

Court File No.

**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 **EXPRESS FASHION APPAREL  
CANADA INC.** and **EXPRESS CANADA GC GP, INC.**

APPLICANTS

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**BOOK OF AUTHORITIES OF THE APPLICANTS**

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May 4, 2017

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APPLICANTS

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19. *Smurfit-Stone Container Canada Inc. (Re)*, 2009 CarswellOnt 391 (S.C.J.)
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**TAB 1**

*Case Name:*  
**843504 Alberta Ltd. (Re)**

**IN THE MATTER of the Bankruptcy and Insolvency Act  
R.S.C. 1985, C. B-3, As Amended; and 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 843504 Alberta Ltd. (formerly known  
as Skyreach Equipment Ltd.)**

[2003] A.J. No. 1549

2003 ABQB 1015

30 Alta. L.R. (4th) 91

351 A.R. 223

4 C.B.R. (5th) 306

127 A.C.W.S. (3d) 1135

2003 CarswellAlta 1786

Docket No. 0303 19663

Alberta Court of Queen's Bench  
Judicial District of Edmonton

**Topolniski J.**

Heard: November 10, 2003.

Judgment: December 9, 2003.

(33 paras.)

*Creditors and debtors -- Debtors' relief legislation -- Companies' creditors arrangement legislation  
-- Stay of proceedings against debtor -- Extension of time to file plan.*

Application by EdgeStone Capital Mezzanine Fund II Limited, a creditor of 843504 Alberta Limited, and the Monitor, for an order extending a stay of proceedings. 843504 Alberta filed a notice of intention to make a proposal to its creditors under the Bankruptcy and Insolvency Act. EdgeStone then chose to apply for a stay of proceedings under the Companies' Creditors Arrangement Act. PriceWaterhouseCoopers was appointed as Monitor. The remaining creditors of 843504 argued that the proceedings were a receivership in disguise for EdgeStone's benefit.

HELD: Application allowed. The extension gave the Monitor a better opportunity to present a plan to the creditors.

**Statutes, Regulations and Rules Cited:**

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11(6), 11.7, 11.7(3), 11.8.

**Counsel:**

A. Robert Anderson, for EdgeStone Capital Mezzanine Fund II Nominee, Inc.

Emi R. Bossio, for Ingersoll-Rand Canada Inc.

Michael McCabe, for Proposal Trustee, PricewaterhouseCoopers LLP.

Kent Rowan, for GE Commercial Distribution Finance Canada Inc.

Michael Penny and Stuart Weatherill, for Unknown Purchaser; John Deere Credit Inc.

Darren Bieganek, for Transportation Lease Systems Inc.

David Stratton, for CNH Canada Ltd. (New Holland Construction) and New Holland (Canada) Credit Company.

Jerry Hockin, for JLG Industries Ltd. and CAFO Inc.

Rick Reeson, for Alberta Treasury Branches.

James MacLean, for Bancorp Financial Services Inc., Bancorp First Mortgage Fund Inc., Bancorp Investments (Fund 2) Ltd. et al.

Steven Livingstone, for Citicapital Commercial Corp. and Capital City.

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MEMORANDUM OF CASE MANAGEMENT DECISION

TOPOLNISKI J.:--

Introduction

**1** EdgeStone Capital Mezzanine Fund II Ltd., (EdgeStone) a creditor of 84305 Alberta LTD., more commonly known as Skyreach Equipment, and the Monitor of Skyreach, appointed under an

Initial Order pursuant to the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36 (CCAA), seek an extension of the stay of proceedings. With the exception of GE Commercial Distribution Finance Canada Inc. (GE), Skyreach's other creditors oppose the extension of the stay. These reasons further expand upon my oral decision on the reasons given on November 10, 2003.

#### Facts

2 Skyreach Equipment, is a well-known name in Alberta. The company specializes in renting, servicing and selling industrial lifts and aerial work platforms to a variety of business sectors. The Skyreach name, up until a short time ago, graced the arena that is home to the Edmonton Oilers, and continues to be the name of another arena, home to the Kelowna Rockets. It has 142 employees, and operates 12 branches - 19 in Alberta and 3 in British Columbia.

