, 2008, having concluded that reorganization was not possible, LeRoy Trucking sought leave to make an assignment in bankruptcy under the *BIA*. The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. Brenner C.J.S.C. dismissed the latter application. Reasoning that the purpose of segregating the funds with the Monitor was "to facilitate an ultimate payment of the GST monies which were owed pre-filing, but only if a viable plan emerged", the failure of such a reorganization, followed by an assignment in bankruptcy, meant the Crown would lose priority under the *BIA* (2008 BCSC 1805, [2008] G.S.T.C. 221).

6 The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, 270 B.C.A.C. 167). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

7 First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and [page391] that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa*

Senators Hockey Club Corp. (Re) (2005), 73 O.R. (3d) 737 (C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

8 Second, Tysoe J.A. concluded that by ordering the GST funds segregated in the Monitor's trust account on April 29, 2008, the judge had created an express trust in favour of the Crown from which the monies in question could not be diverted for any other purposes. The Court of Appeal therefore ordered that the money held by the Monitor in trust be paid to the Receiver General.

2. Issues

9 This appeal raises three broad issues which are addressed in turn:

(1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the *CCAA* and give priority to the Crown's *ETA* deemed trust during *CCAA* proceedings as held in *Ottawa Senators*?
(2) Did the court exceed its *CCAA* authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?
(3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

[page392]

3. Analysis

10 The first issue concerns Crown priorities in the context of insolvency. As will be seen, the *ETA* provides for a deemed trust in favour of the Crown in respect of GST owed by a debtor "[d]espite ... any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)" (s. 222(3)), while the *CCAA* stated at the relevant time that "notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be [so] regarded" (s. 18.3(1)). It is difficult to imagine two statutory provisions more apparently in conflict. However, as is often the case, the apparent conflict can be resolved through interpretation.

11 In order to properly interpret the provisions, it is necessary to examine the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence. It will be seen that Crown priorities in the insolvency context have been significantly pared down. The resolution of the second issue is also rooted in the context of the *CCAA*, but its purpose and the manner in which it has been interpreted in the case law are also key. After examining the first two issues in this case, I will address Tysoe

J.A.'s conclusion that an express trust in favour of the Crown was created by the court's order of April 29, 2008.

3.1 *Purpose and Scope of Insolvency Law*

12 Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain [page393] a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

13 Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the *BIA*. The *BIA* offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the *BIA* itself is a fairly recent statute -- it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The *BIA* is available to insolvent debtors owing $1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

14 Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either [page394] the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

15 As I will discuss at greater length below, the purpose of the *CCAA* -- Canada's first reorganization statute -- is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to

predetermined priority rules.

16 Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors [page395] Arrangement Act*, [1934] S.C.R. 659, at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

17 Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected -- notably creditors and employees -- and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

18 Early commentary and jurisprudence also endorsed the *CCAA*'s remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

19 The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make [page396] the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA*'s objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

20 Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited

recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the *CCAA*, the House of Commons committee studying the *BIA*'s predecessor bill, C-22, seemed to accept expert testimony that the *BIA*'s new reorganization scheme would shortly supplant the *CCAA*, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, 3rd Sess., 34th Parl., October 3, 1991, at 15:15-15:16).

21 In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the *CCAA* enjoyed in contemporary practice and the advantage that a [page397] flexible judicially supervised reorganization process presented in the face of increasingly complex reorganizations, when compared to the stricter rules-based scheme contained in the *BIA*. The "flexibility of the *CCAA* [was seen as] a great benefit, allowing for creative and effective decisions" (Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2002), at p. 41). Over the past three decades, resurrection of the *CCAA* has thus been the mainspring of a process through which, one author concludes, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world" (R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 481).

22 While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

> They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, [page398] rather than exposing them to the risk that a more

aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

23 Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, s. 25; see also *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency*).

24 With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4th) 192, at para. 19).

25 Mindful of the historical background of the *CCAA* and *BIA*, I now turn to the first question at issue.

[page399]

3.2 *GST Deemed Trust Under the CCAA*

26 The Court of Appeal proceeded on the basis that the *ETA* precluded the court from staying the Crown's enforcement of the GST deemed trust when partially lifting the stay to allow the debtor to enter bankruptcy. In so doing, it adopted the reasoning in a line of cases culminating in *Ottawa Senators*, which held that an *ETA* deemed trust remains enforceable during *CCAA* reorganization despite language in the *CCAA* that suggests otherwise.

27 The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the *CCAA* purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), leave to appeal granted, 2010 QCCA 183

(CanLII)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the *CCAA* to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the reasons of my colleague Abella J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

28 The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims [page400] largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the *CCAA* was binding at all upon the Crown. Amendments to the *CCAA* in 1997 confirmed that it did indeed bind the Crown (see *CCAA*, s. 21, as added by S.C. 1997, c. 12, s. 126).

29 Claims of priority by the state in insolvency situations receive different treatment across jurisdictions worldwide. For example, in Germany and Australia, the state is given no priority at all, while the state enjoys wide priority in the United States and France (see B. K. Morgan, "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 *Am. Bankr. L.J.* 461, at p. 500). Canada adopted a middle course through legislative reform of Crown priority initiated in 1992. The Crown retained priority for source deductions of income tax, Employment Insurance ("EI") and Canada Pension Plan ("CPP") premiums, but ranks as an ordinary unsecured creditor for most other claims.

30 Parliament has frequently enacted statutory mechanisms to secure Crown claims and permit their enforcement. The two most common are statutory deemed trusts and powers to garnish funds third parties owe the debtor (see F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at s.2).

31 With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property [page401] held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

32 Parliament has created similar deemed trusts using almost identical language in respect of source deductions of income tax, EI premiums and CPP premiums (see s. 227(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), ss. 86(2) and (2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23, and ss. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8). I will refer

to income tax, EI and CPP deductions as "source deductions".

33 In *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the Alberta *Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"). As then worded, an *ITA* deemed trust over the debtor's property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

[page402]

34 The amended text of s. 227(4.1) of the *ITA* and concordant source deductions deemed trusts in the *Canada Pension Plan* and the *Employment Insurance Act* state that the deemed trust operates notwithstanding any other enactment of Canada, except ss. 81.1 and 81.2 of the *BIA*. The *ETA* deemed trust at issue in this case is similarly worded, but it excepts the *BIA* in its entirety. The provision reads as follows:

> **222...** .
>
> ...
>
> (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed ... .

35 The Crown submits that the *Sparrow Electric* amendment, added by Parliament to the *ETA* in 2000, was intended to preserve the Crown's priority over collected GST under the *CCAA* while subordinating the Crown to the status of an unsecured creditor in respect of GST only under the *BIA*. This is because the *ETA* provides that the GST deemed trust is effective "despite" any other

enactment except the *BIA*.

36 The language used in the *ETA* for the GST deemed trust creates an apparent conflict with the *CCAA*, which provides that subject to certain exceptions, property deemed by statute to be held in trust for the Crown shall not be so regarded.

37 Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have, [page403] subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

This nullification of deemed trusts was continued in further amendments to the *CCAA* (S.C. 2005, c. 47), where s. 18.3(1) was renumbered and reformulated as s. 37(1):

> **37.** (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

38 An analogous provision exists in the *BIA*, which, subject to the same specific exceptions, nullifies statutory deemed trusts and makes property of the bankrupt that would otherwise be subject to a deemed trust part of the debtor's estate and available to creditors (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, s. 73; *BIA*, s. 67(2)). It is noteworthy that in both the *CCAA* and the *BIA*, the exceptions concern source deductions (*CCAA*, s. 18.3(2); *BIA*, s. 67(3)). The relevant provision of the *CCAA* reads:

> **18.3** ...
>
> (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*... .

Thus, the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy.

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39 Meanwhile, in both s. 18.4(1) of the *CCAA* and s. 86(1) of the *BIA*, other Crown claims are treated as unsecured. These provisions, establishing the Crown's status as an unsecured creditor, explicitly exempt statutory deemed trusts in source deductions (*CCAA*, s. 18.4(3); *BIA*, s. 86(3)). The *CCAA* provision reads as follows:

> **18.4** ...
>
> ...
>
> (3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of
>
> (*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,
>
> (*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution ... .

Therefore, not only does the *CCAA* provide that Crown claims do not enjoy priority over the claims of other creditors (s. 18.3(1)), but the exceptions to this rule (i.e., that Crown priority is maintained for source deductions) are repeatedly stated in the statute.

40 The apparent conflict in this case is whether the rule in the *CCAA* first enacted as s. 18.3 in 1997, which provides that subject to certain explicit exceptions, statutory deemed trusts are ineffective under the *CCAA*, is overridden by the one in the *ETA* enacted in 2000 stating that GST deemed trusts operate despite any enactment of Canada except the *BIA*. With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision confirming it. Such a rule is unknown to the law. Courts must recognize [page405] conflicts, apparent or real, and resolve them when possible.

41 A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*. *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219 (Alta. Q.B.); *Gauntlet*).

42 The Ontario Court of Appeal in *Ottawa Senators* rested its conclusion on two considerations. First, it was persuaded that by explicitly mentioning the *BIA* in *ETA* s. 222(3), but not the *CCAA*, Parliament made a deliberate choice. In the words of MacPherson J.A.:

> The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

43 Second, the Ontario Court of Appeal compared the conflict between the *ETA* and the *CCAA* to that before this Court in *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862, and found them to be "identical" (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"), was held to have repealed a more specific provision of the earlier Quebec *Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy, [page406] the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

44 Viewing this issue in its entire context, several considerations lead me to conclude that neither the reasoning nor the result in *Ottawa Senators* can stand. While a conflict may exist at the level of the statutes' wording, a purposive and contextual analysis to determine Parliament's true intent yields the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the *CCAA* when it amended the *ETA* in 2000 with the *Sparrow Electric* amendment.

45 I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists [page407] in those Acts carving out an exception for GST claims.

46 The internal logic of the *CCAA* also militates against upholding the *ETA* deemed trust for GST. The *CCAA* imposes limits on a suspension by the court of the Crown's rights in respect of

source deductions but does not mention the *ETA* (s. 11.4). Since source deductions deemed trusts are granted explicit protection under the *CCAA*, it would be inconsistent to afford a better protection to the *ETA* deemed trust absent explicit language in the *CCAA*. Thus, the logic of the *CCAA* appears to subject the *ETA* deemed trust to the waiver by Parliament of its priority (s. 18.4).

47 Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

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48 Arguably, the effect of *Ottawa Senators* is mitigated if restructuring is attempted under the *BIA* instead of the *CCAA*, but it is not cured. If *Ottawa Senators* were to be followed, Crown priority over GST would differ depending on whether restructuring took place under the *CCAA* or the *BIA*. The anomaly of this result is made manifest by the fact that it would deprive companies of the option to restructure under the more flexible and responsive *CCAA* regime, which has been the statute of choice for complex reorganizations.

49 Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer" (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament's express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either

the *BIA* or the *CCAA*.

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50 It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA*. However, it should be seen for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

51 Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. It merely creates an apparent conflict that must be resolved by statutory interpretation. Parliament's intent when it enacted *ETA* s. 222(3) was therefore far from unambiguous. Had it sought to give the Crown a priority for GST claims, it could have done so explicitly as it did for source deductions. Instead, one is left to infer from the language of *ETA* s. 222(3) that the GST deemed trust was intended to be effective under the *CCAA*.

52 I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough [page410] contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

53 A noteworthy indicator of Parliament's overall intent is the fact that in subsequent amendments it has not displaced the rule set out in the *CCAA*. Indeed, as indicated above, the recent amendments to the *CCAA* in 2005 resulted in the rule previously found in s. 18.3 being renumbered and reformulated as s. 37. Thus, to the extent the interpretation allowing the GST deemed trust to remain effective under the *CCAA* depends on *ETA* s. 222(3) having impliedly repealed *CCAA* s. 18.3(1) because it is later in time, we have come full circle. Parliament has renumbered and reformulated the provision of the *CCAA* stating that, subject to exceptions for source deductions, deemed trusts do not survive the *CCAA* proceedings and thus the *CCAA* is now the later in time

statute. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*.

54 I do not agree with my colleague Abella J. that s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding [page411] the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

55 In the case at bar, the legislative context informs the determination of Parliament's legislative intent and supports the conclusion that *ETA* s. 222(3) was not intended to narrow the scope of the *CCAA*'s override provision. Viewed in its entire context, the conflict between the *ETA* and the *CCAA* is more apparent than real. I would therefore not follow the reasoning in *Ottawa Senators* and affirm that *CCAA* s. 18.3 remained effective.

56 My conclusion is reinforced by the purpose of the *CCAA* as part of Canadian remedial insolvency legislation. As this aspect is particularly relevant to the second issue, I will now discuss how courts have interpreted the scope of their discretionary powers in supervising a *CCAA* reorganization and how Parliament has largely endorsed this interpretation. Indeed, the interpretation courts have given to the *CCAA* helps in understanding how the *CCAA* grew to occupy such a prominent role in Canadian insolvency law.

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3.3 *Discretionary Power of a Court Supervising a CCAA Reorganization*

57 Courts frequently observe that "[t]he *CCAA* is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44, *per* Blair J.A.). Accordingly, "[t]he history of CCAA law has been an evolution of judicial interpretation" (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Ct. (Gen. Div.)), at para. 10, *per* Farley J.).

58 *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

59 Judicial discretion must of course be exercised in furtherance of the *CCAA*'s purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

> 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.
>
> (*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282 , at para. 57, *per* Doherty J.A., dissenting)

60 Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by [page413] staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J.), at para. 3; *Air Canada, Re*, 2003 CanLII 49366 (Ont. S.C.J.), at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

61 When large companies encounter difficulty, reorganizations become increasingly complex. *CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA*. Without

exhaustively cataloguing the various measures taken under the authority of the *CCAA*, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

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62 Perhaps the most creative use of *CCAA* authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (Ont. Ct. (Gen. Div.)); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, aff'g (1999), 12 C.B.R. (4th) 144 (S.C.); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The *CCAA* has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see *Metcalfe & Mansfield*). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the *CCAA*'s supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

63 Judicial innovation during *CCAA* proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) What are the sources of a court's authority during *CCAA* proceedings? (2) What are the limits of this authority?

64 The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against [page415] purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at paras. 31-33, *per* Blair J.A.).

65 I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

66 Having examined the pertinent parts of the *CCAA* and the recent history of the legislation, I accept that in most instances the issuance of an order during *CCAA* proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

67 The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the [page416] matter, ... subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

68 In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus, in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, ... make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

69 The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

70 The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* -- avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all [page417] stakeholders are treated as advantageously and fairly as the circumstances permit.

71 It is well established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C.C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA*'s purposes, the ability to make it is within the discretion of a *CCAA* court.

72 The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that

reorganization would fail and bankruptcy was the inevitable next step.

73 In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown's enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA*. Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA*.

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74 It is beyond dispute that the *CCAA* imposes no explicit temporal limitations upon proceedings commenced under the Act that would prohibit ordering a continuation of the stay of the Crown's GST claims while lifting the general stay of proceedings temporarily to allow the debtor to make an assignment in bankruptcy.

75 The question remains whether the order advanced the underlying purpose of the *CCAA*. The Court of Appeal held that it did not because the reorganization efforts had come to an end and the *CCAA* was accordingly spent. I disagree.

76 There is no doubt that had reorganization been commenced under the *BIA* instead of the *CCAA*, the Crown's deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the *BIA* the deemed trust for GST ceases to have effect. Thus, after reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA*. In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the *CCAA* and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the *CCAA*. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA*'s objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA*. That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament ... that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as [page419] the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

77 The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.

78 Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be [page420] lost in bankruptcy (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, at paras. 62-63).

79 The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

80 Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition [page421] to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

81 I therefore conclude that Brenner C.J.S.C. had the authority under the *CCAA* to lift the stay to allow entry into liquidation.

3.4 *Express Trust*

82 The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

83 Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29, especially fn. 42).

84 Here, there is no certainty to the object (i.e. the beneficiary) inferrable from the court's order of April 29, 2008 sufficient to support an express trust.

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85 At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus, there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

86 The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

87 Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in bankruptcy result, it seems to me that

maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008 denying the Crown's application to enforce the trust once it was clear [page423] that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

88 I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA*.

89 For these reasons, I would allow the appeal and declare that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

The following are the reasons delivered by

FISH J. --

I

90 I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

91 More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). [page424] And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221).

92 I nonetheless feel bound to add brief reasons of my own regarding the interaction between the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*").

93 In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that

jurisprudential approach is warranted in this case.

94 Justice Deschamps develops important historical and policy reasons in support of this position and I have nothing to add in that regard. I do wish, however, to explain why a comparative analysis of related statutory provisions adds support to our shared conclusion.

95 Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the *CCAA* and s. 222 of the *ETA* as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.

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II

96 In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a *CCAA* or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") provision *confirming* -- or explicitly preserving -- its effective operation.

97 This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the *ETA*.

98 The first is the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), where s. 227(4) *creates* a deemed trust:

> (4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act. [Here and below, the emphasis is of course my own.]

99 In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

> (4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an

> amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person ... equal in value to the amount so deemed to be held in trust is deemed
>
> > (*a*) to be held, from the time the amount was deducted or withheld by the person, separate and [page426] apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, ...
> >
> > ...
>
> ... and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

100 The continued operation of this deemed trust is expressly *confirmed* in s. 18.3 of the *CCAA*:

> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* ... .

101 The operation of the *ITA* deemed trust is also confirmed in s. 67 of the *BIA*:

> (2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.
>
> (3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* ... .

102 Thus, Parliament has first *created* and then *confirmed the continued operation of* the Crown's *ITA* deemed trust under *both* the *CCAA* and the *BIA* regimes.

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103 The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

104 As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in s. 18.3(2) of the *CCAA* and in s. 67(3) of the *BIA*. In all three cases, Parliament's intent to enforce the Crown's deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

105 The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust -- or expressly provide for its continued operation -- in either the *BIA* or the *CCAA*. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

106 The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

> **222.** (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a [page428] security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).
>
> ...
>
> (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and InsolvencyAct*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to

> the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed
>
> > (*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, ...
> >
> > ...
>
> ... and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

107 Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.

108 In short, Parliament has imposed *two* explicit conditions, or "building blocks", for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

109 With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, at para. 37). *All* of the deemed trust [page429] provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

110 Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit -- rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

111 Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

112 Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately

chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

113 For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada [page430] be subject to no deemed trust or priority in favour of the Crown.

The following are the reasons delivered by

114 ABELLA J. (dissenting):-- The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), and specifically s. 222(3), gives priority during *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), proceedings to the Crown's deemed trust in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court's discretion under s. 11 of the *CCAA* is circumscribed accordingly.

115 Section 11[1] of the *CCAA* stated:

> **11.** (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

To decide the scope of the court's discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the *ETA* at issue in this case, states:

[page431]

> (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

> (*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and
>
> (*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest
>
> and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

116 Century Services argued that the *CCAA*'s general override provision, s. 18.3(1), prevailed, and that the deeming provisions in s. 222 of the *ETA* were, accordingly, inapplicable during *CCAA* proceedings. Section 18.3(1) states:

> **18.3** (1) ... [N]otwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

117 As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory [page432] interpretation: Does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

118 By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except* the *BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

> The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with "any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)", s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the

> *Bankruptcy and Insolvency Act*... . The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

119 MacPherson J.A.'s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

120 The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from [page433] various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

121 Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA*. Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305, where this Court stated:

> While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

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122 All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

123 Nor do I see any "policy" justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

> I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the *CCAA* and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and, while there is more flexibility under the *CCAA*, it is possible for an insolvent company to attempt to restructure under the auspices of the *BIA*. [para. 37]

124 Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is "later in time" prevails; and Century Services based its argument on the principle that the general provision gives way to the specific (*generalia specialibus non derogant*).

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125 The "later in time" principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

126 The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that "[a] more recent, general provision will not be

construed as affecting an earlier, special provision" (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be "overruled" by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré v. Verdun (City)*, [1997] 2 S.C.R. 862).

127 The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

> ... the overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, ... at p. 239 ... :
>
> > The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the [page436] legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

128 I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant*). But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3).

129 It is true that when the *CCAA* was amended in 2005,[2] s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Attorney General of Canada v. Public Service Staff Relations Board*, [1977] 2 F.C. 663, dealing with the predecessor provision to s. 44(*f*)).

It directs that new enactments not be construed as [page437] "new law" unless they differ in substance from the repealed provision:

> **44.** Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,
>
> ...
>
> (*f*) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an "enactment" as "an Act or regulation or any portion of an Act or regulation".

130 Section 37(1) of the current *CCAA* is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

> **37.** (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

131 The application of s. 44(*f*) of the *Interpretation Act* simply confirms the government's clearly expressed intent, found in Industry Canada's clause-by-clause review of Bill C-55, where s. 37(1) was identified as "a technical amendment to re-order the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the [page438] Senate, confirmed that s. 37(1) represented only a technical change:

> On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were

repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.

(*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

132 Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

133 This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA*.

134 While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request [page439] for payment of the GST funds during the *CCAA* proceedings.

135 Given this conclusion, it is unnecessary to consider whether there was an express trust.

136 I would dismiss the appeal.

* * * * *

APPENDIX

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at December 13, 2007)

11. (1) [Powers of court] Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

...

(3) [Initial application court orders] A court may, on an initial application in respect of a

company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

> (*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
>
> (*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (*c*) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

(4) [Other than initial application court orders] A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

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> (*a*) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
>
> (*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (*c*) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

...

(6) [Burden of proof on application] The court shall not make an order under subsection (3) or (4) unless

> (*a*) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(*b*) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.4 (1) [Her Majesty affected] An order made under section 11 may provide that

(*a*) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

(i) the expiration of the order,
(ii) the refusal of a proposed compromise by the creditors or the court,
(iii) six months following the court sanction of a compromise or arrangement,

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(iv) the default by the company on any term of a compromise or arrangement, or
(v) the performance of a compromise or arrangement in respect of the company; and

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) may apply.

(2) [When order ceases to be in effect] An order referred to in subsection (1) ceases to be in effect if

(*a*) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,
(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, [page442] as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or
(iii) under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(*b*) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person [page443] and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another

person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same [page444] effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

18.3 (1) [Deemed trusts] Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the

same effect and scope against any creditor, however secured, as the corresponding federal provision.

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18.4 (1) [Status of Crown claims] In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

...

(3) [Operation of similar legislation] Subsection (1) does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any

creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and [page446] in respect of any related interest, penalties or other amounts.