3 Since this spring Skyreach has operated under the threat of enforcement proceedings by its two general secured creditors, G.E. and EdgeStone. It tried to negotiate a going concern sale.

4 On September 19 2003, days after making an arrangement with EdgeStone to seek protection under the CCAA, Skyreach filed a Notice of Intention to make a proposal to its creditors under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 as amended (BIA). EdgeStone then chose to apply instead for the CCAA stay of proceedings, and after a contested motion on October 9, 2003, Skyreach was placed under the protective umbrella of the CCAA for 30 days (Initial Order). PriceWaterhouseCoopers was appointed Monitor, with power to operate the business.

5 EdgeStone and the Monitor apply to have the stay extended. The PIMSI and mortgage creditors oppose the extension application. It is common ground that the onus in applications of this nature is on the applicant to satisfy the test in section 11(6) of the CCAA that:

- a) circumstances exist to make the extension order appropriate and
- b) the applicant is acting in good faith and diligently.

The test is not whether the plan of arrangement is doomed to failure - That is the test for terminating, not extending, a stay of proceedings (Re Rio Nevada Energy Inc. (2000), 283 A.R. 146 (Q.B.)).

6 The PIMSI and mortgage creditors argue that EdgeStone has not discharged the onus, asserting that the proceeding has been, and continues to be, an impermissible receivership under the guise of a CCAA restructuring. Further, they object to the Monitor's application on the basis that it is inappropriate for it to take a position in opposition to one of the parties.

7 EdgeStone and the Monitor rely on the Monitor's Third Report to the Court and an excerpt from an Information Circular. as the necessary evidence of good faith and due diligence in pursuing a plan of arrangement. EdgeStone's officer's affidavit says that, based upon his review of the Monitor's reports, the Monitor is acting diligently, in good faith, and that circumstances exist to

warrant the extension.

### 1. The Initial Order

**8** On October 9th, EdgeStone applied to vacate the Notice of Intention and to obtain a CCAA stay of proceedings. GE supported the application. Skyreach took no position. A number of creditors holding PIMSI and mortgage security opposed the initial application on the ground that the CCAA process would benefit only EdgeStone, and therefore was really a receivership for EdgeStone's benefit at the expense of others and an abuse of the CCAA.

**9** Appreciating the PIMSI creditors' concerns, I granted the Initial Order with conditions designed to protect the interests of all stakeholders. It provided for the usual 30-day moratorium to permit the development of, at least, a germ of a plan of arrangement, and further required court approval of any sale of assets for more than \$100,000 and, in the case of assets subject to PIMSI's, \$20,000. It gave the power to carry on business and to solicit invitations from prospective purchasers to the Monitor, and created an expedited process for proving claims for creditors holding PIMSI and mortgage security.

**10** The CCAA contemplates a monitor having powers beyond those required to fulfil the traditional role of monitoring the debtor's business and financial affairs and preparing reports for creditors and the court. Section 11.7(3) of the CCAA leaves discretion in the court to authorize functions other than those specifically enumerated by Parliament. Further support for this proposition is the explicit recognition of a monitor carrying on the debtor's business in section 11.8. (*Syndicat national de l'amiante d'Asbestos Inc. v. Jeffrey Mines Inc.* (2003) 40 C.B.R. (4th) 95; [2003] R.J.Q. 420 (C.A.)). The Monitor's ability to carry on business, at least during the Initial Order phase, was considered necessary given the undisputed evidence of corporate interference and allegations of conflict of interest by Skyreach's Director and CEO, and the imminent resignation of the debtor's directors.

### 2. Subsequent Motions

**11** The minutes of the initial order were settled. In the course of that hearing the Monitor's powers were reviewed to ensure that it had the powers necessary to carry on the business and to establish a process for soliciting offers to purchase assets. The intention was to provide sufficient, but not overreaching powers, given the unusual situation of the Monitor, rather than the company, operating the business.

**12** GE also sought an order amending an earlier order granted by another judge which permitted funding for Skyreach by GE on specific terms. Notice had not been given to most other creditors. The amending order was refused, with the ability to reapply on notice to affected parties.

### 3. This Application

**13** The CCAA is intended to provide a structured, court supervised environment for the negotiation of compromises between a debtor and its creditors for the benefit of not only those parties, but also other stakeholders such as employees and shareholders. At the end of day, the objective is to enable the debtor to continue in business so that all stakeholders benefit (*United Auto and Truck Parts Ltd. v. Aziz* (2000), 135 B.C.A.C. 96, [2000] B.C.J. No. 409, 2000 BCCA 146 at paras. 10 and 11). The CCAA is to be interpreted in a broad and liberal fashion to facilitate that objective. That broad and liberal interpretation, however, must not permit the enhancement of one stakeholder's position at the expense of others - there should be no confiscation of legal rights. This requires a balancing of interests, rights and prejudices to "see if rights are compromised ... and have the pain of the compromise equitably shared." (*Sammi Atlas Inc. (Re)*, [1998] O.J. No. 1089 (Ont. Gen. Div.) citing *Re Campeau Corp.*, [1992] O.J. No. 237, 10 C.B.R. (3d) 104 (Ont. Gen. Div.) at 109).

**14** As acknowledged by LoVecchio J. in *Blue Range Resources Corp.*, (1999) 245 A.R. 154, [1999] A.J. No. 788, 1999 ABQB 1038, reorganization of a company's affairs under the CCAA may take many forms. There is no one solution that will apply for every company. Solutions may vary from organizational and management restructuring, downsizing, refinancing, or debt to equity conversion - the solutions are generally limited only by the creativity of those structuring the plan of arrangement. That said, the solutions in Alberta generally expect the corporate entity to continue in some form or another and do not allow for a liquidation proposal unless exceptional circumstances exist to justify it, notwithstanding that the CCAA seems to allow it (*Royal Bank of Canada v. Fracmaster Ltd.* (1999), 244 A.R. 93, 11 C.B.R. (4th) 230 (C.A.)). Simply put, in this province the corporate entity is expected to continue in some form or another unless there are exceptional circumstances. Liquidation proceedings are typically reserved for receiverships, windings up or bankruptcy.

**15** This is quite different than in Ontario where apparently debtors can use the benefits of the legislation when there is no prospect of corporate survival or no plan of arrangement is proposed: *Anvil Range Mining Corp.* (2002), 25 C.B.R. (4th) 1 (Ont. Sup. Ct. Just.), aff'd (2002) 34 C.B.R. (4th) 157; *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.) at p. 32; *Re Olympia & York Developments* (1995), 34 C.B.R. (3d) 93 (Ont. Gen. Div.) at p. 104; *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.) at para. 46.

#### EdgeStone's Application and Evidence

**16** As noted previously, EdgeStone's affidavit is based upon the deponent's review of the Monitor's reports and merely asserts that the Monitor is acting diligently and in good faith, and that circumstances exist to warrant the extension. This offers nothing more than a conclusion about the very determinations that the court is required to make in deciding whether the test has been satisfied. It is of very little assistance, and this form of conclusory affidavit is not acceptable: *Alberta (Human Rights Commission) v. Alberta Blue Cross Plan* (1983), 48 A.R. 192 (C.A.) at para. 8; *Allen v. Alberta*, [2001] A.J. No. 863, 2001 ABCA 171 at para. 8; *Hovsepian v. Westfair*



Foods Ltd., [2003] A.J. No. 1133, 2003 ABQB 641. I note that the Monitor's report is filed with the court for information purposes and is available to me.

**17** GE supports EdgeStone's application, acknowledging that it expects to be paid out in full through an asset sale, and that it continues to be paid full interest at a rate of \$15,000 per day on its loan under the terms of a funding order granted earlier by another judge.

#### The Monitor's Duties, Application, and Evidence

**18** The appropriateness of the Monitor's application to extend the stay of proceedings was questioned on the basis that by its actions, the Monitor was favouring the debtor and EdgeStone.