20. [Act to be applied conjointly with other Acts] The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at September 18, 2009)

11. [General power of court] Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

11.02 (1) [Stays, etc. -- initial application] A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

> (*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
>
> (*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(2) [Stays, etc. -- other than initial application] A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

> (*a*) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(*a*);

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(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(3) [Burden of proof on application] The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

...

11.09 (1) [Stay -- Her Majesty] An order made under section 11.02 may provide that

(*a*) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

(i) the expiry of the order,
(ii) the refusal of a proposed compromise by the creditors or the court,
(iii) six months following the court sanction of a compromise or an arrangement,
(iv) the default by the company on any term of a compromise or an arrangement, or

(v) the performance of a compromise or an arrangement in respect of the company; and

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a

debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income [page448] Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) that may apply.

(2) [When order ceases to be in effect] The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*) cease to be in effect if

(*a*) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the [page449] collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension*

Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(*b*) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,
(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or
(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection [page450] 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*), does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment*

Insurance Act, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

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37. (1) [Deemed trusts] Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law

> of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or
>
> (*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

Excise Tax Act, R.S.C. 1985, c. E-15 (as at December 13, 2007)

222. (1) [Trust for amounts collected] Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured [page452] creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) [Amounts collected before bankruptcy] Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

...

(3) [Extension of trust] Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

> (*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

> (*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (as at December 13, 2007)

67. (1) [Property of bankrupt] The property of a bankrupt divisible among his creditors shall not comprise

[page453]

> (*a*) property held by the bankrupt in trust for any other person,
>
> (*b*) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or
>
> (*b*.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (*a*) or (*b*),

but it shall comprise

> (*c*) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and
>
> (*d*) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

(2) [Deemed trusts] Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) [Exceptions] Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

> (*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

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> (*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

86. (1) [Status of Crown claims] In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

...

(3) [Exceptions] Subsection (1) does not affect the operation of

> (*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*;

> (*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance*

Act that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

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(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

Appeal allowed with costs, ABELLA J. *dissenting.*

Solicitors:

Solicitors for the appellant: Fraser Milner Casgrain, Vancouver.

Solicitor for the respondent: Attorney General of Canada, Vancouver.

1 Section 11 was amended, effective September 18, 2009, and now states:

> **11.** Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

2 The amendments did not come into force until September 18, 2009.

TAB13

2005 CarswellOnt 1201
Ontario Superior Court of Justice [Commercial List]

JTI-Macdonald Corp., Re

2005 CarswellOnt 1201, [2005] O.J. No. 1202, 10 C.B.R. (5th) 208, 138 A.C.W.S. (3d) 12

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

And In the Matter of JTI-Macdonald Corp.

Farley J.

Heard: March 22, 2005
Judgment: March 29, 2005
Docket: 04-CL-5530

Counsel: Frank Newbould, Q.C., Michael MacNaughton, Tanya Kozak for JTI-Macdonald Corp.
Paul Macdonald, Andrew Kent, Eugene Czolij for Minister Revenue of Quebec
Brian Empey for JT Canada LLC
R.G. Slaght, Q.C. for Attorney General of Canada
John Finnigan, Leanne Hoyles for Monitor, Ernst & Young Inc.

Subject: Insolvency; Civil Practice and Procedure

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

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings

Debtor was tobacco company that was allegedly involved in smuggling — Province alleged that debtor owed taxes in connection with alleged smuggling — Province issued notice of assessment to debtor and brought action against debtor — Debtor brought separate proceeding against province and also filed notice of objection — Debtor obtained stay of proceedings under Companies' Creditors Arrangement Act — Province brought motion for partial lifting of stay so as to permit determination of litigation between province and debtor — Motion granted in part — Stay was lifted for sole purpose of permitting province to file responding materials in debtor's proceeding — This would crystallize dispute and also have side benefit of allowing province to disclaim allegations against it — Province was not at any disadvantage by stay continuing to restrict it from proceeding pursuant to Quebec Revenue Act as that duty was in suspension and could be dealt with in due course — All concerned were directed to renew their efforts to come up with litigation roadmap — All discussions were to remain confidential except that participants were permitted to inform court of their bottom-line positions and others' responses to them.

Table of Authorities

Cases considered by *Farley J.*:

Norris, Re (1989), 75 C.B.R. (N.S.) 97, 69 O.R. (2d) 285, 60 D.L.R. (4th) 606, [1989] 2 C.T.C. 185, 34 O.A.C. 304, 89 D.T.C. 5493, 1989 CarswellOnt 784 (Ont. C.A.) — referred to

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — considered

s. 18.1 [en. 1997, c. 12, s. 125] — referred to

Ministère du Revenu, Loi sur le, L.R.Q., c. M-31
art. 93.1.6 [ad. 1997, c. 85, art. 358] — referred to

MOTION by province for partial lifting of stay of proceedings so as to permit determination of litigation between province and debtor.

***Farley J.*:**

1 The Minister of Revenue for the Province of Quebec (MRQ) moved to vary the Initial Order made August 24, 2004 to lift the stay in these CCAA proceedings so as to permit the determination of certain Quebec litigation between MRQ and JTI-Macdonald Corp. (JTI-M). Specifically the MRQ wanted the following paragraph 4A to be added to the Initial Order for:

> **THIS COURT ORDERS** that nothing in this Order shall have the effect of staying, impairing or delaying the conduct of the following proceedings (the "Quebec Proceedings"):
>
> (a) the Action bearing File No. 500-11-023681-048 commenced on August 12, 2004 by the Deputy Minister of Revenue for the Province of Quebec against JTI-Macdonald and others in the Quebec Superior Court; and
>
> (b) the Action bearing File No.500-17-023034-047 commenced on November 4, 2004 by JTI-Macdonald against the MRQ and others in the Quebec Superior Court; and
>
> (c) proceedings arising out of the Notice of Objection filed by JTI-Macdonald on November 5, 2004 in respect of the Notice of Assessment issued by MRQ against JTI-Macdonald on August 10, 2004, including without limitation proceedings that may be commenced in the Court of Quebec.
>
> however, the taking of any Proceedings (other than the exercise of set off rights in accordance with s.18.1 of the *Companies' Creditors Arrangement Act*) to enforce or collect any amount owing or found to be owing by JTI-Macdonald in the Quebec Proceedings shall be stayed as set out in paragraph 4(a) and (b) hereof.

2 This appears to be awkwardly worded. As argued, it appears that the foregoing should be adjusted to: "...or found to be owing by JTI-Macdonald in the Quebec Proceedings as set out in paragraph 4A (a) and (b) hereof shall be stayed".

3 The MRQ asserts that, contrary to the assertion of JTI-M, there has been little or no material progress in working out a litigation roadmap for the litigation affecting (or likely to affect JTI-M). Of course, it takes more than one to reach an agreement. The fact that, despite urging from the Court, there has been no agreement to date is unfortunate. MRQ also asserts that there is concern that the contents of these discussions may be leaked. That, too, is unfortunate. One would have thought that JTI-M and all interested parties would have equally seen the desire and need for a coordinated approach to this element in these CCAA Proceedings and been assisted in coming to such a litigation roadmap by the efforts of their experienced counsel. To my mind, a healthy application of the 3 Cs (communication, cooperation (at least in procedural matters) and common sense) by parties and counsel alike should be able to come up with a reasonable solution (even recognizing that there are third parties in some of the litigation) provided that no one attempts to get a substantive or otherwise leg up on the others.

4 I note that there is proposed to be a Crown Claims Bar Order which, if granted by the Court, is aimed at smoking out any claims by other governmental instrumentalities relating to the alleged smuggling activities of JTI-M. That motion will be

dealt with in the near future once the present interested parties have had a chance to digest the contents of the motion record served one day before the hearing of this motion. I must say that I am puzzled by the last minute service of motions in any autopsy litigation. At present, this litigation is autopsy, not real time, litigation. Therefore I fail to see the necessity for the Crown Claims Bar Order to have been served the day before the hearing of the motion of the MRQ; equally the same comment goes for the service of this MRQ motion the day before the previous hearing in late February (not withstanding that this MRQ motion had been booked December 13, 2004).

5 In the end result it appears to me that there should be a renewed effort by all concerned to come up with a litigation roadmap and I so direct. It may be of assistance to wait until other governmental entities have been smoked out if there is granted a Crown Claims Bar Order; fresh players may be able to move the presently established players off entrenched positions. If the Monitor in its neutral role feels that it would be of assistance then a mediator/moderator being retained would be helpful. Lastly there is to be a gag order as to any of the discussions, save and except that at the end of this process it will be permissible for any participant to advise the Court of its bottom line position that it has put to all other participants (but this is not to include any discussion of any lead up to that bottom line position) and the reaction of the others to it. If appropriate in the circumstances, the Monitor and/or the mediator/moderator may provide the Court with a recommendation.

6 Allow me to further comment that a CCAA stay order should be taken in context. It is to be used as a shield, not a sword. To my mind, any provision that allows an applicant with the consent of a Monitor to lift the stay should not be used to allow such an applicant to hit out in an offensive way, even when this hitting out may be characterized as merely a defensive measure. To proceed with such litigation activity should require the direct and specific approval of the Court. What has been done by JTI-M in this regard cannot be undone (JTI-M's Notice of Objection to the assessment on November 5, 2004 and its November 4, 2004 appeal to the Superior Court of Quebec). However under these circumstances it is appropriate to even up matters so that the MRQ is not put in any disadvantages position or as it claims it is unable to disclaim any scandalous or quasi-scandalous allegations against it. The MRQ is not at any disadvantage by the stay continuing to restrict the MRQ from proceeding pursuant to s. 93.1.6 of the *Quebec Revenue Act*; that duty is in suspension and can be dealt with in due course. However the MRQ is permitted to file responding materials as to JTI-M's appeal to the Quebec Superior Court and the stay is lifted for that sole and limited purpose. This is in accord with the views I expressed in the first Always Travel lift stay motion in the *Air Canada* proceedings as it will crystallize the dispute and also have the side benefit of allowing the MRQ to disclaim the allegations against it.

7 Having dealt with the foregoing, what then of the MRQ motion?

8 The MRQ at para. 27 of its factum stated:

> 27. This motion raises the following legal issues:
>
> I. Does this Honourable Court, or any claims officers that may be appointed by it, have jurisdiction to adjudicate upon JTI-Macdonalds tax liability under the Assessment?
>
> II. Should the issues raised in the Quebec Litigation be adjudicated by the Quebec Courts?

to these 2 issues, it added a third in argument

> III. Should the CCAA Stay be lifted so as to allow the Quebec Courts to deal with these disputes.

9 I am of the view that once there has been a *final* determination of any debt, let alone a debt which arises because of an assessment under a taxing statute, the Courts (including the CCAA Court (or a CCAA claims officer)) has no jurisdiction to relitigate the validity or amount of that debt. See *Norris, Re* (1989), 69 O.R. (2d) 285, 1989 CarswellOnt 784 (Ont. C.A.) at para 6. Of course that should not be confused with a compromise of any such debt pursuant to a creditor approved and Court sanctioned Plan of Compromise and Arrangement. However, if there is no such finalization for whatever reason, there would not appear to be any lack of jurisdiction in a CCAA Court determining what a finalized value, if any, of such a claim would be.

It is in my view premature to determine at this stage what should be the best way of approaching the MRQ claim in question. See again my views in *Always Travel/Air Canada.*

10 In closing, I note the submissions of the MRQ that these CCAA proceedings are not involved in a restructuring, but rather in a litigation scheme. I think that it sufficient to observe that all the litigation claims (now extant or forthcoming) must be determined before there is a "restructuring" plan developed; if all the present claims were accepted by JTI-M at face value, the equity would be under water so far that it would be resting at the bottom of a deep ocean and certainly there would not be sufficient value in the enterprise to satisfy all claims 100%.

Motion granted in part.

TAB14

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***New Skeena Forest Products Inc., Re,***
2005 BCCA 192

Date: 20050401
Docket: CA032484

Between:

In the Matter of the *Companies' Creditors Arrangement Act*,
R.S.C. 1985, c. C-36
and
In the Matter of the *Canada Business Corporations Act*,
R.S.C. 1985, c. C-44
and
In the Matter of the *Company Act*, R.S.B.C. 1996, c. 62, as amended
and
In the Matter of New Skeena Forest Products Inc.,
Orenda Forest Products Ltd., Orenda Logging Ltd. and
9753 Acquisition Corp.

Respondents
(Petitioners)

And

Kitwanga Lumber Co. Ltd.

Respondent
(Respondent)

Before: The Honourable Mr. Justice Esson
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Smith

R.J.M. Janes and M.D.B. Paine	Counsel for the Appellant City of Prince Rupert
R.A. Millar	Counsel for the Interim Receiver and Trustee in Bankruptcy Ernst & Young Inc.
P.J. Reardon	Counsel for 646325 B.C. Ltd.
R.D. Leong	Counsel for the Attorney General of Canada

D.J. Hatter	Counsel for Her Majesty the Queen in Right of the Province of British Columbia
Place and Date of Hearing:	Vancouver, British Columbia February 28, 2005
Written Submissions Received:	March 22, 24, 29 and 30, 2005
Place and Date of Judgment:	Vancouver, British Columbia April 1, 2005

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Mr. Justice Esson
The Honourable Mr. Justice Smith

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] On August 30, 2004 New Skeena Forest Products Inc. ("New Skeena"), formerly known as Skeena Cellulose Inc., brought to an end its most recent attempt at financial restructuring under the ***Companies' Creditors Arrangement Act*** ("CCAA") by filing an assignment in bankruptcy. The last CCAA proceeding had been initiated in November 2003 when the Supreme Court made an order in the usual terms, staying proceedings against the company, authorizing debtor-in-possession ("DIP") financing to rank ahead of most other charges, appointing a monitor, and granting New Skeena the right to "proceed with an orderly disposition" of its assets in order to facilitate the "downsizing and consolidation of [its] business and operations". But the strenuous efforts made by many creditors and other stakeholders to streamline and restructure New Skeena's business — a mainstay of the economy of northwestern British Columbia — ultimately failed, and the decision was made to move the company into liquidation.

[2] On September 20, 2004, the Supreme Court lifted the stay previously imposed under the CCAA, imposed a new stay under the ***Bankruptcy and Insolvency Act***, and appointed Ernst & Young Inc. as receiver to offer for sale "all or any of the Assets, including any of the properties (whether real, personal or otherwise), rights, assets, businesses, and undertakings of the Company, whether *en bloc* or on a piecemeal basis, as a going concern or otherwise, but subject to the approval of [the Supreme] Court." An auction of many of the remaining assets is scheduled for April of this year.

[3] It is para. 17 of the September order which is significant for purposes of this case. It directed the Receiver to report to the Court concerning the "enforcement" of the so-called "Priority Charges" and the allocation of the sale proceeds of New Skeena's assets proposed to be made by the Receiver among the secured creditors. The order also specified that any proposed allocation could not defeat the priority afforded to any Priority Charges under the Court's previous orders or seek to invoke marshalling or other equitable principles applicable to creditors' remedies. In due course, the Receiver recommended a scheme of allocation of the Priority Charges and it was approved by the Chambers judge below. The discrete question raised by this appeal is whether he erred in so doing, and in particular, whether it was open to him to approve an allocation that may require one key creditor to pay as its share of the Priority Charges an amount greater than its secured charge and indeed greater than what is said to be the true value of the asset against which it holds its security.

[4] This question is complicated by two facts. First, the creditor with which we are concerned is the City of Prince Rupert, appellant in this court. Its security is a statutory tax lien and the enforcement thereof is governed by the ***Local Government Act***, R.S.B.C. 1996, c. 323. Under that Act, the local collector must in September of each year offer for sale by public auction any real estate on which taxes are delinquent. (Evidently, certain obligations under the tax sale provisions of the Act were postponed by special Act of the Legislature in response to the plight of Prince Rupert and other neighbouring municipalities affected by New Skeena's insolvency, but no further special deferments are anticipated.) The upset price at such auction is specified by s. 407(1) and in this case would exceed some

$18,000,000, the amount of the City's unpaid taxes. If no bid is received at least equal to the upset price, s. 407(4) of the Act states that the City "must be declared the purchaser" of the property. Thus it is possible the City will not receive an offer at or above the amount of its claim, and that it will be deemed to be the purchaser of the property. In return it would receive nil proceeds, at least until it succeeds in selling the property at some future time. Obviously, this could take years, and the ***Local Government Act*** preserves for some time the owner's ability to redeem the property: see ss. 414-418. In any event, the City stands to receive only the upset price and interest thereon.

[5] The second complicating factor is that the value of the property over which the City holds its statutory lien is New Skeena's now defunct kraft pulp mill, located on Watson Island. The value of this property is unknown: although in recent years it was assessed for tax purposes at some $8,480,000, an appraisal carried out in January 2004 set its value at only $3,920,000. Now, there are indications that the property may carry a large environmental liability. There is some evidence, which the Chambers judge below did not expressly adopt, that the cost of decommissioning the mill and restoring the property to its original condition might be as much as $100,000,000 — although it seems unlikely any purchaser of the mill site would be willing to do more than restore it to "industrial" standard. Remediation to that standard is expected to cost something less, and the Province has agreed to provide up to $30,000,000 for the latter purpose. However, the possibility of a large liability remains, and to date, no private party has expressed interest in acquiring the property on terms that the Receiver has recommended for acceptance.

[6] Together, these facts are said to place the City in a different position from that of other secured creditors: when the value of their interests falls below the amount of the secured indebtedness, most can simply accept the lesser amount, or even walk away from their secured claim. Indeed, most are lenders who have taken the business risk that their borrower will fail and that their security may prove inadequate to realize their claims. This is not true of the City, however: it is prohibited from accepting less than the statutory upset price, and "must" take the property as its own (subject to the owner's right to redeem) if no offer is received at or above the statutory minimum. This also gives rise to a general 'unfairness' argument that informs the City's other more specific arguments regarding process and jurisdiction.

Factual Background

[7] I turn first, however, to the background of the impugned order of December 1, 2004, which adopted the method of cost allocation proposed by the Receiver. I note at the outset that the City, like all other secured creditors, had consented to the granting of "super-priority" for the DIP financing approved by the Court early on in the CCAA proceeding. The initial order of November 19, 2003 granted to one DIP lender, NWBC Timber & Pulp Inc. ("NWBC"), security in an amount up to $2,300,000, "ranking in priority to all creditors of the Petitioners and any other encumbrances, security or security interests now outstanding save and except for the Administration Charge and the Directors' Charge which shall rank in priority to the DIP Charge." Subsequent orders reduced the principal amount of NWBC's priority and approved further borrowing from Northern Savings Credit Union ("NSCU") and granted that lender a charge ranking ahead of all charges (including

NWBC's DIP Charge) other than the Administration Charge. Still further DIP financing, the "Woodbridge DIP Loan", the "MatlinPatterson DIP Charge", and the "Papyrus DIP Charge", was approved on similar terms in the summer of 2004 without any objection being made by the other secured creditors. However, the CCAA stay was, as earlier mentioned, finally lifted on September 20, 2004.

[8] Pursuant to para. 17 of the Order of that date, Messrs. Ernst & Young prepared a report for the Court dated November 19, 2004 (the "Second Report"). The Receiver advised the Court of its progress (or lack thereof) in selling off the New Skeena assets and undertaking as a going concern. Under the heading "The Receiver's Sale Process", the Receiver stated:

> 33. At the commencement of the receivership process, the Receiver was advised by a number of significant secured creditors that they believed that the opportunities to transact with a credible *en bloc*, going concern buyer had been exhausted through what was expressed to be a lengthy and expensive CCAA process, and that they expected the Receiver to conduct a quick sale process with an emphasis on liquidation. The creditors were extremely clear in their communications with the Receiver that the administration, holding and preservation costs associated with the asset realization and receivership administration process were viewed as substantial. Their view was that a lengthy, multi-month asset marketing campaign was unnecessary and to the detriment of their recoveries.
>
> 34. The Receiver recognized the views expressed by these creditors with regard to the length of the sales process and the associated costs, but also recognized that it was important to pursue offers of an *en bloc* or operator nature, including opportunities for acquiring specific mill sites, concurrently with seeking liquidation proposals, given the very significant impact of the New Skeena assets on the economies of the local communities.
>
> 35. The Receiver commissioned an updated asset appraisal of the Company's machinery and equipment from Maynards

> Appraisals Ltd., the firm that conducted the January 2004 appraisal during the CCAA proceedings. No updated appraisal was commissioned for the Company's mill site real estate, as the Receiver considered this to be of a lower cost benefit. Appraisals of the Company's two residential properties situated in Prince Rupert were commissioned, and these properties were listed for sale with a local realtor. [Emphasis added.]

[9] The Receiver's proposal for the allocation of the "Court Ordered Charges" was set out in detail at Appendix F to the Report. The terms "Court Ordered Charges", "Priority Charges" and "CCAA Costs" were all used to refer to the aggregate of the "Administrative Charge" (consisting of the monitor's professional fees and fees for legal services rendered to the monitor and New Skeena), the "DIP Loan Charge" (consisting of amounts advanced by the DIP lenders mentioned above), and the "Directors' Charge" (consisting of amounts for which the directors of New Skeena might have become liable as a result of the insolvency). According to the report, the Administrative Charge amounted to approximately $1,484,000; the DIP Loan Charge was some $3,250,000; and no amount was outstanding in respect of the Directors' Charge.

[10] The Receiver noted that no attempt had been made in the CCAA proceedings to track these Charges "against the various assets of [New Skeena] or the interests of any creditor or creditor group" and that there had been no discussion of the burden each group of assets might be expected to bear in relation to the costs of the CCAA process. The Receiver expressed the view that it was important for the secured creditors to be able to assess their positions reasonably when considering the potential sale of the assets and that "[w]ithout a framework that contemplates

some reasonable expectation as a basis for distributing costs, a realistic assessment of potential sales [would] be very problematic for secured creditors to undertake." This was particularly so with respect to New Skeena's real estate, since it was uncertain when those assets would be sold and, the Receiver stated, it would be "cumbersome to rely on a framework for cost allocation that takes effect only upon the full liquidation of all assets." Further, it would be "neither productive nor accurate" to try to link the CCAA Costs to any specific asset or creditor. Accordingly, the Receiver recommended that:

> 15. As a proxy for the expected values being preserved or enhanced by undertaking the CCAA proceeding, and accordingly incurring the CCAA Costs, an appropriate reference would be appraisals of real estate and equipment at the operating locations of New Skeena. The Monitor commissioned these appraisals in January 2004 as part of the sales efforts at that time. Those appraisals represent information which was current at the time that the CCAA Costs were being incurred, and formed at least some context for the potential value of the restructuring efforts.
>
> 16. The real estate appraisals did not consider potential environmental issues that may be prevalent on a given site, and so do not necessarily represent the best possible indication of value. Not all operating locations were appraised, and the real estate information is therefore incomplete insofar as the major participants in the CCAA process are concerned.
>
> 17. One alternative would be to use the values provided by the BC Municipal Assessment Authority instead of the appraised values (the "Tax Values"). The Tax Values can consist of land only, or can include the improvements on the lands as well. Use of the Tax Values as a value basis has the advantage of being a consistent measure of value, in that each property has a Tax Value for assessment purposes, and has the further advantage of matching expected values against the basis by which the municipal tax obligations are computed.