**19** As an officer of the court, the Monitor owes a duty to treat all creditors reasonably and fairly. Like a court-appointed receiver or liquidator, its duties are those of a fiduciary.

**20** Because of the special circumstances that existed at the date of the Initial Hearing, the Monitor was given the power to carry on Skyreach's business. With that power comes a risk, be it perceived or real, of conflict of interest, and where the Monitor advocates a position or a plan of arrangement that risk may be exacerbated. In making its application for the extension the Monitor presumed that it was reasonable for it to do so since it was operating the business and there were no directors in place. Although motivated by good intentions this gave rise to a perception of conflict of interest, something that must be jealously guarded against. The appointment of a Chief Restructuring Officer or the appointment of new or returning directors can easily avoid perceptions of bias.

**21** The Monitor relies on an affidavit that attaches its Third Report to the Court and two pages from an Information Circular. The report indicates that since the Initial Order, the Monitor has taken control of the business, working closely with management. The report indicates that the Monitor has identified excess equipment and undertaken an extensive process to solicit offers for:

- a) all or part of the debtor's assets business and undertakings,
- b) refinancing,
- c) acquisition of the shares of Skyreach (subject to the approval of EdgeStone which holds and may exercise the shares under its security), or
- d) any combination thereof.

**22** The Monitor has advertised in newspapers, posted information on its national electronic bulletin board and web site, delivered some 300 Information Circulars to prospective purchasers, and set up a data room. Negotiations have begun with prospective purchasers, one of whom has expressed an interest in buying Skyreach's significant tax losses. Counsel for the Monitor, EdgeStone, and GE argued that only a sale of the tax losses will result in some payment to the unsecured creditors at the end of the day. Whether this is likely given voting structures under the CCAA is, of course, yet to be seen.

The proposed restructuring process

**23** The Monitor proposes the following restructuring process and time line. The Monitor will:

1. will solicit offers until November 28;
2. report the results of the solicitations to the Court by December 19
3. close transactions after obtaining court approval by January 30 2004, and
4. finally, formulate a plan of arrangement for presentation to the creditors by February 28, 2004.

**24** Clearly, this process contemplates the sale of Skyreach's assets, either hard assets or shares, well before a plan is developed and presented to the creditors.

**25** The Monitor, EdgeStone and GE urge that this process will maximize recoveries for the stakeholders, contending that the marketplace can best determine value of the debtor's assets. EdgeStone relies on *Re Consumers Packaging Inc.* (2001), 150 O.A.C. 384, 27 C.B.R. (4th) 197 (Ont. CA) and *Re Canadian Red Cross Society* (1998), 72 O.T.C. 99, 5 C.B.R. (4th) 299 (Ont. Gen. Div.) in support of the proposition that this is an acceptable practice.

**26** Once again, the opposing creditors say that this is simply more evidence that this proceeding is nothing more than a receivership in disguise for EdgeStone's benefit.

**27** In *Consumers Packaging* the court approved a going concern sale before the plan of arrangement was presented because the sale would preserve the business, albeit under new ownership, and because of uncertainty over whether the debtor could continue operations given its financiers' demands.

**28** In *Canadian Red Cross Society* provincial and territorial governments decided to transfer responsibility for the Canadian blood supply to a new national agency. The court held that the CCAA was flexible enough that it could be interpreted to convert the company's assets into a cash fund, crystalizing the highest value recovery pool possible. This was advantageous to unsecured creditors, but did not affect creditors with security interests. The Court ruled that it had jurisdiction to grant the order, noting that the proper question was whether the process was appropriate in all of the circumstances.

**29** I accept that the need for flexibility in CCAA proceedings may, in the appropriate circumstances, warrant a sale of a significant portion of a debtors assets or undertaking before a plan of arrangement is put to the creditors. (*Re PSI Net Ltd* (2001), 28 C.B.R. (4th) 95, [2001] O.J. No. 3829 (Ont. S.C.J.), *Canadian Red Cross and Consumer's Packaging*). Obviously, each case must be assessed on its own unique facts, but in this case there is no evidence that it is either necessary or in the stakeholders' best interests. Accordingly, at this stage the proposed process is unacceptable. In deciding this, I make no finding as to EdgeStone's bona fides nor rule out the prospect of evidence being adduced to establish that it would be appropriate.