18. When comparing the calculation of improvements for Tax Value purposes with the equipment appraisals performed by Maynards, it is apparent that there is opportunity for overlap between these two categories. There is not a direct method of assessing this potential overlap, or calculating a corrective measure. As well, when comparing the land portion of the Tax Value with the appraised values to the extent both are available, it would appear that the Tax Value of both lands and improvements is higher than the value attributed to the real estate in the appraisal information. Accordingly, it is the Receiver's view that preference should be given to use of the appraised value of the lands, where available, and to use Tax Values for those other properties where necessary.

19. The Receiver's proposal is to use appraised values as a basis for allocating the CCAA Costs pro rata against those operating assets for which appraisals are available, and in the cases where no land appraisals were commissioned to use the land portion only of the Tax Values, all on an interim basis as described further below. The use of Tax Values shall only apply to land at the operating locations of New Skeena.

20. Using appraised or assessed values instead of ultimate sale values to allocate costs represents, in some respects, an artificial measure by which to burden participants in the process. By using a measure that is a proxy for ultimate sales value, rather than that sales value itself, the Receiver recognizes that those who believe they may be adversely affected by this basis of allocation may question this proposal. [Emphasis added.]

This method, the Receiver stated, would provide an "independent basis" for dealing with the interests of secured creditors at an early stage of the distribution process. It would avoid "waiting for particular asset sales to occur before allocating costs", and minimize additional disputes "to the extent that actual sales of assets contain price allocations that may be arbitrary, as could occur in multi-asset sales or if secured creditors take assets using their security positions as partial satisfaction of the transaction price." In the Receiver's analysis, the certainty provided by the use of

the appraised or assessed values would outweigh "the lack of precision inherent in using a measure other than the actual sales values obtained."

[11] Accordingly, the Receiver recommended that with respect to those operating lands and equipment for which appraisals or assessments were available, an interim allocation of the CCAA Costs in full would be carried out. But notwithstanding the use of the term "interim", no later adjustment would be made to reflect the actual sale of these assets, including the Prince Rupert mill site. In the Receiver's words:

> 26. The Receiver's proposal is to apportion the CCAA Costs pro rata against the equipment and lands appraised in January 2004, on the basis of appraised values or Tax Values, as the case may be, rather than eventual sale proceeds. It is not proposed that the calculation of allocated costs be adjusted subsequently as sales of those assets occur. [Emphasis added.]

[12] Under the heading "Distributions of Sale Proceeds", the Receiver acknowledged the possibility that certain assets could "accumulate a level of allocated costs in excess of their ultimate sales value." In such cases, the Receiver said:

> . . . it is proposed that the shortfall in cost recovery become an additional General Cost, and [be] allocated against the remaining appraised and/or sales values as the case may be.
>
> 40. In the event that a secured creditor seeks to recover the asset against which it holds security, as for example could occur in the instance of a municipality taking title to real property rather than it being sold by the Receiver, then the Receiver would ask that the Court permit such a transaction to be completed only if, and when, the secured creditor provides the Receiver with the cash equivalent of the applicable allocated costs against that asset, as calculated by the Receiver under this proposal. [Emphasis added.]

It is this aspect of the proposal to which the City of Prince Rupert objects.

[13] It does not appear that the recommendations contained in the Second Report were the subject of a court order. Rather, the Chambers judge requested certain additional information, leading to the Receiver's Third Report, dated November 29, 2004. It dealt with various substantive matters and again returned to the subject of cost allocation, on which the Receiver had received further comments from counsel for the concerned municipalities and others. The Receiver noted that certain of the municipalities (including Prince Rupert) had objected to the use of an appraisal that failed to consider any environmental liability attaching to the mill site. Another creditor had objected to the use of asset values generally, suggesting that funds actually generated from the DIP loans be traced to the locations or assets on which such funds had been spent, and that costs be allocated on that basis.

[14] With respect to Prince Rupert's objections, the Receiver responded as follows:

> 52. The assessed value for tax purposes of the Prince Rupert land is $8.48 million, whereas the appraised value used in our cost allocation proposal is $3.92 million. The environmental remediation program currently being funded by the Province has seen almost $19 million of a total funding available of $30 million already expended, and our understanding from discussions with the professional remediation firm is that the completion of this project will render the Watson Island site comparable in condition to other industrial sites in the Province. The use of a value for the Prince Rupert lands is, in the Receiver's view, appropriate in the context of the ongoing remediation and the expectation that this likely will be a site with commercial value in the future, given its physical attributes of rail and water access to facilitate shipping and materials handling opportunities.

> 53. The Receiver understands that any reductions by the Assessment Authority in assessed values, due to the closure of operations, will affect only the industrial improvements values and not the land values, and so the values used in the Receiver's proposal would be unaffected by that development which, in any event, is prospective. [Emphasis added.]

[15] With respect to the proposal that costs be linked to DIP loan expenditures, the Receiver predicted that hardly any costs could be directly tied to the interests of the secured creditors in real estate, which would mean that the cost burden would rest almost entirely on the secured creditors having interests in equipment and other operating assets. In conclusion, the Receiver stated:

> Using a method of allocation that simply traces costs gives no recognition to the underlying basis for the CCAA process and the restructuring effort, which is to preserve and enhance the value of all assets, including the real estate, and in the Receiver's view is therefore inappropriate.
>
> 56. The comments from counsel for the various affected creditors have been considered further by the Receiver, but the Receiver remains of the view that the process set forward in our Receiver's Report #2 provides an appropriate outcome of allocation, taking into account the multiple objectives of early certainty as to the parties' exposure to costs, the relative ability of the affected assets to absorb the allocations (or, alternatively, the various parties' abilities to fund those costs) and the roles played by the various parties during the CCAA and receivership proceedings. [Emphasis added.]

The Order of the Chambers Judge

[16] The matter came on for hearing before the Chambers judge on December 1, 2004. In his oral reasons, he briefly reviewed the Receiver's proposal as set out in

its Second and Third Reports. With specific reference to Prince Rupert's situation, he reasoned:

> With the exception of Prince Rupert all of the parties here want to have certainty at this stage. Prince Rupert says that the value that is proposed to be used in its case, which is the appraised value of $3.92 million, is unrealistic because it is simply not known whether this property will fetch that amount, or even any amount, given the environmental contamination issues.
>
> At paragraph 52 of his report number three, the Receiver addresses the conservatism in his proposal. The Receiver points out that the assessed value of the land set by Prince Rupert for tax purposes is some $8.48 million; the appraised value used by the Receiver for the purpose of this cost allocation proposal is $3.92 million.
>
> There has been an ongoing remediation effort on the Prince Rupert mill site, which has been funded by the Province. Some $19 million of a total funding available of $30 million has been spent. While there is some issue as to the likely market value of these lands, it is the Receiver's view that, given this remediation which has taken place, and given the remediation which is going to continue, that the appraised value figure is a realistic figure to use for the purposes of his proposal.
>
> The reality is that no method, in these circumstances, is perfect. The only way to achieve perfection, as I said at the outset, is to do nothing until everything has been sold. That clearly would not serve the interests of the parties and it is one that simply does not make sense. [paras. 16-19]

In the result, the Chambers judge concluded that it was in the best interests of all the parties to accept the Receiver's recommendation with respect to the cost allocations. The entered Order provided in this regard:

> 6. the Receiver's proposal:
>
> (a) to allocate the CCAA Costs (as defined in the Report) on a preliminary basis against only those assets consisting of equipment and real property which are identified in the illustrative chart attached to Appendix F to the Report

(the "Assets"), pro rata based upon the appraised or assessed value of the Assets at January, 2004, provided that such preliminary allocation will be subsequently adjusted based upon:

(i) the actual sale proceeds realized on the future disposition of the remaining assets of the Petitioners which do not have values attributed to them in Appendix F as aforesaid; or

(ii) such other value as may be subsequently attributed to such remaining assets by the Court; and

(b) to allocate the Receivership Costs (as defined in the Report) by:

(i) firstly, applying specific costs directly attributable against specific assets; and

(ii) secondly, applying any specifically allocated costs not fully recoverable from specific assets together with all general receivership costs which cannot be specifically allocated, pro rata against all assets on the same basis as the CCAA Costs;

is hereby approved, provided that the obligations of any affected creditor to pay its portion of the allocated costs in relation to any asset where they hold a first priority position (subject to the prior CCAA Costs and Receivership Costs) is [sic] postponed, pending further application at the time that the Receiver applies for approval to distribute any of the proceeds generated from the sale of any of the Petitioners' assets; [Emphasis added.]

[17] It is worth emphasizing that notwithstanding the reference to "preliminary" allocation in subpara. 6(a) of the Order, the only adjustment contemplated is in respect of sale proceeds received from the "remaining assets" (which I understand consist mainly of intangibles such as forestry licences) and that no adjustment is contemplated in respect of the sale proceeds of the assets with which we are here concerned — those items of equipment and real property referred to in Appendix F

to the Receiver's Second Report. Further, the Order does not specifically incorporate the Receiver's recommendation that if and when a secured creditor seeks to recover an asset on which it holds its security, the Court will permit such a transaction to be completed "only if, and when, the secured creditor provides the Receiver with the cash equivalent of the applicable allocated costs against that asset, as calculated by the Receiver under this proposal." Instead, the Order "postpones" the obligation of any creditor to pay its portion of the allocated costs in respect of any asset on which it holds first priority, pending further application. However, the Chambers judge did approve the entire proposal for cost allocation set out in the Receiver's reports and counsel have all agreed that the Court intended to impose the condition on recovery described at para. 12 above. I will also proceed on that assumption, although it would have been preferable if the Order had been worded to reflect this important aspect of the recommendation.

On Appeal

[18] In this court, the City submits that the Chambers judge made two basic errors of law in acceding to the Receiver's recommendation regarding the allocation of CCAA Costs: first, that in exercising his discretion the Chambers judge "ignored" a relevant factor, namely, the actual value of the asset in question; and second, that it did not lie within the jurisdiction or discretion of the Chambers judge to approve an allocation that carried with it the risk that a secured creditor — i.e., the City — would have to pay to the Receiver an amount that exceeds the value of its security interest on the Watson Island property.

[19] Counsel for the City acknowledged that the CCAA, which consists only of 22 sections, gives the court a broad discretion, in the sense that the court must consider a wide variety of competing interests which are likely to vary greatly from case to case. (See S. Waddams, "Judicial Discretion", (2001) 1 ***Cmnwth. L.J.*** 59.) As we observed in the previous *Skeena* appeal (***Clear Creek Contracting Ltd. v. Skeena Cellulose Inc.*** (2003) 13 B.C.L.R. (4th) 236, 2003 BCCA 344), the case law that has developed under the CCAA "fills the gaps" between the provisions of the statute and has been informed by the "broad public policy objectives" thereof:

> There is now a large body of judge-made law which "fills the gaps" between these provisions. Most notably, courts appear to have given full effect to the "broad public policy objectives" of the Act, which in the phrase of a venerable article on the topic (Stanley E. Edwards, "Reorganizations under the Companies' Creditors Arrangement Act", (1947) 25 *Can. Bar Rev.* 587) are to "keep the company going despite insolvency" for the benefit of creditors, shareholders and others who depend on the debtor's continued viability for their economic success. . . .
>
> In accordance with these objectives, Canadian courts have adopted a "standard of liberal construction" that serves the interests of a "broad constituency of investors, creditors and employees" and reflects "diverse societal interests." (See *Re Smoky River Coal Ltd.* (1999) 175 D.L.R. (4th) 703 (Alta. C.A.), at 721-2.) [paras. 34-35]

[20] Consistent with this approach, Canadian courts have now accepted that their discretion may be exercised to permit DIP financing and to grant "super-priority" to DIP lenders, albeit subject to certain restrictions and safeguards: see Michael B. Rotsztain, "Debtor-in-Possession Financing in Canada: Current Law and a Preferred Approach", (2000) 33 Can. Bus. L.J. 283, at 284-87; and ***Re United Used Auto & Truck Parts Ltd.*** (1999) 12 C.B.R. (4th) 144 (B.C.S.C.), aff'd (2000) 16 C.B.R. (4th) 141 (B.C.C.A.), superseding the more restrictive approach taken in

Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd. (1975) 59 D.L.R. (3d) 492, 21 C.B.R. (N.S.) 201 (Ont. C.A.) and ***Lochson Holdings Ltd. v. Eaton Mechanical Inc.*** (1984) 55 B.C.L.R. 54 (B.C.C.A.). Appellate courts also accord a high degree of deference to decisions made by Chambers judges in CCAA matters and will not exercise their own discretion in place of that already exercised by the court below. This court has stated that its powers should be exercised "sparingly" when it is asked to interfere with the exercise of discretion of a CCAA court: see ***Clear Creek***, *supra*, at para. 52, citing ***Re Pacific National Lease Holding Corp.*** (1992) 72 B.C.L.R. (2d) 368, and ***Re Smoky River Coal Ltd.*** (1999) 175 D.L.R. (4th) 703 (Alta. C.A.). In the more general context, I note the statement of Viscount Simon L.C. in ***Charles Osenton & Co. v. Johnston*** [1942] A.C. 130 (H.L.), which was quoted by the majority of the Supreme Court of Canada in ***Friends of the Old Man River Society v. Canada (Minister of Transport)*** [1992] 1 S.C.R. 3, at 76-77. Viscount Simon L.C. stated:

> The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. [at 138]

At the same time, discretionary decisions are not immune from review. As Viscount Simon L.C. stated in the same case:

> But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient

> weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified. [at 138]

(See also ***Harelkin v. University of Regina*** [1979] 2 S.C.R. 561 at 588, where it was said that in refusing to take into consideration a "major element for the determination of the case", the trial judge had failed to exercise his discretion on relevant grounds and thus gave the Court of Appeal "no choice" but to intervene.)

[21] The City contends that the Chambers judge in the case at bar "ignored" or failed to consider a relevant matter — the actual value of the Watson Island property — and proceeded on an irrelevant criterion — whether a previous appraisal had been carried out — in approving the allocation method he did. Mr. Janes referred us to ***Musqueam Indian Band v. Glass*** [2000] 2 S.C.R. 633, where the Supreme Court of Canada held that the Federal Court of Appeal had wrongly interfered with a trial judgment fixing the "value" of a leasehold interest in certain reserve lands. The Court of Appeal had ruled that the value should be determined on the basis of land in fee simple with no reduction for the fact that it was located on a reserve. However, the Supreme Court of Canada restored the trial judgment, Gonthier J. noting for the majority that the Indian band was bound to "accept the realities of the market". (Para. 44.) Similarly, in ***Cowichan Tribes v. Canada*** (2003) 314 N.R. 384, [2003] F.C.J. No. 1919, the Federal Court of Appeal upheld a trial judgment which, in determining the "fair market rental value" of property that was subject to flooding, took that susceptibility into account. Létourneau J.A. for the Court stated that "[i]t defies common sense to think that a prudent and reasonable

developer or tenant would allocate the same value to a land that is partly flooded annually as it would to a land that is not so flooded and that is ready for development or occupation. This is not a question of law: this is a fact of life, a practical reality which . . . the mortgage lenders and the insurers will soon remind you of when they assess the risk they have to assume." (Para. 9.)

[22] In response to the City's submission that the Chambers judge in the case at bar erred in the same manner as the Federal Court of Appeal in ***Glass***, counsel for the Receiver says it is implicit in the Chambers judge's Reasons that he did not accept the "negative value theory" with respect to Watson Island, particularly in light of the fact that the Province has already spent more than $19,000,000 in restoring the mill site. Mr. Millar characterized the evidence of remediation liability of $100,000,000 as "entirely vague" and noted that that estimate had included the cost of decommissioning and closure (dismantling, demolition, removal, transportation, resloping and grading) of the mill site. In his submission, it is unrealistic to think that this will ever be done in the near to middle term, and the Chambers judge must be taken to have been of the opinion that the property did have commercial value by reason of its location, its facilities, and the remediation work.

[23] In my view, these are the kinds of considerations which the Chambers judge (who has heard most if not all of the Chambers applications relating to New Skeena) was especially qualified to make. Moreover, I do not agree that the Chambers judge "ignored" the issue of the true value of the Watson Island property. He specifically referred to this matter at paras. 16-18 of his Reasons (quoted above), but at the end of the day he concluded that "perfection" in terms of matching values with costs, was

outweighed by the need for certainty and expediency. In my view, assuming for the moment that the Court had the jurisdiction to make the order it did, the Chambers judge was entitled to weigh these competing interests and to decide that the interests of all the creditors as a group overshadowed the City's particular objections.

[24] Two other factors raised by the City, however, do in my view cast greater doubt on the Court's exercise of its discretion. First, there is the fact that Prince Rupert's security and the remedies available to it are very different from those of other creditors. As has been seen, if the Watson Island property cannot be sold, the ***Local Government Act*** requires Prince Rupert to take the land, environmental liabilities and all, whether or not it will realize anything after payment of its share of the CCAA Costs. Not surprisingly, there is no case law directly on point, but in ***Re Hunters Trailer & Marine Ltd.*** (2001) 305 A.R. 175, [2001] A.J. No. 1638 (Alta. Q.B.), the Court said it would be unfair to ignore "differences in the type of security held by various creditors and the degree of potential benefit that might be derived by them from CCAA proceedings" in allocating CCAA costs. Thus the Court in ***Hunters*** approved the allocation of a share of CCAA costs to a mortgage lender that was smaller than the shares allocated to other creditors. Wachowich C.J.Q.B. commented:

> The CCAA recognizes that there may be different classes of creditors for purposes of voting on a plan of arrangement or compromise. Would UMC as first and second mortgagee of Hunters' real property have been placed in a different class than the other secured creditors? There is no significant difference in the nature of the debt giving rise to the claim. However, there is a difference in the nature and priority of

> UMC's security, the remedies that were available to it and the extent of its recovery.
>
> Under the circumstances, I conclude, as did the Interim Receiver, that UMC is in a different position than that of the other major secured creditors and it would not be equitable that it be allocated the same proportion of CCAA costs. I agree with the Interim Receiver's proposal that UMC be charged 15 percent of the Monitor's fees and $500.00 of the Monitor's legal fees, the same percentage proposed for its share of the interim receivership costs. I note that UMC also agreed with this proposal.
>
> Under the Interim Receiver's proposal, UMC is not allocated any of the DIP financing costs. The Interim Receiver and UMC take the position that UMC received no benefit from the DIP financing and therefore should not be required to contribute to repayment of these funds.
>
> Not only UMC but all of the secured creditors can point to costs that cannot be attributed to the assets over which they hold security. However, DIP financing was granted to meet the debtor company's urgent needs during the sorting-out period. That was for the benefit, at least the potential benefit, of all creditors. . . .
>
> I am of the view that UMC must bear a proportion of the DIP financing costs. I recognize that any means of calculating that percentage will be arbitrary. A strict accounting on a cost-benefit basis would be impractical. I am prepared to allocate five percent of the DIP financing costs to UMC, in addition to that share of the Monitor's fees and legal expenses identified above. [paras. 20-23 and 26]

[25] My second concern is that the Chambers judge proceeded on the assumption that there were urgent time pressures militating in favour of cost allocations that provided immediate certainty to creditors of what they were likely to be receiving net of the CCAA Costs. Indeed, at para. 3 of his Reasons, the Chambers judge noted that "time is the enemy of enterprise value" and at para. 19 that it would clearly not serve the interests of the parties to "do nothing until everything has been sold". But at this state of New Skeena's existence, the hope of "enterprise value" has had to give way to the reality of liquidation value, all efforts at restructuring the business of

the company as a going concern having failed. As in ***Re Weststar Mining Ltd.*** (1993) 75 B.C.L.R. (2d) 16 (B.C.C.A.), "The battle for the survival of the Company is over, at least for the time being. What remains is merely to determine priorities. . . ." (Para. 58, *per* McEachern C.J.B.C. dissenting, whose judgment was adopted by the Supreme Court of Canada on appeal at [1993] 2 S.C.R. 448.) The Chambers judge was not facing a "now or never" determination. As Mr. Janes noted, he could have elected to recognize the unusual position of the City and await any sale that might occur within a reasonable time. Failing such a sale, he could assign a value based on more up-to-date evidence. In the meantime, interim allocations and distributions could be made. In this regard, I note that para. 4 of the December 1 Order stated:

> 4. The sale proceeds from the sale of each specific asset shall stand in the place and stead of the asset sold and all liens, claims, encumbrances and other interests that are attached to an asset prior to its sale shall attach to the sale proceeds with the same validity, priority and in the same amounts, and subject to the same defences, that existed when the liens, claims, encumbrances and other interests attached to the asset;

As counsel for the Receiver suggested, this provision obviates in large measure any time pressure which might have made a more exact allocation of costs and proceeds impractical. Assets can be sold to the highest bidder free and clear of encumbrances. The charges attach instead to the proceeds held by the Receiver, and interim allocations and distributions can be made subject to final adjustment, all without unduly inconveniencing creditors.

[26] I would prefer, however, not to decide this appeal on the basis that the Chambers judge erred in the exercise of his discretion by failing to give due weight

to the two factors I have described. Again, an appellate court should not interfere with an exercise of discretion in the present context where the question is one of the weight or degree of importance to be given to particular factors, rather than a failure to consider such factors or the correctness, in the legal sense, of the conclusion. Instead, I turn to the more fundamental question of jurisdiction — whether it lay within the Chambers judge's authority to adopt a method of cost allocation that might require the City to pay as its share of CCAA Costs an amount greater than the value of the land over which it holds its tax lien. I note that Mr. Janes and Mr. Millar have confirmed their view that this question relates to the equitable and statutory jurisdiction of the Court under the CCAA rather than under the ***Bankruptcy and Insolvency Act***.

[27] Mr. Janes for the City submitted that the potential imposition of a "personal liability" on the City over and above its interest in the Watson Island property is fundamentally inconsistent with the entire CCAA scheme, which empowers the court to impose stays and compromise creditors' rights but not to impose further financial liabilities on creditors. He characterizes the scheme as providing a "shield, not a sword". In his submission, this principle is implicit in s. 11 of the Act, which permits a court to stay, to restrain and to prohibit various proceedings (see especially, ss. 11(3) and (4)); and it is explicit in s. 11.3, which states:

> 11.3 No order made under section 11 shall have the effect of
>
> (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

> (b) requiring the further advance of money or credit.
> [Emphasis added.]

Further, Mr. Janes contends that the orders made during the CCAA proceedings in this case which permitted the DIP loans and granted the "super-priority" to them, all contemplated that the CCAA Costs would be paid out of the proceeds of realization of the assets, not out of additional funds to be advanced by creditors. Certainly there was no explicit reference to the possibility that any secured creditor might have to advance or contribute funds beyond its existing exposure.

[28] Mr. Janes also notes what he calls the "perverse" effect of the cost allocation order in this case: while the unsecured creditors, who were the parties who stood to gain the most from the attempted restructuring of New Skeena, will bear none of the CCAA Costs under the proposed allocation, the City of Prince Rupert will, if the Watson Island property cannot be sold for the statutory "upset price", actually end up worse off. Its unpaid tax debt will go unpaid and it will have to pay something — likely between $1.5 and $2.5 million — in CCAA Costs. This is particularly anomalous when one considers that the Legislature intended to grant municipalities such as the City of Prince Rupert a very high level of priority for its claims for unpaid taxes.

[29] Counsel also notes the caution with which courts have approached the granting of the "extraordinary" remedy of priority for DIP financing, as illustrated by ***United Used Auto***, *supra*, at paras. 21-30 (B.C.S.C.). In that case, Tysoe J. quoted a passage from the judgment of Blair J. in ***Re Royal Oak Mines Inc.*** (1999) 6 C.B.R. (4th) 314 ((Ont. Gen. Div.) and a passage from a judgment of Farley J. in

Royal Oak Mines Inc. (1999) 7 C.B.R. (4th) 293 (Ont. Gen. Div.). Farley J. stated in part:

> Aside from the question of the lienholders who have registered liens which but for the Initial Order granted by Blair J. (but subject to the comeback clause) would have priority over the DIP financing, I see no reason to interfere with this superpriority granted. It would seem to me that Blair J. engaged properly in a balancing act as to the $8.4 million of superpriority DIP financing as authorized. I am in accord with his views as expressed in *Re Skydome Corporation* [(1998), 16 C.B.R. (4th) 118 (Ont. Gen. Div.)], where Blair J. stated [at para. 13]:
>
> > This is not a situation where someone is being compelled to advance further credit. What is happening is that the creditor's security is being weakened to the extent of its reduction in value. It is not the first time in restructuring proceedings where secured creditors - in the exercise of balancing the prejudices between the parties which is inherent in these situations - have been asked to make such a sacrifice. Cases such as *Re Westar Mining Ltd.* (1992), 14 C.B.R. (3d) 88 (B.C.S.C.) are examples of the flexibility which courts bring to situations such as this. See also *Re Lehndorff Gen Partner* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.); *Olympia & York Developments Limited v. Royal Trustco* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.).
>
> Implicit in his analysis and part of the equation is the reasonably anticipated benefits for all concerned which derive from these sacrifices. [para. 5; emphasis added.]

Tysoe J. in ***United Used Auto*** stated that in his view, "there should be cogent evidence that the benefit of DIP financing clearly outweighs the potential prejudice to the lenders whose security is being subordinated." (Para. 28.) He was not so satisfied in that case and therefore declined to approve the application for a prior charge to secure DIP financing which was before him.

[30] The City emphasizes the underlined sentence in the quotation above from ***Re Skydome Corporation*** and contrasts that with the situation here, where the City

may well be "compelled" to advance further funds from its pocket simply in order to "recover" an asset that will fall into its possession in any event as a matter of law and that has little or no market value at present. (I note parenthetically that no argument was made by the City to the effect that the imposition on the City of the condition reproduced at para. 12 of these Reasons contravenes s. 403(1) of the ***Local Government Act***, which requires that the local collector offer "each parcel of real property on which taxes are delinquent" for sale by public auction on the last Monday in September. See the discussion in ***Clear Creek***, *supra*, at paras. 40-42.)

[31] The Receiver contends on the other hand that the proposed cost allocation is simply a consequence of the original grant of priority to the DIP financing early on in the CCAA process, and that it was "implicit in any priority scenario that where a creditor took title to an asset, it would have to first satisfy the burden of the Charge." In the Receiver's analysis, the question in this case is not whether the Order was made without jurisdiction by virtue of the fact that it imposes a "personal liability" on the City, but rather whether it is appropriate that "if the City takes the property in lieu of taxes, it must as a condition of that taking, discharge or pay any priority charge that affects the property. That the City would have to discharge that liability upon taking title is a most uncontroversial and self-evident proposition. If one takes the benefit of an asset [one] must discharge the burdens associated with it."

[32] Counsel also emphasizes that under the terms of the Order and the Receiver's recommendation, the City would not be required to "ante up" any amount unless it decided to take the property into its own name — i.e., that the City's obligation to pay the share of the CCAA Costs would not apply if the Watson Island

property were sold to a third party without the City having to "recover" it. Further, since the mill was the "primary asset" of New Skeena, the City should, Mr. Millar argues, properly bear a large portion of the costs incurred in trying to sell the business as a going concern — a possibility that had obvious potential benefits for the City and its inhabitants. As for s. 11.3 of the CCAA, Mr. Millar says that it is not aimed at the situation with which we are concerned, but rather is intended to allow creditors the right to require "C.O.D." payment under supply contracts with the insolvent company.

[33] I agree that para. (a) of s. 11.3 was intended for the purpose Mr. Millar describes, but para. (b) appears to have a wider reach that is engaged by the facts of this case, assuming the Chambers judge's order of December 1, 2004 was an order "made under s. 11" of the CCAA. (On this latter point, neither counsel for the City nor the Receiver argued to the contrary.) In my view, the effect of the Order is to require the further advance of money or credit in certain circumstances. Considering the purpose and tenor of the Act, which does generally operate as a "shield, not a sword", I am persuaded that the Chambers judge strayed beyond his authority in acceding to the recommendation of the Receiver that if a secured creditor sought to recover the asset against which it holds security, the creditor should be required as a condition of such transaction to pay to the Receiver in cash the amount of CCAA Costs allocated against that asset. To the extent that a creditor could be required to pay funds in excess of the value of its security interest, such a condition was not, in my view, an inevitable aspect of the granting of DIP priority but

instead was an unusual feature that, in the almost unique circumstances of this case, contravenes s. 11.3(b). I would therefore allow the appeal.

[34] The question then is what order this court should make to permit the sale of New Skeena's assets to proceed as quickly and conveniently as possible, while recognizing the City's unusual situation as a secured creditor. The City sought an order to the effect that the CCAA costs should be allocated on the basis of actual values as and when they are realized, or alternatively, that the Watson Island property be treated in the same way as the "remaining assets" referred to in the Order — i.e., based upon such values as may be attributed by the court. I find the latter alternative more attractive in that it does not affect all the other assets, minimizes the accounting that will be required, and thus retains much of the efficiency of the original order. It will be clear from these Reasons, however, that if and when the time comes for the Court to allocate a value to the Watson Island property for the purposes of allocating the CCAA Costs, the effect of the order cannot be to require that Prince Rupert pay cash from its pocket as a condition of taking the property, the "value" (as determined by the Court) of which is less than the amount required to be paid.

Costs

[35] The City sought an order of costs "on a substantial indemnity scale, such costs not to form part of the Receiver's charge against the assets of the bankrupt." I would ask that the City provide us with written submissions of law concerning this

prayer, to be filed within 15 days of the issuance of these Reasons. I would then ask the Receiver to file its written submissions within 10 days of the latter date.

"The Honourable Madam Justice Newbury"

I Agree:

"The Honourable Mr. Justice Esson"

I Agree:

"The Honourable Mr. Justice Smith"

TAB15

Indexed as:

T. Eaton Co. (Re)

IN THE MATTER OF the proposal of the T. Eaton Company Limited

[1999] O.J. No. 3277

12 C.B.R. (4th) 130

File No. 31-OR-364921

Ontario Superior Court of Justice
In Bankruptcy and Insolvency - Commercial List

Farley J.

Heard: August 27, 1999.
Judgment: August 29, 1999.

(21 paras.)

Landlord and tenant -- The lease -- Restrictive covenants -- Business lease -- Bankruptcy -- Property of bankrupt -- Particular property -- Goods manufactured and sold by bankrupt.

This was a motion by the various landlords of the T. Eaton Co. for an order to state that Eatons' leases with them did not allow for liquidation or going out of business sales as envisioned by Eatons and its liquidators. The liquidators's arrangement included an augmentation provision under which the liquidator was allowed to augment Eaton's merchandise with merchandise inventory of similar quality as Eaton's customary inventory at the liquidator's risk.

HELD: The landlords' motions were dismissed except to the extent that the liquidator was not to be allowed to augment its sales by sales of goods it had acquired elsewhere. The landlords' assertion overreached. There was no prohibition in any of the Cadillac Fairview leases against a liquidation sale; most did not even prohibit a bankruptcy sale. The only lease which did prohibit liquidation or clearance sales was that of the Edmonton Londonderry Mall. The liquidator had to abide by the terms of the leases in conduction the sales on behalf of Eaton's. The liquidator did not have any higher rights than Eaton's did. The augmentation provision had to fail. To allow it to operate would

be to impose on the landlords a new arrangement with a stranger. In the end result, the liquidator could continue to conduct liquidation or store closing sales, without sales by it as principal of any augmentation merchandise.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, ss. 46, 47, 47.1, 50.4(8), 50.4(11), 81.1, 243(2).

Counsel:

Lyndon Barnes, Gordon Marantz and John MacDonald, for T. Eaton Company Limited.
A. Kauffman, for Hilfiger and Empire.
W.S. Rapoport, for Eaton's Management Employees.
R.J. Arcand, for Cambridge Shopping Centre Limited and Oxford Development Group Inc.
G. Karayannides and S. Bhattacharjee, for Cosmair Canada Inc. (Lancome).
R. Robertson, M. MacNaughton and E. Lamek, for Richter and Patners Inc., Interim Receiver.
K. Page, for National Apparel Bureau.
J. Wigley, for Shiseido (Canada) Inc., Estee Lauder Sunglass Hut Ltd. and Brandselite International Corp.
C.C. Lax, for Dylex Inc. and Grafton Fraser.
Justin R. Fogarty, for National Retail Credit Services.
M. Gottlieb and J. Swartz, for Gordon Brother Retail Partners, LLC, Schottenstein/Bernstein Capital Group, LLC, Hilco Trading Co., Inc., Garcel, Inc. and Retail Funding, Inc.
G. Grierson, for the Quadrant Cosmetics.
B. Zarnett and J. Carfagnini, for Cadillac Fairview Corporation Limited and its related companies.
S. Philpott and S. Rowland, for Employees and Retirees of T. Eaton Company Limited.
Kent E. Thomson, for Gentra Inc.
E.B. Leonard and E.P. Shea, for Jones New York, Polo Ralph Lauren Springs Canada, Riviera Concepts and Warnaco Canada.
Chris E. Reed, for Zale Canada.
K. Prehogan, for Toronto Hydro.
K. McElcheran, for Hudson's Bay Company.
M. Weinczok, for Associated Merchandising Corp., Chanel and Prestilux.
Deborah S. Grieve, for Siga International (Nautica).
Lou Brzezinski, for Sanofi Beaute Canada, Riviera Concepts Inc., Belae Brands, Givenchy Perfumes, Guerlin Paris, Calvin Klein Cosmetics, Elizabeth Arden, Puig Canada Inc., Shiseido, Brandelite and Quadrant Corporation.

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1 **FARLEY J.**:-- The various landlords of The T. Eaton Company Limited (Eaton's) advanced

the proposition on this comeback hearing that the Eaton leases with them did not allow for liquidation or going out of business sales as envisaged in the Eaton's - Richter & Partners Inc. (IR) Gordon et al (the Liquidator) documentation. Cadillac Fairview asserted in Peter Sharpe's affidavit that:

> 9. While lease arrangements which govern Eaton's right to occupy and use its premises in the Shopping Centres vary from property to property, the Cadillac Fairview leases generally contain similar provisions which (i) prevent the sub-letting, assigning, occupation, licensing or alienating of the premises to others; (ii) require the operation of a first class major department store business or a typical Eaton's department store and no other purpose; and (iii) specifically prohibit any liquidation, bankruptcy or fire sale from being carried on, conducted or advertised by Eaton's.

2 In this regard it would appear that this assertion overreaches. There is no prohibition in any of the Cadillac Fairview leases against a liquidation (or going out of business) sale; most do not even prohibit a bankruptcy sale; fire sales are not prohibited if the goods sold have been effected by a fire on the Eaton's premises. In fact the only lease brought to my attention during the hearing which prohibited liquidation sales or clearance sales was that of Gentra's Edmonton Londonderry Mall which states:

> "... and there shall be no liquidation sales or clearance sales, except clearance sales in the ordinary course of business, carried on from the store, without the written consent of Gentra."

3 This lease was handed up to me after the lunch break and after Gentra's submissions had been made earlier that morning. Certainly Mr. Sharpe, the Executive Vice-President of Cadillac Fairview is familiar with the concept of and apparently differences between "liquidation sales", "going out of business sale" or "bankruptcy sale": see his affidavit of December 12, 1991 in the Ayers Limited CCAA proceedings in Newfoundland especially at paragraph 9 which recites the provisions of section 9.02 of the Ayers lease at the Fairview Mall, Toronto. At paragraph 9. of his affidavit Mr. Sharpe indicates that:

> Every lease which Cadillac Fairview has entered into with every tenant in all of the shopping centres referred to in paragraph 4 above, including Ayers'; contain provisions which restrict in a number of ways the use of the leased premises by the tenant. Each of these leases contain restrictions on so-called "liquidation sales" in wording which is either similar or identical to the following lease entered into by Ayers in respect of the Fairview Mall shopping centre in Toronto. (emphasis added)

4 Section 9.02 is then recited which prohibits:

"... liquidation sale, "going out of business" or bankruptcy sale, ..."

5 The list at paragraph 4. of the affidavit includes the following shopping centres in which Eaton's is involved: Toronto Eaton Centre; The Promenade; Lime Ridge Mall; Le Carrefour Laval; Fairview Pointe Claire; Les Galleries Anjou; Cornwall Centre; Midtown Plaza; Polo Park. However it would be appropriate to point out that (a) the Quebec leases involving Eaton's do contain prohibitions against bankruptcy sales and (b) the Ayres lease would appear to equate a "going out of business sale" with a "bankruptcy sale". Perhaps it is inevitable in the untidiness and rush of bankruptcy matters that full research will not be conducted before making an assertion; however it is clear that the assertion is a significant overreach. It would appear that discounted sales are not unusual in shopping centres.

6 There is no quarrel by anyone and specifically Eaton's and the Liquidator that there is a duty to make full and fair disclosure of the highest nature in an ex-parte hearing (or a quasi ex-parte hearing) or that the Eaton's-IR-Liquidator documentation should not be interpreted as to their substance and in context as opposed to just a bare bones reading of the words themselves.

7 Whatever the nature of the operation - that is, that Eaton's carry on the business of a first class department store - or of a typical Eaton's store suitable for the market - it is clear that some businesses run into financial difficulty. I do not see that Eaton's operating to effect a liquidation sale is incompatible with it so functioning as a first class department store or typical Eaton's store under the circumstances in which such an objective standard store would find itself. I would note in passing that it is not contemplated that this would include the operation of a "liquidation outlet" on an ongoing indefinite basis.

8 Thus it would appear to me that we should examine whether the documentation in substance is a license or sub-lease of the premises by Eaton's directly or via the IR to the Liquidator. While it was acknowledged that the documentation was not a standard form agency agreement, that is not the end of the matter. Any documentation should be tailored to fit the circumstances prevailing. Certainly the documentation has been tailored to these circumstances precisely. It is also obvious that the drafting was not perfect, no doubt considerably influenced by the haste in which the deal and the redeal had to be negotiated and documented. The Liquidator has to abide by the terms of the leases in conducting the sale - which sale is said to be on behalf of Eaton's (or the IR). It is clear that the Liquidator, if the sale proceeds as contemplated, will reap a handsome reward (and in the view of the IR and Eaton's earn it). It is also clear that the Liquidator while paying certain expenses is doing so as the agent - and perhaps more importantly as the entity which is receiving the proceeds of the sale before a final accounting is to be conducted with its principal. It does not appear to me that the Liquidator has any higher rights than Eaton's does and that the provisions of the arrangement are in keeping with those wherein someone is to liquidate merchandise from a store in a mall; that is, these provisions in themselves appear fairly neutral. There appear to be two exceptions to this: (a) the Liquidator is given the right to terminate the operation of restaurants in the store (section 6.1) and (b) the Liquidator "shall have the right to augment the Merchandise with

merchandise inventory of similar quality and category as Merchant's customary inventory, quality and category. Such augmentation shall be at [Liquidator's] sole risk and cost ..." (replacement Section 16.2). In the circumstances I do not see the restaurant question as being of much importance in the overall circumstances.

9 In my view (b) is the important question. Certainly as constituted this would allow the Liquidator as a principal to carry on the business of selling its goods into the liquidation or store closing sales it is conducting as agent for (Eaton's and) the IR. I see no basis in the leases for this to happen. Certainly it would be to impose upon the landlords a new arrangement with a stranger since such would not appear to be a permitted licence arrangement with the tenant. This activity of the Liquidator as principal should not be allowed. That leaves open the question of whether it would be permitted as agent if this aspect of the arrangement were re-transfigured. Since the augmentation question was raised in a different context by the landlords, I will deal with it now for the sake of certainty. While replacement section 16.2 is open-ended as to the source of goods, the Liquidator in court undertook that any such augmentation would be limited to the delivery of outstanding Eaton's orders from the Eaton's suppliers. Given this approach, then one would have to puzzle over why the augmentation provision was not previously cast as an agency arrangement. Replacement section 16.2 is in my view inoperable, that is, incapable of being operated without the consent of the landlords.

10 If the augmentation provision were on an agency relationship, then it appears from attempting to sort out the exhibits that by the 45 day after August 24, 1999 (i.e. by October 9, 1999 which appears to be the end of Period 9) that this could involve a substantial amount namely some $150 million approximately, if all the figures in Exhibit 5.2 are outstanding orders. That would however appear to be an outside figure as the exhibit indicates that it is not only commitments but forecasts. As well, does commitment translate into an outstanding order? What would make sense in the circumstances which would include the aspect that this is in a Notice of Intention to File a Proposal stage as contemplated by the Bankruptcy and Insolvency Act (BIA) and the fact that Eaton's wishes to eliminate its present inventory to clear the decks (and clear out the stores so that Eaton's interest in such stores may be sold to a potential third party buyer). While it would include merchandise which has been purchased, it would not include merchandise which has not in fact been ordered. Even where there is a binding agreement between Eaton's and the supplier, the question would appear to be whether Eaton's could reasonably extricate itself from the obligation. However, augmentation merchandise would appear to include goods which have been effectively paid for, although not directly so - e.g. where Eaton's has provided a letter of credit from a financial institution to the supplier. It would also appear that where the supplier has labeled or otherwise fairly indelibly identified Eaton's on or with the goods to the objective observer, then these would be appropriate augmentation goods. In this analysis what we are looking at are goods which are Eaton's in the sense of beneficial title having passed even if the goods have not been paid for. Eaton's would be contractually obligated to pay for such goods (subject of course to any mitigation). Thus while these goods would not be in Eaton's direct hands in the sense of their being in its stores or warehouses, these goods would be Eaton's responsibility. It would seem to me that these would

fit with s. 47.1 BIA language of "debtor's property" and that this distinction between debtor's property and liquidator's property was effectively made. Certainly if Eaton's purchasing policies were appropriate, then except in the case of perhaps high fashion fad items, there would be outstanding purchase arrangements so that gaps in the product line in the stores could be plugged by deliveries until October 31, 1999. Thus in these circumstances one would expect that the augmentation goods would be but a fraction of the $150 million to the end of Period 9. I note that the Oxford and Cambridge landlords supported the view that augmentation be limited to goods on order which were effectively paid for.

11 In the end result the Liquidator in my view can continue to conduct as agent of the IR (and indirectly Eaton's) the liquidation or store closing sales, but without any sales by it as principal of any augmented merchandise.

12 I would note that as the sale progresses, there will be anticipated to be less and less inventory on hand (even if it were augmented) and thus the impact of these sales through, for example, the month of November should have limited impact upon the early Christmas sales of other retailers during that month as well as a limited ripple effect of "pre-selling" Christmas.

13 What of s. 50.4(11) BIA? This section allows an application to terminate the 30 day period within which Eaton's is to make a proposal (subject to any extensions where the onus would be on Eaton's). Thus a creditor could apply as here the landlords (e.g. Cadillac Fairview) or the 30 day goods creditors (e.g. Tommy Hilfiger) have. That application may be granted on any one of four disjunctive grounds. As to (d), the onus on the applicant is to show that "the creditors as a whole would be materially prejudiced were the application under this subsection rejected" (emphasis added). No one has advanced cogent evidence as to the "creditors as a whole". As to (a), (b) and (c), I think it appropriate to note the extensive exposure to restructurings that Mr. Hap Stephen has had prior to his becoming CFO of Eaton's, in this regard he would be alive to and cognizant of the requirements and pitfalls in trying to put together a proposal which would stand a reasonable chance of succeeding with the creditors. Mr. Stephen stated in his August 27/99 affidavit as follows:

> 18. I consider it extremely disturbing that the Sharpe affidavit states as a conclusion that "there is no realistic prospect of a viable proposal" when all of the evidence is to the contrary. I have been in continuing discussions with a prospective purchaser for certain of Eaton's retail stores and the company's shares as referenced in the August 23, 1999 Stephen affidavit. Those discussions have continued throughout the past week and are ongoing. Also, other parties have expressed interest in acquiring Eaton's leases. Cadillac was actively encouraging similar discussions with the previous prospective purchaser a few weeks ago and it is in incredible that it now takes the position that such negotiations are not worthwhile ...
>
> 19. ... Prospective purchasers of Eaton's stores have expressed an interest in pursuing such a transaction because of the "value added" components including Eaton's

tax losses and certain of its leases with below-market rates ...

20. The fact that prospective purchasers of certain of Eaton's stores recognize value in the tax losses and the below-market leases is demonstrated by the ongoing negotiations with one such prospective purchaser. It may have been easier on August 13, 1999 for management to "walk away" from the company after being advised that an earlier potential purchaser would not be proceeding with a similar transaction. However, that would have represented an abdication of management's responsibilities to Eaton's unsecured creditors and its employees. The employees are a significant stakeholder and collectively represent the largest single group of unsecured creditors.

24. I indicated in the August 23, 1999 Stephen Affidavit that I was encouraged with the prospects of Eaton's successfully concluding negotiations with a prospective purchaser for the sale of certain of its stores as part of the proposal to be forward for creditor approval. Nothing has happened in the interim to alter my view. To the contrary, the continuing negotiations and the interests expressed by others in Eaton's leases completely supports the continuing initiative by Eaton's management to conclude such a transaction. I fully appreciate the obligations owed by Eaton's to its stakeholders in this process and would absolutely refuse to support continuing negotiations with prospective purchasers if I believed there was no reasonable prospect of success.

14 Mr. Stephen will have a continuing obligation to advise if he reasonably feels that there has been a change in his view.

15 Section 81.1 BIA goods problems have usually been quite thorny ones. The relief given by this section is frequently illusory as it is so difficult to leap the various hurdles. The situation was not clarified in the 1997 amendments to the BIA. Here in this case we have another example of a difficult situation. That is during the period allowed a debtor who has filed a Notice of Intention to File a Proposal, the 30 day goods suppliers watch the calendar pass by so that even if there is no proposal advanced by the end of the 30 day period (or extension) so that a voluntary assignment in bankruptcy is deemed to be made (see s. 50.4(8)), the goods supplied will have been supplied outside the s. 81.1 30 day retrogressive period. Thus if there is a deemed assignment on the 30th day (and no goods have been obtained in that 30 day period), then on the deemed assignment in bankruptcy, there will have been no goods supplied that can be repossessed by the suppliers. I discussed this problem in Bruce Agra Foods Inc. v. Proposal of Everfresh Beverages Inc (Receiver of) (1996), 45 C.B.R. (3d) 169 (Ont. Gen. Div.).

16 It was submitted that this is a different situation. In one approach it was submitted that because it was not contemplated that Eaton's in any proposal would be an ongoing enterprise but rather was liquidating over time that the same concerns not come into play. However valid that observation may be, particularly in any submissions for an amendment of the BIA, I would however note that as discussed by Mr. Stephen, there is the live issue of a possible share deal to preserve tax

losses. In another approach it was asserted that there was a receivership over and above the interim receivership which I granted on August 23, 1999 - namely that the secured creditor was realizing on its security - and therefore the 30 day goods suppliers already had rights to repossess pursuant to that receivership - and that such rights should not be derogated from by the fact that there was an interim receivership in place. Firstly, I would observe that the secured lender Retail Funding, while a related entity to the Liquidator (Gordon) is a separate and distinct legal entity and that there was no evidence presented that these entities have merged in identity. I would also observe that it would not appear to me that this hearing was set up in any way so as to have valid determination of whether there was a receivership effected by Retail Funding.

17 I would also note that an interim receiver appointed under s. 46 or s. 47 of BIA is a receiver - although that appointment does not per se make such interim receiver a receiver of the nature contemplated by s. 243(2): see Everfresh supra. There was no evidence that the IR took possession of the inventory.

18 There also were submissions whose thrust appears to be that there was misrepresentation by omission or commission by Eaton's. That would appear to me to be outside the scope of this hearing and more properly the subject matter of a claim for damages for misrepresentation.

19 I have no doubt but that the IR will cooperate with all creditors including 30 day goods suppliers, including the facilitation of their filing claims either under the proposal or in bankruptcy as the case may be and further that the IR will to the best of its ability track the 30 day goods physically and "in the book".

20 As for the question of paragraphs 17 and 18 of the August 23, 1999 order being amended by adding in liability on the IR for "or conversion of 3rd party interests or property", I do not see this as necessary since the 30 day goods situation does not arise unless the goods have been identified by the supplier and, if so, then their identification would fix the IR with gross negligence or willful misconduct if the IR allowed sales of such identified 30 day goods if the goods were not in fact goods of the IR to sell.

21 In the end result, the motions of the landlords are dismissed (except to the extent that the Liquidator is not to be allowed to augment its agency sales by sales of goods it has acquired as principal and the liquidation prohibition at Londonderry Mall). The motions of the 30 day goods suppliers are dismissed.

FARLEY J.

cp/d/mcc

TAB16

Indexed as:

R. v. Kelly

William Thomas Kelly, appellant;
v.
Her Majesty The Queen, respondent.

[1992] 2 S.C.R. 170

[1992] S.C.J. No 53

File No.: 21719.

Supreme Court of Canada

1991: October 31 / 1992: June 11.

Present: L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Stevenson* and Iacobucci JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA (93 paras.)

* Stevenson J. took no part in the judgment.

Criminal law -- Secret commissions -- Elements of offence -- Accused acting as financial investment advisor selling housing units to his clients -- Commissions paid to accused by development company for sale of units not disclosed to clients -- Whether accused guilty of corruptly accepting a reward or benefit under s. 426(1)(a) of Criminal Code -- Whether Crown required to prove existence of corrupt bargain between giver and taker -- Meaning of word "corruptly" -- Criminal Code, R.S.C., 1985, c. C-46, s. 426(1)(a).

The accused was charged with four counts of corruptly accepting a reward or benefit contrary to s. 426(1)(a) of the Criminal Code. He was one of the principals of a company ("KPA") which offers, for a fee, financial planning services, including advice respecting investment in real estate and tax planning strategies. In 1980, the accused persuaded a property development company to give KPA the exclusive right to sell the units of its MURB project. KPA sold all the units, mainly to its clients, within the relatively short time prescribed in the agreement and received a commission from the

development company for each unit sold. These commissions were the same as those which the development company would have paid to any salesman. At trial, the evidence indicated that KPA's clients were unaware of the commissions paid by the development company to KPA. At their initial meeting with new clients, KPA only gave vague and general information as to its sources of remuneration on a "white board". The accused himself later advised his associates [page171] that, with respect to the MURB project, he did not want further disclosures in writing. In defence, the accused testified that the clients purchasing the MURB units should have known of the commissions to be paid to KPA from two small references in the Offering Memoranda on the "Issuing and Sales Costs". The accused was convicted on all four counts. The trial judge found that he had an obligation to make full, frank and fair disclosure of the sales commission. The majority of the Court of Appeal affirmed the conviction. The question raised on this appeal is what the Crown must prove in order to obtain a conviction pursuant to s. 426(1)(a) of the Criminal Code. In particular, this Court must determine whether s. 426 has any application where the party making the payments was not part of a corrupt bargain with the taker.

Held (Sopinka J. dissenting): The appeal should be dismissed.

Per L'Heureux-Dubé, Gonthier, Cory and Iacobucci JJ.: In preserving the integrity of the agency relationship and protecting the vulnerable principals, s. 426 of the Code acknowledges the importance of that relationship in our society. There are three elements to the actus reus of the offence set out in s. 426(1)(a)(ii) as they apply to an accused agent/taker with regard to the acceptance of a commission: (1) the existence of an agency relationship; (2) the accepting by the agent of a benefit as consideration for doing or forbearing to do any act in relation to the affairs of the agent's principal; and (3) the failure by the agent to make adequate and timely disclosure of the source, amount and nature of the benefit. The word "corruptly" adds that third element to the actus reus of the offence. This word in the context of secret commissions means secretly or without the requisite disclosure. The Crown is not required to prove the existence of a corrupt bargain between the giver and the taker of the reward or benefit. It is thus possible to convict a taker despite the innocence of the giver.

The requisite mens rea must also be established for each element of the actus reus. Pursuant to s. 426(1)(a)(ii), an accused agent/taker (1) must be aware of the agency relationship, (2) must knowingly accept the benefit as consideration for an act to be undertaken in relation to the affairs of the principal, and [page172] (3) must be aware of the extent of the disclosure to the principal or lack thereof. When an accused is aware that some disclosure was made, the court must determine whether, in all the circumstances of the particular case, the disclosure was in fact adequate and timely.

Here, the Crown has established all the elements requisite for conviction under s. 426. It is clear that an agency relationship existed between the accused and his clients and that he was aware of the existence of that relationship. It is also clear that the nature of the commission paid by the development company was to encourage the accused to influence his clients to purchase the MURB

units and that he was aware of this intention. He accepted the commission secretly and influenced the affairs of his principals. Finally, the payment of the commission was not disclosed in an adequate and timely manner. At the time of the sales, KPA's clients were not aware that KPA would receive a sales commission from the development company for each MURB unit sold to KPA clients. KPA disclosure of its sources of remuneration was vague and general and did not meet the objectives of s. 426. The accused himself made a conscious decision to limit the extent of the disclosure. While the Offering Memoranda for the MURB units contained two one-line references to "Issuing and Sales Costs" for the projects, there was no specific reference to the fact that it was the accused who was to receive these costs as a commission.

Per McLachlin J.: Lack of disclosure is an element of the actus reus of the offence of taking a secret commission under s. 426(1)(a)(ii) of the Code, and awareness of that lack of disclosure is an element of its mens rea. No corrupt bargain is required. However, since criminal law must be certain and definitive, the time and the degree of disclosure must be clearly defined. Agents must be given fair notice in advance whether a proposed course of conduct is criminal. With respect to the timing of disclosure, certainty requires that where the gravamen of the offence is the taking of a secret commission disclosure to the principal must be made by the time the commission is accepted. If the agent accepts a commission without beforehand (or simultaneously) advising the principal of the fact, the offence is established. With respect to the degree of disclosure, it is not enough to state at the beginning of a relationship between an agent and his principal that commissions may from time to time be taken. The requirements of s. 426(1)(a)(ii) will only be satisfied if the agent discloses to the principal that he will receive a commission with respect to the [page173] transaction in question. The amount of the commission is secondary and need not be disclosed in order to escape liability. The communication that the agent will receive a commission with respect to the particular transaction in issue will put the principal on notice that the agent is in a potential conflict of interest. Here, since there was no disclosure of the particular commission to the principals involved, the offence is made out.

Per Sopinka J. (dissenting): When an agent is charged with accepting a benefit under s. 426(1)(a)(ii) of the Code, it must be established that he accepted the benefit as a quid pro quo to influence him. To secure a conviction, the Crown must prove two essentials of the mental element of the offence: (1) that the benefit was so accepted with the agent's knowledge or belief that it was given for the purpose of influencing him; and (2) that the agent entered into the transaction mala fide. The first requirement looks to the state of mind of the agent at the time of the transaction. The corruption in this action is the belief that the valuable consideration is intended to influence the agent to show favour to some person in relation to the affairs of his principal. The taker is thus caught even if he was mistaken as to the true intention of the giver. The offence is complete without the necessity of showing that the agent was in fact influenced in his actions. It is his state of mind in accepting the consideration that is crucial. The second requirement is most easily satisfied through proof of dishonesty. Non-disclosure by the taker is not synonymous with the terms "corruptly" or mala fides, although it may be a strong indicator that the agent has acted in bad faith. In some situations disclosure or the intent to disclose will be highly relevant.

In this case, the accused should be acquitted. While he sold most of the units to his clients, that was not because he was influenced by the development company to do so nor because he believed that this was the intended purpose of either the agreement with that company or the payments. The agreement was entered into at arm's length, the commissions were the same amount as was paid to any other salesmen and they were to be paid regardless of to whom the units were sold. The decision to sell to his clients was one that the accused made unilaterally. His failure to make full disclosure [page174] amounted to a breach of his duty but he is not guilty of the offence charged.

Cases Cited

By Cory J.

Distinguished: Cooper v. Slade (1858), 6 H.L.C. 746, 10 E.R. 1488; R. v. Gallagher (1985), 16 A. Crim. R. 215; referred to: R. v. Morris (1988), 64 Sask. R. 98; R. v. Brown (1956), 116 C.C.C. 287; R. v. Arnold (1991), 65 C.C.C. (3d) 171; R. v. Wigglesworth, [1987] 2 S.C.R. 541.

By McLachlin J.

Referred to: Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), [1990] 1 S.C.R. 1123.

By Sopinka J. (dissenting)

R. v. Brown (1956), 116 C.C.C. 287; R. v. Morris (1988), 64 Sask. R. 98; R. v. Gallagher (1985), 16 A. Crim. R. 215; R. v. Gallagher (1987), 29 A. Crim. R. 33; R. v. Gross (1945), 86 C.C.C. 68.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1970, c. C-34, s. 383(1)(a).
Criminal Code, R.S.C., 1985, c. C-46, s. 426(1)(a).

Authors Cited

Bowstead on Agency, 14th ed. By F.M.B. Reynolds and B.J. Davenport. London: Sweet & Maxwell, 1976.
Fridman, G.H.L. The Law of Agency, 5th ed. London: Butterworths, 1983.

APPEAL from a judgment of the British Columbia Court of Appeal (1989), 41 B.C.L.R. (2d) 9, 52 C.C.C. (3d) 137, 73 C.R. (3d) 355, dismissing the accused's appeal from his conviction on charges of accepting a secret commission contrary to s. 426(1)(a) of the Criminal Code. Appeal dismissed, Sopinka J. dissenting.

Stephen Tick, for the appellant.
Patricia J. Donald, for the respondent.

Solicitors for the appellant: Oreck, Chernoff, Tick, Farber & Folk, Vancouver.
Solicitor for the respondent: The Ministry of the Attorney General, Vancouver.

[page175]

The judgment of L'Heureux-Dubé, Gonthier, Cory and Iacobucci JJ. was delivered by

1 CORY J.:-- The question raised on this appeal is what the Crown must prove in order to obtain a conviction pursuant to s. 426(1)(a) (formerly s. 383(1)(a)) of the Criminal Code, R.S.C., 1985, c. C-46. Particularly, it must be determined whether the section requires that there be a "corrupt bargain" between the "giver" and "taker" of the reward or benefit.

Factual Background

2 The appellant William Kelly was one of the principals of Kelly, Peters and Associates Ltd. ("KPA"). This was the central company of a group of companies which offered financial planning services to the general public. KPA and its related companies offered investment counselling to their clients and provided services to implement their planning advice. Clients of KPA were generally successful business people and professionals who earned a good income and required financial advice.

3 New clients were, as a rule, charged an advisory fee of $2,500 for a personalized "Base Plan". The Plan set out the client's financial situation and made certain basic recommendations regarding the organization of the client's financial affairs. These basic recommendations related to matters such as having a will drawn, purchasing life insurance and investing in registered retirement savings plans.

4 Clients of KPA paid additional advisory or counselling fees for advice respecting investments in real estate and tax planning strategies. These fees ranged between $2,000 and $30,000 annually depending on the nature of the advice.

5 Kelly was convicted of charges arising out of his dealings with Qualico Developments Ltd. [page176] ("Qualico"), a property development company. Each count related to a specific apartment building development marketed by Qualico. Units in these buildings were sold pursuant to the provisions of Canadian tax law respecting Multiple Use Residential Buildings, commonly referred to as MURBs. There is no question that MURBs were often purchased as tax shelters.

6 Prior to the fall of 1980, KPA had never recommended the purchase of MURBs to its clients. In October of that year, Kelly approached Qualico with regard to a MURB project being built in Vancouver and referred to as Mirror Development. Kelly told the Vancouver branch manager of Qualico that KPA provided financial advice to "good solid" clients who would be interested in investing in the MURBs of the Mirror Development. He persuaded Qualico to give KPA the exclusive right to sell the 112 units of this development.

7 Qualico had never before dealt with Kelly. As a result KPA was required to post a performance bond of $112,000. The terms of the agreement required KPA to sell all the units within a relatively short time. The agreement was signed on November 7, 1980. By the 24th of November, all the units were sold. KPA received $262,000 for the sale of the units and the performance bond was refunded. The majority of the units were sold to KPA clients, although Kelly, his wife, and some of the associates of KPA bought units as well.

8 KPA marketed three more Qualico projects in the same manner. It received total commissions from the four projects of $925,586. The fees paid by Qualico to KPA were the same as those which Qualico would have paid to any agent engaged to sell the units.

Evidence at Trial

9 A cross-section of KPA clients testified. Each one of them had bought units in the Qualico MURBs. They all purchased the MURBs upon the recommendation of Kelly or one of his associates. [page177] They all testified that they were unaware that Qualico paid KPA a sales commission for each Qualico MURB unit sold to KPA clients.

10 At their initial meeting with new clients, KPA personnel outlined the history of the firm, the various professional backgrounds of members of the firm, the investment philosophy of the firm, the services the firm could provide, and the various sources of compensation that KPA received either directly, or indirectly through related companies. The presentation took as a rule from one to one and half hours. The explanation of KPA sources of remuneration took less than five minutes. Disclosure of the sources of KPA remuneration was never put in writing to be given to the clients, nor was it raised as a matter of discussion in the initial meeting with the client. Kelly testified that his practice was to write the general sources of KPA remuneration on a "white board" during the first meeting with a new client. Kelly advised associates in his firm that he did not want to put further disclosures with regard to the MURB project in writing.

11 Kelly, in his evidence, expressed the opinion that clients purchasing the MURBs should have known, from the Offering Memoranda, of the commissions to be paid to KPA. The Offering Memoranda for each of the four projects were lengthy, somewhat complicated booklets. They contained two one-line references to "Issuing and Sales Costs" for the projects. It is not without significance that the accused in cross-examination had great difficulty finding these references in the booklets despite his reliance upon them as providing disclosure of the commissions. The clients of KPA, on the other hand, indicated that they did not read the Offering Memoranda carefully

because they relied upon the advice for which they were paying KPA. Significantly, no MURB projects other than Qualico projects were recommended to clients of KPA.

12 In 1982, the Canadian economy was beset by recession. Those who had invested in real estate could neither find buyers for their property nor [page178] make payments on their debt load. KPA's clients were thoroughly dissatisfied with their investments and were shocked when they found that the appellant had received substantial commissions for selling the MURBs. The appellant was charged with four counts of corruptly accepting a reward or benefit contrary to s. 383(1)(a) (now s. 426(1)(a)) of the Criminal Code, R.S.C. 1970, c. C-34. He was convicted on all four counts: (1987), 1 W.C.B. (2d) 173. A majority of the Court of Appeal dismissed his appeal from conviction: (1989), 41 B.C.L.R. (2d) 9, 52 C.C.C. (3d) 137, 73 C.R. (3d) 355. He now appeals as of right to this Court based on the dissenting judgment of Hutcheon J.A.

The Judgments Below

Provincial Court of British Columbia

13 The trial judge found that the timing of the demand from the clients at KPA for MURBs coincided precisely with the two-week period set out in the Qualico agreement for the sale of the units on the Mirror Development. Further, he noted that no other MURBs were recommended to KPA clients until the next Qualico project was ready.

14 The trial judge then considered the extent of the disclosure of compensation made to the clients with respect to the Qualico transactions. He found that most of KPA's clients were advised verbally that KPA received income from "real estate transactions". With regard to the terms contained in the Offering Memoranda pertaining to "sales costs" and "marketing costs" he observed that, although some experienced clients might have assumed from reading them that commission fees were being paid to KPA for the sale of the MURBs, not one of the clients testified that there was explicit disclosure with regard to the commissions to be received from Qualico.

15 The trial judge was satisfied that the appellant Kelly was indeed an agent for his clients. Kelly held himself out as a professional financial planner [page179] with special skills. He gave advice on significant and confidential matters. He specifically set out to establish a long-term fiduciary relationship with his clients. He was both an advisor and the implementor of the advice for his clients who were, in that regard, his principals.

16 The trial judge emphasized that the appellant conducted himself "in a manner that was calculated to result in enjoying his clients' fullest confidence and trust". He also observed that "the Accused went a long way out of his way to deliberately close his clients' eyes to the possibility of corruption". It was his opinion that the appellant did not disclose the Qualico commissions to his clients. The essence of the judgment is set out in these words:

> ... he had an obligation to make full, frank and fair disclosure of the Qualico fees.

> At best on the evidence he deliberately made disclosure of those fees a remote possibility and not even a probability. In failing to make adequate disclosure, I find that the Accused acted dishonestly, unfaithfully, without integrity and therefore corruptly in accepting the Qualico fees.
>
> If his clients had been provided full, frank and fair disclosure some of them probably would not have acted any differently. But some of them might have been in a better position to negotiate down the amount of advisory fees they were paying. Some of them might have questioned both the quality and quantity of M.U.R.B.s they were told to buy. Some of them might have invested in other M.U.R.B.s, the purchase of which would not have resulted in commissions being paid to the Accused.
>
> By contracting secretly with Qualico, the Accused knowingly fettered what he held out to be his professional judgment and put himself in a criminal conflict of interest. [Emphasis in original.]

The trial judge therefore found the appellant guilty as charged on all four counts of the indictment.

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Court of Appeal (1989), 52 C.C.C. (3d) 137

17 Locke J.A., writing for the majority, quoted from the reasons of the Saskatchewan Court of Appeal, in R. v. Morris (1988), 64 Sask. R. 98, at p. 118, where that court found that the provisions of s. 383 (now s. 426) are directed toward the preservation of the integrity of employees and agents of a principal and those who deal with them. To that end society has decreed that secret commissions are not acceptable as they compromise the integrity of our commercial life. The essence of this offence involves the taking of a "secret commission". However, if the agent takes a commission with the full knowledge and consent of his principal then no offence is made out.

18 In the opinion of Locke J.A. the section is designed to prevent agents from being put in a position of temptation. He cited R. v. Brown (1956), 116 C.C.C. 287, at p. 289, for the proposition that "the act of doing the very thing which the statute forbids is a corrupt act within the meaning of the word "corruptly" used in the section under consideration" (p. 154).

19 He also determined that this section does not require a "corrupt bargain". He put his position in this way (at p. 155):

> ... the statute requires a transaction, but that transaction need be no more than the giver paying the taker to do something in relation to his client's affairs, and the taker knowing this. Such a transaction can be completely blameless in so far as the giver is concerned, and in the ordinary course of business. But the crime is committed by the taker who receives the money knowing the reason it is paid. That, in my view, is this case.
>
> ...
>
> As I have said, in my opinion the "corruption" can be one-sided only. The precise words of the section do not literally require that the other party to the transaction also be guilty of an offence. [Emphasis in original.]

20 He was of the view that the acceptance by Kelly of the commission from Qualico was "corrupt" [page181] unless sufficient disclosure was made to the clients of KPA.

21 He said "it cannot be successfully contended that there is no basis for the trial judge's finding that there had not been sufficient disclosure of the Qualico commissions" (p. 159). In his view, "[t]he disclosure must be adequate and full in the sense that the principal must be specifically advised, or it be otherwise made so crystal clear that he could not deny he ought to have known. That was not done in this case" (p. 160). As a result the majority dismissed the appeal.

22 Hutcheon J.A. dissenting found that this section required proof of a "corrupt bargain" between the agent and the third party. He concluded that this section had no application in the absence of a corrupt bargain between the taker and the giver. He then applied his conclusion to the facts of this case in these words (at p. 146):

> ... Qualico was not a party to a corrupt bargain. The commissions were paid at the ordinary rate and in the ordinary course of business. Qualico knew nothing of the relations between Kelly/Peters and its clients. As I view s. 383, in every case of a completed offence, there must be a giver of the benefit "in consideration of ..." and a taker of the benefit "in consideration of ...". Qualico did not "give" anything; it paid the ordinary commission paid other agents. In these circumstances s. 383 of the Criminal Code has no application. [Emphasis in original.]

Hutcheon J.A. would have allowed the appeal and set aside the convictions.

The Issue

23 The issue on appeal is relatively narrow. It must be based upon the question of law on which Hutcheon J.A. dissented from the majority. The formal order of the Court of Appeal was carefully drawn and settled by that court. The portion pertaining [page182] to the dissenting reasons of

Hutcheon J.A. is as follows:

> AND BE IT FURTHER RECORDED THAT The Honourable Mr. Justice Hutcheon dissented and would have dismissed the appeal, and his dissent was grounded in whole upon the following questions of law:
>
> 1. The essence of the case for the Crown was that the commissions were accepted by Kelly/Peters secretly and contrary to Section 383(1)(a) of the Criminal Code. The main issue on this appeal is whether s. 383 has any application where the person making the payments was not part of a corrupt bargain with Kelly. My conclusion is that s. 383 (now s. 426(1)(a)) has no application in such circumstances and the conviction must be quashed.

24 Thus, it is apparent that the dissenting reasons give rise to only one question of law. Namely, it must be determined whether s. 383 (now s. 426) has any application where the party making the payments, Qualico, was not part of a corrupt bargain with the taker, Kelly. In answering the "corrupt bargain" question, it is necessary to examine this issue in the context of the elements of the offence and the meaning of "corruptly".

The Relevant Statutory Provision

25 Section 426(1) of the Criminal Code provides:

> 426. (1) Every one commits an offence who
>
> (a) corruptly
>
> (i) gives, offers or agrees to give or offer to an agent, or
> (ii) being an agent, demands, accepts or offers or agrees to accept from any person,
>
> any reward, advantage or benefit of any kind as consideration for doing or forbearing to do, or for having done or forborne to do, any act relating to the affairs or business of his principal or for showing or forbearing to show favour or disfavour to any person with relation to the affairs or business of his principal;

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The Importance of the Agency Relationship

26 Before considering the purpose of s. 426, something must be said of the importance of the agency relationship in today's society. Society today simply could not function without the services of agents. The number of the principal/agent relationships is legion. It is difficult to sell a house or commercial property without relying upon a real estate agent. It is difficult to place insurance of any kind without consulting an insurance agent. Holidays are arranged through a travel agent. Brokers act as agents in the most complex and difficult financial transactions. Solicitors act as agents for their clients.

27 With increasing frequency financial advisors are acting as agents for their clients. Very often business and professional people earning a good income are too busy earning that income to properly arrange their financial affairs. They turn to financial advisors for assistance. The principal/agent relationship is almost invariably based upon the disclosure by the principal to the agent of confidential information. The relationship is founded upon the trust and confidence that the principal can repose in the advice given and the services performed by the agent.

The Nature of Agency

28 In The Law of Agency (5th ed. 1983), Fridman suggests at p. 9 the following definition of agency:

> Agency is the relationship that exists between two persons when one, called the agent, is considered in law to represent the other, called the principal, in such a way as to be able to affect the principal's legal position in respect of strangers to the relationship by the making of contracts or the disposition of property. [Emphasis in original.]

29 The principal must be able to place trust and confidence in the agent since the agent has the authority to affect the legal position of the principal. This is perhaps the focus of the relationship. In essence the agent acts to achieve the same results that would have been obtained if the principal had acted on his or her own account. The influence the [page184] agent can have on the affairs of the principal and the power to take action on behalf of the principal are significant. They are of such great significance that it follows as the night the day that the agent must always act in the best interests of the principal.

The Duties of an Agent

30 The agent is obliged to perform those duties which he or she has undertaken to perform. The primary consideration in performing the duties of the agent must be to always act in the best interests of the principal. However, in performing them the agent must not exceed the authority which was delegated by the principal.

31 In the context of the "Secret Commission" cases, the fundamental duties of the agent are those arising from the fiduciary nature of the agency relationship. The relationship of trust focuses on the principal with the result that agents must not let their own personal interests conflict with the obligations owing to their principals. A conflict of interest exists when an agent is faced with a choice between the agent's personal interest and the agent's duty to the principal. Fridman, supra, put it in this way (at p. 153):

> Where the agent is in a position in which his own interest may affect the performance of his duty to the principal, the agent is obliged to make a full disclosure of all the material circumstances, so that the principal, with such full knowledge, can choose whether to consent to the agent's acting.

32 The policy of the courts has been stringent in seeking to prohibit not just actual fraud perpetrated by agents on their principals but also in prohibiting the creation of a situation where agents could be tempted into fraud. The text, Bowstead on Agency (14th ed. 1976), provides several examples where the agent has a personal interest and, therefore, must make full disclosure (at p. 130):

> ... an agent may not buy his principal's property or sell his property to his principal because in such a case his interest will be in conflict with his duty. He is not [page185] allowed to receive a commission from both parties to a transaction; he may not make any secret profits by exploiting his position or the property of his principal; he may not acquire a benefit for himself by dealing with a third party in breach of his relationship with his principal, nor may he compete with his principal.

33 The agency relationship is extremely important to the functioning of our society. It is a relationship based on trust and it is fiduciary in nature. It is essential that the integrity of that relationship be preserved.

The Purpose of Section 426

34 There can be no doubt that s. 426 acknowledges both the importance of the agency relationship and the necessity of preserving the integrity of that relationship. It confirms that an agent should not be placed in a position which is in conflict with that of the principal. It recognizes that a benefit taken by an agent from a third party will place that agent in a conflict of interest position with the principal unless the benefit is promptly and adequately disclosed. No one should provide an agent with a benefit, knowing the benefit to be secret, in order to influence the agent with regard to the affairs of the principal. To do so corrupts and destroys the agency relationship. The secret benefit renders the advice and services of an agent so suspect that they cannot be accepted.

35 The position was correctly stated in R. v. Morris, supra, where at pp. 112 and 116 the

following appears:

> The intent of the section is that no one shall make secret use of an agent's position and services by means of giving him any kind of consideration for it ... . [T]he intent in passing this section was and is to protect the principal, the employer, in the conduct of his affairs and business against people who might make use or attempt to make use of his agent.
>
> ...
>
> [page186]
>
> The legislative history of this section demonstrates that the purpose and intent of it is to criminalize an agent's or employee's act of accepting "secret commissions" for showing favour or disfavour to any person with relation to the affairs or business of his principal.

36 There can be no doubt that the commendable aim of s. 426 is to protect the agency relationship, to preserve its integrity and to protect the principal.

Is Section 426 Applicable to the Facts of this Case?

(a) Agency Relationship -- The First Element

37 First the Crown must establish that Kelly was acting, and knew he was acting, as an agent for the clients of his company KPA. There can be no doubt in this case that an agency relationship existed between Kelly and his clients and that Kelly was aware of the existence of that relationship. Indeed this element of the offence was not an issue on this appeal or at the trial.

(b) Accepting a Benefit to Influence One's Principal -- The Second Element

38 The second element the Crown must prove is that the agent took the benefit as consideration for acting in relation to the affairs of the agent's principal. There can be no doubt that Kelly accepted a commission from a third party. It goes without saying that this commission comes within the category of a "reward, advantage, or benefit" required by s. 426. Nor can there be any question that the commissions were accepted as consideration for doing an act in relation to the affairs of the principals. Clearly, Kelly accepted the payment for recommending and eventually selling the MURBs to his clients.

39 To establish the requisite mens rea for this second element, the Crown must prove that the taker, knowingly accepted the commission as consideration for acting in relation to the affairs of his

clients or principals. It must be remembered that offences involving "secret commissions" are by their very nature secretive. They arise from operations that are inherently covert. It follows that [page187] courts should in these cases apply common sense and draw the reasonable and appropriate inferences from the proven facts.

40 Certainly Qualico's purpose in paying commissions to Kelly would be to encourage Kelly to influence his clients to purchase Qualico MURBs. Here it was Kelly who sought out Qualico to negotiate an agreement for selling MURBs and for receiving commissions on those sales. It was Kelly who advised the resident manager of Qualico that he had "good solid" clients to whom he could sell the MURBs. On the first development, Kelly was prepared to incur the risks of a performance bond with a strict time limit as part of the agreement for selling the entire development. The only time that Kelly advised any of his clients to purchase MURBs was when the Qualico developments were put on the market. Thus, it is clear from the inherent nature of commissions and from Kelly's actions that Kelly knowingly accepted the Qualico payments as consideration for influencing his principals (that is to say his clients) to purchase MURBs. He was eminently successful in doing just that.

(c) Non-Disclosure and the Meaning to be Attributed to "Corruptly" -- The Third Element

(i) Meaning of "Corruptly" in Section 426

41 It will be remembered that s. 426 covers everyone who corruptly

1. gives, offers or agrees to give or offer to an agent, or
2. being an agent, demands, accepts or offers or agrees to accept from any person, any reward, etc.

42 What meaning should be given to the word "corruptly" in the context of this section? It is argued that the offence is complete as soon as the agent takes the benefit as consideration for influencing the affairs of the principal. This is based [page188] upon decisions such as Cooper v. Slade (1858), 6 H.L.C. 746, 10 E.R. 1488, and R. v. Gallagher (1985), 16 A. Crim. R. 215 (Vict. C.C.A.). I cannot accept this position. It stems from the old jurisprudence on the corruption of voters. It is true these cases together with those which deal with the bribery of officials are concerned with the interpretation of "corruption". However, they are readily distinguishable from the secret commissions cases. In bribery cases there is no prerequisite that an agency relationship exists. Yet the whole aim and object of s. 426 is the protection of the vulnerable principal and the preservation of the integrity of the agent/principal relationship. Furthermore, the nature of a commission is very different from that of a bribe.

43 The interpretation of the word "corruptly" must take place within the context of s. 426 itself. It is a trite rule of statutory interpretation that every word in the statute must be given a meaning. It

would be superfluous to include "corruptly" in the section if the offence were complete upon the taking of the benefit in the circumstances described by the section. The word must add something to the offence.

44 In my view, corruptly, as used in the section, designates secrecy as the corrupting element of the offence. It is the failure to disclose that makes it impossible for the principal to determine whether to act upon the advice of the agent or accept the actions of the agent. It is the non-disclosure which makes the receipt of the commission or reward corrupt. The word corruptly, in this context, adds the element of non-disclosure to the actus reus of the offence.

45 The recognition of secrecy as the corrupting element of s. 426 is consistent with the analysis in R. v. Brown, supra. There Laidlaw J.A. discussed the meaning of "corruptly" in the context of s. 368 (now s. 426). He found that the "evil against which that provision in the Criminal Code is directed is secret transactions or dealings with a person in the [page189] position of agent concerning the affairs or business of the agent's principal" (p. 289). (Emphasis added.)

46 The interpretation of corruptly as secretly or without disclosure reinforces the aim of s. 426 to preserve the integrity of the agent/principal relationship. It is as well supported by the heading "Secret Commission" which precedes this section. It is the secrecy of the benefit and not the benefit itself which constitutes the essence of the offence. The appellant Kelly argued that the words in the heading are merely marginal notes, and as such should not be considered when interpreting the words in the section. I cannot agree with that contention. R. v. Wigglesworth, [1987] 2 S.C.R. 541, makes it clear that it is appropriate to consider the statutory heading and the history of a section as an aid in interpreting the aim of a section.

47 In sum, corruptly, in the context of secret commissions, means without disclosure. This definition provides some symmetry between the two offences created by s. 426(1)(a). Corruptly, with respect to the taker/agent, refers to the agent's failure to disclose the payment to the principal in an adequate and timely manner. With respect to the giver, corruptly means the reward was given with the expectation and intention that the agent would not disclose it to the principal in an adequate and timely manner.

(ii) What is the Appropriate Standard for Disclosure?

48 What then is the extent of disclosure that is required of an agent? To put it in another way, what degree of non-disclosure is the Crown required to prove in order to establish the guilt of an agent under s. 426? The majority of the British Columbia Court of Appeal in Kelly held that the [page190] disclosure "must be adequate and full in the sense that the principal must be specifically advised, or it be otherwise made so crystal clear that he could not deny he ought to have known" (p. 160). The Supreme Court of Nova Scotia, Appeal Division in R. v. Arnold (1991), 65 C.C.C. (3d) 171 agreed with this standard. These courts held that there must be full, frank and fair disclosure made by the agent. On the other hand, Hutcheon J.A. dissenting in Kelly stated in obiter, that a standard of "full, frank and fair disclosure" would be too high for criminal law and that "partial

disclosure may be sufficient".

49 Once again a consideration of the aim of s. 426 may be of assistance in determining the requisite standard of disclosure. The policy motivating the prohibition of secret commissions is the protection of vulnerable principals and the preservation of the integrity of the agency relationship. A requirement that disclosure of a commission be made by the agent promotes the objective of this section. Indeed, disclosure is essential to alert the principal to the existence of conflict of interest situations. In the absence of disclosure, the principal has no way of knowing if the agent is truly acting in the principal's best interests and cannot determine whether the advice of the agent should be accepted.

50 If the object of the section is to be attained, then adequate and timely disclosure must be required of the agent. A general and vague disclosure that the agent is receiving commissions will not meet the objective of this section. The agent must disclose the nature of the benefit which is being received, the amount of that benefit calculated to the best of the agent's ability and the source of the benefit. It may not be possible for the agent to be exact as to the amount of commission which will be received. It will suffice if a reasonable effort is made to alert the principal as to the approximate amount and source of commission to be received. Obviously, the principal will be influenced by the amount of benefit the agent is receiving. The greater the benefit [page191] to the agent, the greater the agent's conflict of interest, and commensurately the greater the risk for the principal. The disclosure must be timely in the sense that the principal must be made aware of the benefit as soon as possible. Certainly the disclosure must be made at the point when the reward may influence the agent in relation to the principal's affairs. It is essential then that the agent clearly disclose to the principal as promptly as possible the source and amount or approximate amount of the benefit.

51 It is only if the disclosure is both adequate and timely that the agency relationship would be protected. With this knowledge, the principal would then be able to determine whether, and to what extent, to rely upon the advice given by the agent. It would be preferable if the disclosure were made in writing.

52 It is clear that KPA's clients were not aware that KPA accepted a sales commission from Qualico for each Qualico MURB sold to KPA clients. At their initial meeting with new clients, KPA personnel described the history of the firm, the services that the firm could provide and the various sources of compensation that KPA received. While the entire presentation took approximately one and a half hours, the explanation of sources of remuneration took less than five minutes. Such a vague and general disclosure is not sufficient to meet the objectives of s. 426.

53 At the time of the Qualico sales, there was no evidence that the clients were told that KPA was to receive commissions from Qualico. Kelly himself advised KPA associates that he did not want to put in writing any further disclosure concerning sources of remuneration for the MURB project. While the Offering Memoranda for the Qualico MURBs contained two one-line references to

"Issuing and Sales Costs" for the projects, there was no specific reference to the fact that it was the appellant who was to receive these costs as a commission. Thus, in this case, it certainly could not be said that the disclosure was adequate and [page192] timely. As well it can be seen that Kelly was aware of the extent of the disclosure and made a conscious decision to limit and restrict it. There was then cogent evidence upon which the convictions of the appellant could properly be based.

(iii) Corrupt Bargain

54 Is the Crown required to prove that there was a corrupt bargain between the giver and taker of the benefit? I think not. That was the basis of Hutcheon J.A.'s dissent. He held that the existence of a "corrupt bargain" is a pre-requisite to the commission of the offence described in s. 426. Hutcheon J.A.'s position is that there must be a guilty giver and a guilty taker in order for the Crown to secure a conviction under s. 426. The corrupt bargain approach focuses on the relationship between the agent and the third party rather than on the critical relationship which exists between the agent and principal.

55 The requirement of both a corrupt giver and a corrupt taker collapses the two independent provisions of s. 426(1)(a). The use of the disjunctive "or" in s. 426(1)(a) must mean that the section applies to either the giver or the taker. The provision need not apply to both at the same time. This interpretation I believe is supported by the obvious intent and aim of the section itself.

56 To repeat, the aim of s. 426 is to protect the principal in the conduct of the principal's affairs against people who might use or attempt to make use of the principal's agent. The section is concerned with the integrity of the agent and the right of the principal to rely upon the agent's integrity. Thus, if the agent/taker secretly accepts a commission to influence the principal's affairs there ought to be a finding of guilt whether or not the expectation and intention of the giver was that the taker would not disclose the benefit to the principal in an adequate and timely manner.

[page193]

57 The question of the corrupt bargain requirement is resolved by the definition of the offence contained in the section. Section 426(1)(a)(ii) provides that a crime is committed when the agent/taker knowingly accepts a benefit as consideration for influencing the affairs of the agent's principal without sufficient disclosure. In the case of a prosecution of an agent/taker under this section, the giver of the benefit must have paid the benefit to the taker as consideration for influencing the taker's principal. However, there is no requirement under s. 426(1)(a)(ii) for the Crown to prove that the giver was corrupt in the sense that the giver knew, expected or intended that the agent/taker would not disclose the benefit to the principal in an adequate and timely manner. Section 426 provides for the conviction of a guilty taker regardless of the guilt or innocence of the giver. A corrupt bargain is not required by the section.

Summary

58 There are then three elements to the actus reus of the offence set out in s. 426(1)(a)(ii) as they apply to an accused agent/taker with regard to the acceptance of a commission:

(1) the existence of an agency relationship;

[page194]

(2) the accepting by an agent of a benefit as consideration for doing or forbearing to do any act in relation to the affairs of the agent's principal; and
(3) the failure by the agent to make adequate and timely disclosure of the source, amount and nature of the benefit.

59 The requisite mens rea must be established for each element of the actus reus. Pursuant to s. 426(1)(a)(ii), an accused agent/taker:

(1) must be aware of the agency relationship;
(2) must knowingly accept the benefit as consideration for an act to be undertaken in relation to the affairs of the principal; and
(3) must be aware of the extent of the disclosure to the principal or lack thereof.

60 If the accused was aware that some disclosure was made then it will be for the court to determine whether, in all the circumstances of the particular case, it was in fact adequate and timely.

61 The word "corruptly" in the context of secret commissions means secretly or without the requisite disclosure. There is no "corrupt bargain" requirement. Thus, it is possible to convict a taker of a reward or benefit despite the innocence of the giver of the reward or benefit. Non-disclosure will be established for the purposes of the section if the Crown demonstrates that adequate and timely disclosure of the source, amount and nature of the benefit has not been made by the agent to the principal.

62 In the case at bar, Qualico paid the standard commission to Kelly. It is clear that the nature of the commission was to encourage Kelly to influence his clients. Kelly was aware of this intention. He accepted the commission secretly and influenced the affairs of his principals. The payment of the commission was not disclosed in an adequate and timely manner. The Crown was not required to prove that Qualico's actions in paying the commissions were corrupt or part of a corrupt bargain with Kelly.

63 The Crown therefore has established all the elements requisite for conviction under s. 426.

Disposition

64 In the result the appeal must be dismissed.

[page195]

The following are the reasons delivered by

65 SOPINKA J. (dissenting):-- I have had the opportunity of reading the reasons of Cory J. herein but unfortunately I cannot agree with the result that he has reached. I agree with him that the relationship of principal and agent is an important one and that the trust on which it is dependent should be fostered by the law. I do not agree that this should be done by criminalizing breaches of duty unless Parliament has clearly indicated its intention to do so. More specifically, I cannot accept that the unilateral act of the appellant in failing to make full disclosure converts a breach of duty into criminal conduct.

The Purpose and Meaning of Section 426

66 A review of the history of the section shows that it deals with the giving of secret commissions or bribes to or by an agent. These benefits or rewards must have as their purpose the influencing of the agent in the exercise of his or her duty to the principal. I adopt the following statement of Laidlaw J.A. in R. v. Brown (1956), 116 C.C.C. 287 (Ont. C.A.), at p. 239, as a definitive statement of the purpose of the legislation:

> The evil against which that provision in the Criminal Code is directed is secret transactions or dealings with a person in the position of agent concerning the affairs or business of the agent's principal. It is intended that no one shall make secret use of the agent's position and services by means of giving him any kind of consideration for them. The agent is prohibited from accepting or offering or agreeing to accept any consideration from anyone other than his principal for any service rendered with relation to the affairs or business of his principal. It is intended to protect the principal in the conduct of his affairs and business against persons who might make secret use, or attempt to make such use, of the services of his agent. He is to be free at all times and under all circumstances from such mischievous influence. Likewise, it is intended that the agent shall be protected against any person who is willing to make use secretly of his position and services. Everyone is prohibited from entering into secret transactions under which he "gives, offers or agrees to give or offer" consideration to an [page196] agent for services with relation to the affairs or business of his principal. [Emphasis added.]

67 What the section proscribes are transactions or dealings designed to influence an agent in his conduct of the principals' affairs. It seeks to proscribe the various stages of such transactions or dealings. It applies at the formative stage by prohibiting an offer or demand. It applies to an agreement and it applies to dealings that are completed by the exchange of benefits or rewards.

68 What the section seeks to achieve is to keep the agent free of the influence of third parties who seek to reward the agent in return for some act affecting the affairs of the principal. In R. v. Morris (1988), 64 Sask. R. 98 (C.A.), it was stated (at p. 112):

> He must be free at all times and under all circumstances from such an influence. Likewise, the intent is to protect the employee from being approached by people who are willing to make use secretly of his position and services and who are willing to reward him or pay him for doing so.

69 Accordingly, when an agent is charged as the person receiving a benefit or reward, it must be established that he or she accepted it as a quid pro quo to influence him or her. This requires proof that it was offered, promised or given for this purpose and that it was within the agent's knowledge or belief that it was given for this purpose.

70 Considerable reliance was placed by the majority of the Court of Appeal on the judgments of the Court of Criminal Appeal of Victoria in R. v. Gallagher, infra. In that case an agent was prosecuted for receipt of gifts in contravention of the Victoria version of the corruption law. Section 176(1)(b) of the Crimes Act 1958 (Vict.) provided:

> Whosoever being an agent corruptly receives or solicits from any person for himself or for any other person any valuable consideration --
>
> ...

[page197]

> (b) the receipt or any expectation of which would in any way tend to influence him to show or to forbear to show favour or disfavour to any person in relation to his principal's affairs or business;
>
> ...
>
> shall be guilty of an indictable offence ... .

In the first appeal (1985), 16 A. Crim. R. 215, the following charge to the jury was approved (at p. 222):

> The fourth and final element of the crime alleged in each of the counts is that the agent corruptly received a valuable consideration. This looks to the state of mind of the agent at the time he received the valuable consideration. He acted corruptly if he then believed that the person giving him the valuable consideration intended that it should influence him to show favour or to forbear to show disfavour to some person in relation to his principal's affairs or business. It is irrelevant whether the agent himself intended by the receipt of the valuable consideration to show favour or forbear to show disfavour or not. Indeed, it is irrelevant as to whether or not he did show favour or forbear to show disfavour. If he believed that the person giving him the valuable consideration so intended to influence him, that is enough, because by accepting it he thereby had his loyalty divided. [Emphasis added.]

A new trial was, however, ordered on other grounds. The accused was convicted at the new trial and appealed again. See R. v. Gallagher (1987), 29 A. Crim. R. 33. The Court of Appeal confirmed in the latter appeal that the recipient must believe that the giver intends that the benefit should influence the taker to show favour to the giver in the taker's dealings with the affairs of the principal. It was on this basis that the taker could be found guilty but the giver not. At page 35 the court stated: "... if the recipient mistakenly believed that the giver intended to influence him the giver would not be acting corruptly but the recipient would be."

71 Section 426 is more emphatic than the Victoria statute that the purpose of the payment must be to influence the agent to do or forbear from doing some act relating to the affairs of the principal. The [page198] agent is guilty only if the benefit or reward is "as consideration for doing or forbearing to do, or for having done or forborne to do, any act relating to the affairs or business of his principal ... ". This requires either that the benefit is in fact offered for this purpose or that the recipient believes that it is. A benefit cannot be received in consideration for doing such an act if it is neither intended for that purpose by the giver nor believed to be so by the taker. Ordinarily, in any transaction the "consideration for" is the quid pro quo for each party's obligation. The recipient of a promise or a benefit as a result of a promise does not determine its character unilaterally. Its character is determined by the promisor with the agreement of the promisee.

72 In most cases, therefore, the offence against the agent will be made out by establishing that he or she accepted a reward offered, promised or given for the purpose of influencing the agent. The offence is complete without the necessity of showing that the agent was in fact influenced in his or her actions. As pointed out by the Court of Appeal in Gallagher, it is the state of mind of the agent in accepting the consideration that is crucial. If the agent's state of mind is affected by the temptation to affect the manner in which his duty is carried out by the expectation of a benefit or reward the evil against which the provision is aimed is engaged. For the same reason if the agent demands a benefit in return for some act or forbearance vis-à-vis the principal the section applies. The agent's loyalty has been compromised by the expectation of reward. It is for this reason that an agent who believes that a benefit is being offered as consideration for affecting the affairs of his

principal is guilty even if it was not in fact offered for this purpose.

73 The use of the word "corruptly" serves to emphasize the requirement that the acts of the giver or taker are not innocently done but mala fide in the sense of intentionally doing what the section otherwise forbids. In R. v. Brown, supra, at p. 289, "corruptly" was stated to mean "the act of [page199] doing the very thing which the statute forbids". In R. v. Gross (1945), 86 C.C.C. 68 (Ont. C.A.), Roach J.A., while emphasizing the purpose of the gift or consideration, added that it must be mala fide. He stated (at p. 75):

> The word "corruptly" in the section sounds the keynote to the conduct at which the section is aimed. The evil is the giving of a gift or consideration, not bona fide but mala fide, and designedly, wholly or partially, for the purpose of bringing about the effect forbidden by the section.

74 I do not agree that non-disclosure by the offeree is synonymous with the term "corruptly". While in some situations to which the section applies disclosure or the intention to disclose on the part of the offeree may negative mala fides, in others the fact of disclosure or intention to disclose is irrelevant. For example, when the giver is accused he or she may be guilty if he or she simply makes an offer as consideration for affecting the affairs of the principal. Provided that the intention of the giver is that the benefit not be disclosed to the principal, the offence is complete when the offer is made. The intention on the part of the offeree to disclose or indeed actual disclosure on his or her part is irrelevant. Inasmuch as the giver would still have acted corruptly, it cannot be treated as if the two terms were interchangeable. I regard disclosure and non-disclosure as one factor which in some applications of the section may be relevant in respect of the mental element of the offence. In cases in which the giver is charged, the offence is complete when the offer is made, accepted or the benefit or reward taken with the requisite state of mind. The cases to which I have referred make it plain that the gravamen of the offence as regards the recipient is the influence on the mind of the agent at the time at which one of these events takes place. If subsequent conduct is not relevant to show that the agent actually was or was not influenced, subsequent disclosure is also not relevant to excuse an offence which is complete.

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Application to this Case

75 The words of the charges in this case make it clear that the offences charged are in relation to a transaction with Qualico pursuant to which the appellant accepted consideration for inducing his clients to invest in Mirror Development. Count 1 which is typical reads as follows:

> Between the 1st day of June, A.D. 1980, and the 31st day of March, A.D. 1983, at the City of Vancouver, Province of British Columbia, being an agent for Janet

> BIGA, Michael DRISCOLL, Bruce HARRISON, Garry HENRY, and other clients of KELLY PETERS & ASSOCIATES LTD., did corruptly accept from QUALICO DEVELOPMENTS LTD. a reward or benefit, to wit, Two Hundred Sixty-Two Thousand Dollars ($262,000), as consideration for doing or having done an act relating to the affairs of Janet BIGA, Michael DRISCOLL, Bruce HARRISON, Garry HENRY, and other clients of KELLY PETERS & ASSOCIATES LTD., concerning the investments by the aforesaid persons in Mirror Developments, contrary to Section 383(1)(a) of the Criminal Code of Canada. [Emphasis added.]

76 The payments by Qualico were made to the appellant pursuant to an agreement that could not be said to be in consideration of the sale to clients of the appellant. The commissions were to be paid in consideration of a sale to whomever it was made. The agreement was entered into at arm's length and the commissions were the same amount as was paid to any other salesmen. While in many instances the appellant sold to his clients that was not because he was influenced by Qualico to do so nor because he believed that this was the intended purpose of either the agreement with Qualico or of the payments. The decision to sell to his clients was one that he made unilaterally. His failure to make full disclosure amounted to a breach of his duty but he is not guilty of the offence charged.

77 The majority of the Court of Appeal summed up the case against the appellant as follows:

> I think the statute requires a transaction, but that transaction need be no more than the giver paying the taker to do something in relation to his client's affairs, and the [page201] taker knowing this. Such a transaction can be completely blameless in so far as the giver is concerned, and in the ordinary course of business. But the crime is committed by the taker who receives the money knowing the reason it is paid. That, in my view, is this case. [Emphasis added.]

((1989), 52 C.C.C. (3d) 137, at p. 155.)

With respect, applying this test to the facts of the case, the appellant ought to have been acquitted. The appellant did not know nor believe that Qualico was paying him to sell to his clients. This element is one that is stressed in the cases to which I have referred and which is totally absent in this case.

78 In the result I would allow the appeal and direct that an acquittal be entered in regard to each of the charges.

The following are the reasons delivered by

79 McLACHLIN J.:-- I have read the reasons of Sopinka J. and Cory J. and agree with Cory J. that the appeal should be dismissed. However, I have two concerns with respect to the reasons of

Cory J. which require comment. Both are related to the lack of disclosure which constitutes an element of the actus reus of the offence, and an awareness of which constitutes an element of its mens rea.

80 I am satisfied that the aspect of the mens rea of the offence of taking a secret commission which is imported by the adverb "corruptly" may lie in awareness of the fact of non-disclosure. No corrupt bargain is required, for the reasons given by the majority below and Cory J. in this Court. Indeed, on the clear language of s. 426(1)(a)(ii) of the Criminal Code, R.S.C., 1985, c. C-46, the offence may be committed simply by making a "demand" for or "agreeing to accept" a reward, which alone is sufficient to negate the alleged concluded corrupt bargain requirement.

81 My difficulty relates to the time and nature of the disclosure necessary to negate this element of [page202] the mens rea of the offence. Cory J. states that there must be "timely" and "adequate" disclosure. In my view, the way he goes on to define these terms extends the ambit of the offence in a way which is inconsistent with the basic principles of criminal law.

82 The first problem is that of timeliness. Cory J. states that "[i]t is essential ... that the agent clearly disclose to the principal as promptly as possible the source and amount or approximate amount of the benefit" (emphasis added). He elaborates as follows (at p. 191):

> The disclosure must be timely in the sense that the principal must be made aware of the benefit as soon as possible. Certainly the disclosure must be made at the point when the reward may influence the agent in relation to the principal's affairs.

This passage begs a number of questions. When is the crime complete? What is meant by "as soon as possible"? Is it a defence for the agent to say that the point had not yet been reached when he or she might be influenced? If so, when is that point? To pose these questions is to admit of the possibility of a variety of different answers.

83 As analyzed by Cory J. this offence is quite different from the general run of criminal offences. An offence is complete upon commission of a particular act or acts, the actus reus, accompanied by the requisite blameworthy mental state, the mens rea. Thus, for example, the offence of assault is complete when a person without the consent of another applies force to that other person, the actus reus, and does so with the intention of applying force to that other person without that other person's consent. The act is committed with the necessary intent and the offence is complete in a single, unified transaction. Under Cory J.'s analysis of the offence of taking secret commissions the agent may commit part of the actus reus, the taking of the commission in the requisite circumstances, and do so with part of the mens rea, namely knowledge of the circumstances constituting the actus reus to that point. But his ultimate [page203] guilt is at that point uncertain, dependent upon whether he fails "to make adequate and timely disclosure of the source, amount and nature of the benefit", the remainder of the actus reus, with an awareness of "the extent of the disclosure to the principal or lack thereof", the remainder of the mens rea. Under Cory

J.'s analysis the commission of part of this offence can be deferred in accordance with the prevailing circumstances. If at that point in time which a trial judge with the benefit of hindsight determines to have been "timely" the agent has not made full disclosure and is aware of the lack of disclosure, the actus reus and mens rea appear, transforming non-criminal conduct into criminal conduct. It is as if the offence lies dormant, waiting to be brought to germination by the bright light of judicial contemplation.

84 It is a fundamental proposition of the criminal law that the law be certain and definitive. This is essential, given the fact that what is at stake is the potential deprivation of a person of his or her liberty and his or her subjection to the sanction and opprobrium of criminal conviction. This principle has been enshrined in the common law for centuries, encapsulated in the maxim nullum crimen sine lege, nulla poena sine lege -- there must be no crime or punishment except in accordance with law which is fixed and certain. A crime which offends this fundamental principle may for that reason be unconstitutional. As Lamer J., as he then was, said in Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), [1990] 1 S.C.R. 1123, at p. 1155:

> It would seem to me that since the advent of the Charter, the doctrine of vagueness or overbreadth has been the source of attack on laws on two grounds. First, a law that does not give fair notice to a person of the conduct that is contemplated as criminal, is subject to a s. 7 challenge to the extent that such a law may deprive a person of liberty and security of the person in a manner that does not accord with the principles of fundamental justice. Clearly, it seems to me that if a person is placed at risk of being deprived of his liberty when he has not been given fair notice that his conduct falls within the scope of the offence as defined by Parliament, then surely this would offend the principles of [page204] fundamental justice. Second, where a separate Charter right or freedom has been limited by legislation, the doctrine of vagueness or overbreadth may be considered in determining whether the limit is "prescribed by law" within the meaning of s. 1 of the Charter.

It is vagueness in the first sense mentioned by Lamer J. which is raised by the "after-the-fact" approach to the determination of when disclosure is timely that is advocated by Cory J.

85 Dickson C.J., La Forest and Sopinka JJ. concurring, agreed that it would be contrary to the principles of fundamental justice to permit a person to be deprived of his or her liberty for the violation of a vague law. As Dickson C.J. put it (at p. 1141):

> Certainly in the criminal context where a person's liberty is at stake, it is imperative that persons be capable of knowing in advance with a high degree of certainty what conduct is prohibited and what is not. It would be contrary to the basic principles of our legal system to allow individuals to be imprisoned for transgression of a vague law.

86 A hovering possibility of criminality, which may come into being when in the circumstances it is deemed (after the fact) to have been timely to disclose, offends the fundamental requirement that the criminal law be certain. Simply put, agents will not thereby be given fair notice in advance whether a proposed course of conduct is criminal. Not only is this lack of predictability potentially unfair, it is also calculated to lessen the deterrent effect of the existence of the criminal prohibition, since people may put off disclosure which they ought to make because, as they see the circumstances at the time, no disclosure is necessary. Finally, it raises the question of whether an agent, who, at a certain time ought in all the circumstances to have disclosed a reward, is entitled to be acquitted because he did not realize that it was time to disclose.

87 In my view, if lack of disclosure is an element of the offence, then the time for disclosure must be clear and certain in law. Rather than holding the offence in suspended animation pending some [page205] future event which will determine the timeliness of disclosure, I would fix the time at which disclosure must be made. Where the actus reus is the taking of a secret commission, then the relevant time to see whether there has been a failure to disclose is the time the commission is taken. For practical purposes, this means that if the agent accepts a commission without beforehand (or simultaneously, if that can be conceived) advising the principal of the fact, the offence is established. It is up to the agent to refuse the commission unless he or she has first advised the principal of his or her intention to take it.

88 This, in my view, makes practical sense. To allow an agent to accept a secret commission on the basis that he or she will tell the principal "as soon as possible" is to encourage the acceptance of such commissions: the road to crime, as to hell, may be paved with good intentions. On the other hand, to require the agent to clear the matter with his or her principal before accepting the commission imposes no undue hardship. Assume, for example, the arrival in the mail of an unsolicited commission. The agent cannot accept the cash or cash the cheque, as the case may be, until he or she has advised the principal of the commission. I see only good coming from such a requirement.

89 I turn from the timing of disclosure to the question of degree of disclosure. Here again the governing consideration is that the criminal law must be clear and certain. Cory J. states that the amount of the commission must be stated to the "best of the agent's ability", and concludes (at p. 194):

> If the accused was aware that some disclosure was made then it will be for the court to determine whether, in all the circumstances of the particular case, it was in fact adequate ... .

This "after-the-fact" standard is, in my opinion, too vague to meet the requirements of the criminal law.

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90 I agree with Cory J. that the extent of disclosure required depends on the purpose which the disclosure requirement is intended to further. I agree with Cory J. as well that "disclosure is essential to alert the principal to the existence of conflict of interest situations" (p. 23). It is to the avoidance of conflicts of interest and the consequent danger that the agent may not act exclusively in the best interests of his or her principals that the disclosure requirement is directed. The amount of the commission is purely secondary. A large commission might tempt one agent; a small one might suffice for another. Moreover, a requirement that the amount of the commission be disclosed poses practical difficulties of calculation, as Cory J. recognizes. These are exacerbated if disclosure is to be made either simultaneously with acceptance of the commission, or, as would be practically necessary under my reasoning, in advance.

91 In my view, all that is required by the criminal law is that if an agent is contemplating taking a commission from a third party with respect to a transaction with his principal, then the agent must disclose the fact that he will receive the commission to the principal, specifically advising the principal of the transaction to which the commission will relate. Such a communication will put the principal on notice that the agent is in a potential conflict of interest. It will then be open to the principal to decline to enter the transaction, to ask for further details or amounts, or to take such other steps as he or she may choose. The objective of the section will be achieved, and the question as to whether the agent's conduct is criminal will not hang on arguments over whether the agent has made a "reasonable effort" to state the amount of the commission to the "best of [his or her] ability" "in all the circumstances of the particular case". I add that it cannot be enough to state at the beginning of a relationship that commissions may from time to time be taken. The offence relates to a particular taking, and so, it follows, must disclosure.

92 On the facts of this case it is clear that there was no disclosure of the particular commissions to the [page207] principals involved. Therefore the offence is made out.

93 I would dismiss the appeal.

TAB17

CHAPTER 1

The definition of agency

A tentative definition. Though it is true that agency does not allow of a brief description, and the whole law cannot be compressed into a sentence that is both short and significant,[1] this does not render either impossible or useless an attempt to summarise succinctly what is involved in the concept of agency. To a large extent, the nature and content of such a summary depends upon the outlook of the particular writer who is expounding the subject. None the less, such a summary can provide a guide to the student in the search for the features which distinguish agency from other legal relationships. The following is therefore suggested as a tentative, brief description of what agency involves:

> Agency is the relationship that exists between two persons when one, called the *agent*, is considered in law to represent the other, called the *principal*, in such a way as to be able to affect the principal's legal position in respect of strangers to the relationship by the making of contracts or the disposition of property.

It seems virtually impossible to define agency except in terms of its consequences. A person is an agent only in so far as his acts can result in some alteration of the legal situation of the one for whom he acts or purports to act. Hence the indication in an Australian case[2] that the secretary of a Builders' Labourers' Federation was not its agent because the secretary was not authorised to create legal relations between the Federation and third parties. On this ground the accused was not guilty of corrupt acts as an agent (although his appeal failed on other grounds).

The suggestion has been made that overmuch emphasis has been placed upon the power of the agent to affect the principal's position, with consequent neglect of the realities of the situation so far as concerns the agent.[3] The commentator in question would prefer to see more interest taken by writers and courts in what the agent does and what he is supposed to be doing. By way of response, it is suggested that, while there may be indications in the cases that the historical concept of agency may be

1 Stoljar *Law of Agency* p 1. The discussion that follows (in the form in which it appeared in the fourth edition, 1976, pp 8–13) was invoked and applied by Hallett J in the Nova Scotia case of *Gerco Services Ltd v Aston* (1982) 48 NSR (2d) 541 at 557.

2 *R v Gallagher* [1986] VR 219.

3 Reynolds 'Agency: Theory and Practice' (1978) 94 LQR 224. See, also, *Bowstead on Agency* (15th edn 1985) at pp 6–11.

undergoing some revision, or at least some measure of reconsideration by the courts,[4] the traditional point of view, that agency as a relationship is dependent upon the extent to which, and ways in which one person can produce legal consequences for another, is still of the greatest importance, and remains the vital issue when it comes to determining whether someone is an agent. Having said this, several features of the definition suggested above require elaboration and comment.

First, it is meant to indicate that although there may be many situations in which one person represents or acts on behalf of another, it is only when such representation or action on another's behalf affects the latter's *legal* position, that is to say his rights against, and liabilities towards other people, that the law of agency applies. The law of agency has no relevance to social or other non-legal obligations. Thus, the law of agency has no application to the kind of situation in which, for example, a man sends his wife to represent him at a wedding, and to congratulate on his behalf the bride and groom. For in such circumstances the representation is intended to serve a social purpose, not a legal one. However, the legal purpose intended to be achieved by the employment of an agent need not be a complex or sophisticated one. A mother who tells her son to buy milk from the milkman is making an agent of him, in the same way as a company makes agents of directors who enter into contractual obligations on behalf of the company. Clearly, the more important the transaction, the more necessary will it be to determine accurately the legal position of the interested parties. But, at least for the purposes of definition and comprehension, the only distinction that can validly be drawn is between the use of another person to fulfil some social or similar obligation or purpose, and the employment of another person to execute or discharge some legal obligation, or achieve some legal result.

The second feature of the definition given above is that it stresses the importance of the way in which the *law* regards the relationship that has been created.[5] It is the effect in law of the way the parties have conducted themselves, and not the conduct of parties considered apart from the law, or

4 Fridman 'The Abuse and Inconsistent Use of Agency' (1982) 20 U of Western Ontario LR 23, to which a response is suggested in Bowstead, op cit at p 11: a response with which the present author disagrees.

5 The objection was raised by one reviewer of the fou.th edition of this book (Bridge (1977) 14 JSPTL 150) that this definition did not accommodate estate agents who merely introduce prospective house purchasers to a vendor. It is certainly true that such agents do not normally create contractual relationships between their principals and third parties: and that they may not make their principals liable for deposits obtained by them from such third parties (see *Sorrell v Finch* [1977] AC 728, [1976] 2 All ER 371, discussed below pp 43, 72). However, as the writer of the review points out, an estate agent may affect the legal position of the vendor, by making a misrepresentation: and may make the vendor liable to pay commission on certain circumstances (below, pp 169–180, 381–391). The precise legal quality of the relationship between an estate agent and a vendor who 'employs' him is far from certain, at least as regards some of its aspects: see Murdoch 'The Nature of Estate Agency' (1975) 91 LQR 357. Perhaps the most satisfactory approach to adopt is to say that the agency of estate agents is an anomalous type of agency, that has some practical utility, but does not conform to the normal commercial agency.

the language used by the parties,[6] that must be investigated, in order to determine whether the agency relationship has come into existence.

This is not always an easy problem to solve and it can involve some intricate analysis of the facts and the nature of the relationship between the parties.[7] It must be solved, however, if the true legal relationship between the parties, and the incidents of such relationship, are to be classified, understood, and applied.

In this connection two factors merit consideration, in the light of their necessity for the understanding of the legal nature and function of the agency relationship. They are: *the consent of the parties* and *the authority of the agent*.

Consent. Several of the definitions proffered by leading writers introduce, and indeed revolve around the idea that principal and agent have agreed, either in the form of a contract, or otherwise, that the agent should represent the principal. Thus Bowstead[8] says that agency is:

> '. . . the fiduciary[9] relationship which exists between two persons, one of whom expressly or impliedly consents that the other should represent him or act on his behalf and the other of whom similarly consents to represent the former or so to act.'

6 The terms 'agency' and 'agent' are often used wrongly in a commercial or business sense, not as meaning or involving the strict legal relationship of principal and agent which is the subject-matter of this book: cf Powell *Law of Agency* (2nd edn 1961) p 29. Thus dealers in goods may be described as agents, though in fact purchasers of goods from a manufacturer or wholesaler, and sellers of such goods to the public at large. What the term 'agency' really means in such a context is that the dealer in question is the approved dealer in goods of the kind in question: cf *Powell* pp 27–28. See, eg *Kennedy v De Trafford* [1897] AC 180 at 188 per Lord Herschell; *WT Lamb & Sons v Goring Brick Co Ltd* [1932] 1 KB 710; *International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co* (1958) 100 CLR 644.

Similarly someone who was an intermediary for an English company doing business in Israel was not an agent of the English company: *Vogel v R and A Kohnstamm Ltd* [1973] QB 133, [1971] 2 All ER 1428.

7 For examples, see *Moorgate Mercantile Co Ltd v Twitchings* [1977] AC 890, [1976] 2 All ER 641, when an organisation that supplied information about hire purchase to the dealers and finance companies was not the agent of such a dealer or finance company; *Garnac Grain Co Inc v HMF Faure and Fairclough Ltd* [1968] AC 1130, [1967] 2 All ER 353 in which an intricate sales relationship was held not to involve any agency: *Bart v British West Indian Airways Ltd* [1967] 1 Lloyd's Rep 239, where the Court of Appeal of Guyana held that a 'middleman' who sent pools coupons to England was not the agent of the investor for the purpose of the contract of carriage with respect to the coupons: *Crampsey v Deveney* [1969] 2 DLR (3d) 161, where the Supreme Court of Canada held that a mother who was joint tenant of land with her children was not their agent when she contracted to sell it. Contrast *Royal Securities Corpn v Montreal Trust Co* (1967) 59 DLR (2d) 666; affd. (1967) 63 DLR (2d) 15 where a broker was held to be the agent for *both* parties in a loan transaction, not merely an *interpreter* between them of the suggested terms. If there is no special requirement that money collected by someone acting on behalf of another should be kept in a separate fund, the relationship between the parties may simply be that of debtor and creditor, not one of agency: *R v Robertson* [1977] Crim LR 629.

8 *Bowstead on Agency* (15th edn 1985) Article 1.

9 This word was added in the 15th edition. It is not disputed that agency creates fiduciary duties (below pp 156–168): but this is a *consequence* of the relationship: it is not an essential feature of it.

The *American Restatement of the Law of Agency*[10] defines agency as

> '. . . the relationship which results from the manifestation of consent, by one person to another, that the other shall act on his behalf and subject to his control, and consent by the other so to act.'

Similarly, Seavey[11] spoke of agency as 'a consensual relationship'; and Powell[12] included the notion of agreement on the part of the agent in his definition of agent. There is judicial support for this view. In *Garnac Grain Co Inc v HMF Faure and Fairclough Ltd*,[13] Lord Pearson said: 'The relationship of principal and agent can only be established by the consent of the principal and the agent'. However his lordship went on to say that they would be held to have consented 'if they have agreed to what in law amounts to such a relationship, even if they do not recognise it themselves and even if they have professed to disclaim it'. But consent was necessary, either expressly or by implication from their words or conduct.

This statment by Lord Pearson is open to criticism.[14] First of all it indicates that *consent* is the basis of agency, whereas, it is suggested, it is for the law to determine what is or is not agency, admittedly on the basis of the factual arrangements between the parties, but, in a sense, outside those arrangements in that it is a question of legal construction rather than of mechanical determination. A second criticism is that it seems to exclude from the scope of agency situations in which the parties have not truly consented to any such relationship, yet such a relationship arises. There are circumstances in which the relationship arises (at least for certain purposes) against the real wishes of one, if not both, of the parties. In situations of this kind the agency relationship, as far as certain of its effects are concerned, has no contractual, or even consensual, basis. Indeed the conduct which gives

10 *Restatement, Second, Agency* (1958) para (1): cf Conant 'The Objective Theory of Agency' (1968) 47 Nebraska LR 678, who argues that contractual agency and agency which involves estoppel (below, pp 98–100) are based on manifestations of consent by the principal. For another discussion of the theory of contract and agency, see Barnett, 'Squaring Undisclosed Agency Law with Contract Theory' (1987) 75 Calif LR 1969.

11 'The Rationale of Agency' (1920) 29 Yale LJ 859 at p 868: cf also ibid, pp 863–864.

12 *Law of Agency* p 5. By way of contrast, see the stimulating article by Dowrick 'The Relationship of Principal and Agent' (1954) 17 MLR 24, esp at pp 25–28. See also Müller-Freienfels 'Legal Relations in the Law of Agency (1964) 13 Am J of Comp L 193 at p 203. Professor Müller-Freienfels, it is suggested, has unfortunately misinterpreted what is said below at p 51. He appears to read what is stated there as meaning that whenever the agent acts on behalf of another there is an implied contract: but in fact a distinction is drawn between a true implied contract and the agency relationship or aspects of it arising by estoppel when the agent cannot really be said to be impliedly consenting to act as an agent, though his conduct is treated by the law as making him an agent, for certain purposes at least.

13 [1967] 2 All ER 353 at 358. see also *Branwhite v Worcester Works Finance Ltd* [1969] 1 AC 532 at 573, [1968] 3 All ER 104 at 113 per Lord Morris to the effect that it was a question of fact whether there is an agency. Similarly in *Royal Securities Corpn v Montreal Trust Co* [1967] 59 DLR (2d) 666 at 686, Gale CJHC of Ontario stated that one of the essential requisites for, or ingredients of an agency relationship was the consent of both the principal and the agent (the others being authority given to the agent by the principal allowing the former to affect the latter's legal position, and the principal's control of the agent's activities).

Furthermore, in *Guerin v R* (1984) 13 DLR (4th) 321 at 322–323 Dickson J (later CJC) indicated that one reason the Crown was not the agent of an Indian band was that the Crown's authority to act on the band's behalf lacked a basis in contract.

14 Fridman 'Establishing Agency' (1968) 84 LQR 224 at pp 225–231.

rise to the particular effects in question may have occurred without the cognizance, let along the approval of the person who is treated as the principal, and possibly without the agent's intending to act for the benefit of such principal. The contrast here is between agency arising by consent, and agency arising from estoppel. The dichotomy between consent and estoppel, or as he prefers to express it, between *contract* and estoppel, has been criticised by Professor Stoljar[15] on the ground that it is a dichotomy that is unreal, giving rise to a controversy that is beside the point. His view is that agency is really always contractual, involving two distinct contracts, one between the agent and the third party, the other between the principal and the third party. This gives rise, in his opinion, to a theory of 'transmissible contracts' or 'transmissible contract-interests'. This is not only difficult to grasp conceptually, it is also misleading as a guide to the rationale of the various types of agency relationship that can arise, and inaccurate as a description of what the law is doing when it recognises the existence and effects of an agency relationship.

The possibility that agency may exist, at least for certain purposes, even where no consent, and certainly no contract, can be found as between principal and agent, is evidenced by the decision of the House of Lords in *Boardman v Phipps*,[16] in which it was held that parties to whose acting as agents no consent had ever been given could be treated as 'self-appointed agents'. A comparison of these cases leads to the conclusion that it is not completely satisfactory to base agency upon consent, even though, in many instances, consent is a relevant, and possibly a determining factor in the existence as well as the scope of an agency relationship. But this is not the same as to say that the relationship and its effects always arise from and are determined by agreement.

This is borne out, it is suggested, by the fact that not all the incidents of the agency relationship, ie, the rights and duties which attach to the parties, arise as a result of any special agreement between them, although they may be limited or otherwise affected by such an agreement. Many such incidents are attached to the relationship by virtue of some rule of law. As Dowrick validly pointed out,[17] much of the law relating to agency is derived from equity, quasi-contract, or tort. For example, some of the obligations incumbent upon an agent are 'imposed by law, irrespective of agreement, and may properly be classed as quasi-contractual'.[18] An example is the duty of the agent to hand over to his principal money belonging to him, and received to the principal's use.[19] By virtue of the law of torts, an agent who acts gratuitously, in the absence of contract because there is no

15 *Law of Agency* pp 18–36. But see Dowrick [1963] CLJ 148; Conant 'The Objective Theory of Agency: Apparent Authority and the Estoppel of Apparent Ownership' (1968) 47 Nebraska LR 678 at p 683. For a more recent American discussion, see Fishman, 'Inherent Agency Power—Should Enterprise Liability Apply to Agents' Unauthorized Contracts?' (1987) 19 Rutgers LJ 1. On 'agency by estoppel' see below, ch 6.

16 [1967] 2 AC 46, [1966] 3 All ER 721; discussed in Fridman, (1968) LQR 224 at pp 231–239, and by Hope JA in *Walden Properties Ltd v Beaver Properties Pty Ltd* [1973] 2 NSWLR 815 at 833. See further, below, pp 163–165.

17 (1954) 17 MLR 24 at pp 28–34. On the fiduciary aspects of agency, see Waters *The Constructive Trust* (1964) ch IV: cf below pp 156–168.

18 Dowrick (1954) 17 MLR 24 at p 32. Today one would refer to restitution rather than quasi-contract.

19 *Lyell v Kennedy* (1889) 14 App Cas 437; *Dixon v Hamond* (1819) 2 B & Ald 310.

consideration, is still obliged to exercise care in the handling of his principal's affairs.[20]

The attack upon the importance of consent in agency has also been made elsewhere. In *Branwhite v Worcester Works Finance Ltd*,[1] Lord Wilberforce suggested that 'some wider conception of vicarious responsibility other than that of agency, as normally understood, may have to be recognised in order to accommodate some of the more elaborate cases which now arise when there are two persons who become mutually involved or associated in one side of a transaction.' The basis for such attack is suggested to be the problems arising from making a principal liable for the unauthorised acts of his agent, if consent to the exercise of power is stressed as the basis for the relationship.[2] It is argued that the common law utilises the concept of estoppel, in the form of 'apparent authority',[3] for the objective idea of holding someone to the expectations which his acts reasonably create,[4] in order to make up for the deficiencies, and to fill the gaps, resulting from the 'consent' or 'agreement' exposition of agency. Estoppel, or the objective approach, if accepted as bases for, or explanations of agency, should lead to a rationalisation of agency in terms akin to the reasoning that appears in tort cases. This would produce an approach to agency that resembles more closely the American view of agency to which reference has been made earlier.[5] While 'consent' should not be over-emphasised as the explanation of agency, it may be added that it cannot altogether be ignored. In the modern law of agency, what has happened, it may be suggested, is not that 'consent' has ceased to be relevant and important: rather that modifications have been made to the pristine idea of agency, so as to make it more adaptable, and to cause it to conform much more to modern needs and requirements.

Attempts to base agency relationships upon a single theory of contract or to distinguish between only two bases for the emergence of an agency relationship are unprofitable, it is suggested, because neither a contractual explanation nor a simple division into two categories will provide an adequate framework within which to discuss the law. There are instances of agency arising from consent. There are also situations in which the agency relationship and its effects come about by the operation of the doctrine of estoppel. In addition, however, there are examples of the agency relationship and its consequences which cannot be treated either as consensual or as based upon estoppel.[6]

20 Below, pp 142–147.

1 [1968] 3 All ER 104 at 122.

2 Reynolds 'Agency: Theory and Practice' (1978) 94 LQR 224 at pp 226–227; *Bowstead on Agency* (15th edn 1985) pp 8–11.

3 Below, ch 6.

4 Cf *N & J Vassopoulos Ltd v Ney Shipping Ltd, The Santa Carina* [1977] 1 Lloyd's Rep 478, especially at 483 per Roskill LJ. See also Atiyah *The Rise and Fall of Freedom of Contract* pp 496–501.

5 Above p 7 note 5.

6 Below, pp 119–136. Eg, agency of necessity, insofar as it may be regarded as involving agency at all: below pp 120–129. So, too, there are situations in which one party appears to be treated as an agent to effect some policy of the law: eg, a receiver put in by creditors, who is the agent of the company not of debenture holders: *Standard Chartered Bank Ltd v Walker* [1982] 3 All ER 938, [1982] 1 WLR 1410; a mortgagee regarded as the agent of the mortgagor to effect insurance: *Re National Bank of Canada and Co-operative Fire and Casualty Co* (1989) 53 DLR (4th) 519; a salesman engaged by a broker: *McKee v Georgia Pacific Securities Corpn* (1988) 20 BCLR (2d) 12.

An alternative division into agency arising by act of the parties and agency arising by operation of law is also misleading and narrow. Where an agency relationship comes into existence because of the consent of the parties, it may be said to arise by their acts. The conduct of the parties is accepted by the law as giving rise to a specific legal relationship with particular legal consequences. But the foundation of this relationship and its consequences is to be seen in the acts of the parties. Where an agency relationship comes about because of the operation of the doctrine of estoppel, it may be said that, here again, the law is interpreting the conduct of the parties as having a certain legal effect. In this respect agency by estoppel is similar to agency arising from consent, ie by act of the parties. At the same time, however, agency by estoppel is really agency by operation of law, in that it is only because the law regards the situation as one having the effect of an agency relationship in toto or for specific purposes that such relationship may be said to arise. In this respect, as in the absence of any true consent on the part of the principal, agency by estoppel resembles agency which arises entirely by operation of law, for example, agency of necessity. Where this is said to emerge it is sometimes the case that a relationship which may come about by consent, even contract, creates an agency even though the primary and original purpose of the relationship, or the consent which underlies it, was not the creation of an agency relationship. Hence, it is suggested, though the consent of the parties, ie their acts, may originate the ultimate agency relationship recognised and effectuated by the law, that relationship is not itself consensual or based upon the acts of the parties. It is an agency relationship which is the creation of the law, for reasons of policy.

Authority. The question of the authority of an agent is at the very core of agency. It is complex and difficult, but it must be understood, if the nature of agency is to be comprehended. Authority, at one time, was regarded as the cornerstone of the agency relationship.[7] It remains a vital feature; and the scope of an agent's 'authority' is frequently the key to an understanding of that relationship and its consequences.

The notion of authority is extremely artificial, in the sense that there are many instances in which an agent is regarded as having authority to act even where it is impossible to say that he has been invested with such authority by the principal. To describe the reason why the agent's acts produce a change in the principal's legal position by speaking of his 'authority' to act on behalf of the principal is hardly very explanatory.[8] For the purpose of explaining the *effects* of the agency relationship, the notion of authority is extremely useful. It enables a lawyer to state concisely and simply what the agent can and cannot do, and how he can affect his principal, beneficially or adversely. But as a means of describing the legal nature of the agency relationship, the

7 See, eg *Digest of English Law* para 132; Dowrick (1954) 17 MLR 24 at p 35, note 57; Powell *Law of Agency* p 7. Cf Gale CJ HC in *Royal Securities Corpn v Montreal Trust Co* (1967) 59 DLR (2d) 666 at 686. Hence the dispute over authority in several Canadian cases: *Calgary Hardwood and Veneer Ltd v Canadian National Rly Co* [1979] 4 WWR 198; *Rockland Industries Inc v Amerada Minerals Corpn of Canada Ltd* [1978] 2 WWR 44; revsd [1979] 2 WWR 209, [1980] 2 SCR 2; *Canadian Laboratory Supplies Ltd v Engelhard Industries Ltd* [1979] 2 SCR 787.

8 Cf Montrose 'The Basis of the Power of an Agent in Cases of Actual and Apparent Authority' (1938) 16 Can BR 757 at pp 761–763.

notion of authority is unsatisfactory, because it does not go far enough. It describes the purposes of the agency relationship, in that it is a relationship by which one person 'permits' (or, in law is regarded as 'permitting') another person to act for him; but it does not say why this permission (or authorisation) is so vitally important to the agency relationship.

This missing explanation is provided by the analysis of the relationship in terms of the agent's power to affect his principal's legal position. Modern writers have begun to accept this idea as the explanation of the agency relationship.[9] Thus Seavey[10] called agency:

> 'a consensual relationship in which one (the agent) holds in trust for and subject to the control of another (the principal) a power to affect certain legal relations of that other.'

Powell said that an agent was a person who (inter alia) 'has power to affect the legal relations of his principal with a third party'.[11] Dowrick[12] described the essential characteristics of an agent as being that '. . . he is invested with a legal power to alter his principal's legal relations with third persons'; and adds that 'the principal is under a correlative liability to have his legal relations altered'.

There are many instances of such a power-liability relation. Agency is only one of them.[13] By the agency relationship the agent is invested by the law with 'a facsimile of the principal's own power'.[14] For example, in respect of the making of a contract[15] the agent, in effect, acts in such a way that he produces the same results as if the principal had acted personally and the agent had never appeared on the scene at all.[16] This power is strictly controlled by the law. It may not be abused or misused, so as to benefit the agent to the detriment of the principal.[17] It may not be excessively exercised beyond the limits of its use as created by acts of the parties or operation of law. Its exercise results in liabilities on the part of principal and agent alike—though the liabilities differ.

The use of this terminology, it is suggested, underlines the argument put forward earlier, that the agency relationship is one that is created by the law, not by the conduct of the parties. The parties, by contract or otherwise, may bring these powers and liabilities into existence and operation: they may even restrict, or broaden their scope.[18] But, in the absence of any special agreement, the power arising from the creation of the agency relationship is

9 See the citations in Dowrick (1954) 17 MLR 24 at p 36, note 63.

10 'The Rationale of Agency' (1920) 29 Yale LJ 859 p 868.

11 *Powell* p 7.

12 (1954) 17 MLR 24 at p 36: for the explanation of the terms 'power' and 'liability' see Hohfeld *Fundamental Legal Conceptions* pp 50–60. Salmond *Jurisprudence* (12th edn, 1966) pp 228–231; Dias *Jurisprudence* (5th edn 1985) pp 33–39.

13 Hence the similarity between agency and certain other relations. See pp 20–32.

14 Dowrick (1954) 17 MLR 24 at p 37. Hence an agent's authority is always limited to the *power* of the principal to act on his own behalf: see *Wilkinson v General Accident Fire and Life Assurance Corpn Ltd* [1967] 2 Lloyd's Rep 182.

15 Below, pp 194–200.

16 This is not completely true, since there are instances in which the agent does not drop out of the picture completely (below, pp 207–218). But this is in order to safeguard the third party, rather than to affect the principal's position.

17 Below, pp 156–168.

18 Subject to certain qualifications, such as illegality.

derived from the law itself. Indeed the power in question may arise or vest in the absence of any agreement, as is shown by the whole idea of agency by estoppel.[19] Montrose[20] argued, for example, that the basis of agency is the endowment by the principal of the agent with the power to act, coupled with the exercise of that power by the agent. This endowment of the agent with the power to act results from *either* (i) agreement with the agent that the principal will be bound, which gives rise to actual authority of the agent, ie agency arising by act of the parties; *or* (ii) the principal's showing the third party an intention to be bound by the agent's acts, and his leading the third party reasonably to believe that he will be so bound, which gives rise to apparent authority on the part of the agent, ie agency by estoppel. The notion of authority may be used to describe the way in which the powers of the agent have been circumscribed by the agreement or conduct of the parties. But it does not adequately explain, in legal terms, the nature of the relationship between principal and agent.[1] This can best be done by talking of the powers and liabilities that emerge from the creation of the agency relationship.

Agency as a power-liability relationship. Once it is recognised that the essence of agency is this power to affect the principal's legal relations with the outside world, the law of agency can be more readily understood. Much of it is concerned with the way in which the conduct of principal and agent (or two persons who are treated in law as being principal and agent) affects third parties. Even the relationship inter se of principal and agent is important not merely from the point of view of those parties themselves, but also from the point of view of the rights and liabilities of strangers to the relationship. These two aspects of the agency relationship have been differentiated as *external* and *internal*.[2] They may be considered and discussed separately, but it must not be forgotten that they interact. For example, the way the agent binds a third party to his principal can affect the agent's right to remuneration or indemnity. Whether the agent has properly performed or exercised his authority may be connected with the position of a third party as a result. The principal's right to determine the agent's authority, as between himself and the agent, can affect the third part's rights.

The law of agency is therefore concerned with the powers and liabilities of principal and agent, ie, the powers of the agent and the liabilities of the principal.[3] The purpose of this book is to discuss how those powers and liabilities arise and may be determined, and what they involve. To do this, it

19 Below pp 98–100. Contrast the view of Conant (1968) 47 Nebraska LR 678.

20 'The Basis of the Power of an Agent in Cases of Actual and Apparent Authority' (1938) 16 Can BR 757.

1 Cf Dowrick (1954) 17 MLR 24 at p 37, note 69: see also Seavey, (1920) 29 Yale LJ 859 at pp 860–861, where he shows that 'power' and 'authority must be distinguished.

2 Müller-Freienfels, (1964) 13 Am J of Comp L 193 at p 198; cf Hay and Müller-Freienfels 'Agency in the Conflict of Laws and the 1978 Hague Convention' (1979) 27 Am J Comp L 1 at pp 8, 16, referring to national choice-of-law rules with respect to the 'internal' relationship (principal-agent) and the 'external' relationship (principal-third party). Cf Stoljar *Law of Agency* p 17.

3 Note, however, the suggestion (above, p 9) that there should be less emphasis, on the powers of the agent and more on his real position: Reynolds 'Agency: Theory and Practice' (1978) 94 LQR 224.

is first necessary to differentiate agency from other relationships which similarly give rise to powers and liabilities. The purpose of such differentiation is to clarify and stress the fact that an agent affects the legal position of his principal by the making of contracts or the disposition of property. This power is the essence of the agency relationship. It distinguishes the position of an agent from that of others who have the power to affect the legal relations of another person. Such others do not possess the same kind of power as an agent, in that either they cannot affect the legal position of someone else by the making of a contract, or they cannot dispose of someone else's property effectively to alter the title of the original owner. Only an agent can do both.[4] In this connection it is also relevant to differentiate various kinds of agents in terms of the content of their respective authorities, ie, the nature and extent of their powers. Such a differentiation brings out the features of the agency relationship now being stressed, ie its effects upon the contractual and proprietary position of the principal, by showing how the most important kinds of agents evolved, and now exist, for precisely such purposes, namely to make contracts for another and to dispose of another person's property.

4 Note the comments made with respect to estate agents: above, p 10; note 5.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC

Court File No. CV-15-10832-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BRIEF OF AUTHORITIES OF THE CADILLAC FAIRVIEW CORPORATION LIMITED AND ITS AFFILIATES

(Motion for Process Approval and Stay Extension Orders)
(Returnable on February 4, 2015)

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