**30** EdgeStone argues that there is Alberta authority for the sale of all or substantially all of the debtor's assets (Blue Range Resource Corp, Gauntlet Energy Corp action 0301-09612, Liberty Oil & Gas Ltd., [2002] A.J. No. 1302, action 0201-03299, and Mirant Canada Energy Marketing Ltd. action 0301-11094. Blue Range and Liberty Oil & Gas Ltd. obtained court sanctioning for liquidation-style plans. Gauntlet obtained creditor approval for a liquidation-type plan, but the sanctioning hearing has not yet been held. Mirant's creditors have not yet approved a liquidation-style plan, although a plan has been circulated to the creditors.

The Extension should be granted

**31** Applying the three arms of the test in s. 11.7, I find that the Monitor has acted diligently in moving the process along towards the development of a plan. The fact that the on the evidence before me, I disagree with the proposed timing for steps in the restructuring to occur does not detract from that.

**32** Although suspicions are raised by the opposing creditors' arguments, I cannot find on the materials before me that EdgeStone is acting in bad faith. The Monitor is certainly acting in good faith, but that is not an appropriate ingredient in applying the s. 11.7 test.

**33** In considering whether circumstances exist for the extension, the following factors assist the applicant:

1. An extension gives the Monitor a better opportunity to formulate and present a plan to the creditors, meeting the purpose and intent of the legislation;
2. With sufficient controls in place, an extension will prevent creditors from maneuvering for a better position (Rio Nevada, and cases cited at para. 36)
3. There is no evidence about whether the anticipated costs of these proceedings will be similar to costs anticipated in a receivership. What is known is that Skyreach is expected to suffer a \$337,000 deficit by the end of January 2004. PIMSI and mortgage creditors want EdgeStone to pay all of CCAA costs. However, it would be inappropriate to allocate costs now since there is no certainty about what benefits will accrue to any given party. That can be done later.
4. The extension Order is only until December 19th. At that time a further assessment of good faith, due diligence, and the appropriateness of the circumstances can be made.
5. I cannot conclude that a liquidation sale is inevitable or the most likely outcome at this stage of the proceedings. The Monitor is offering shares for sale.
6. The prospect of a tax loss sale may have value for unsecured creditors. A tax loss sale is apparently easier to facilitate in CCAA proceedings than

other insolvency proceedings;

Order

1. The stay of proceedings under the CCAA is extended to December 19th
2. The Monitor is to hire and hand over possession and operational control of Skyreach to a Chief Restructuring Officer within 14 days;
3. The Monitor is to fulfil its traditional role of monitoring the debtor's business and financial affairs and preparing reports for creditors and court and play a supportive role in developing the plan and presenting it to the creditors;
4. The proposed sale of all or substantially all of the assets before a plan of arrangement is presented to the creditors is not approved.
5. A further stay extension should be supported by evidence demonstrating significant progress towards a plan of arrangement.
6. If the company is unable to present a viable plan of arrangement before a sale of all or substantially all of the assets, the sale documents should be prepared as though for a receivership sale. However, if the company or another applicant proposes a sale before the presentation of a plan, the appropriate application may be made.
7. Assets subject to PIMSI interests used in the company's daily operations are to be paid for in accordance with the terms of the governing agreement.
8. A cost allocation hearing is to be scheduled to follow an application to sanction the plan of arrangement.

TOPOLNISKI J.

cp/e/nc/qw/qlmmm/qlcas



**TAB 2**

2015 ONSC 124  
Ontario Superior Court of Justice [Commercial List]

4519922 Canada Inc., Re

2015 CarswellOnt 178, 2015 ONSC 124, 22 C.B.R. (6th) 44, 249 A.C.W.S. (3d) 508

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

In the Matter of a Plan of Compromise or Arrangement of 4519922 Canada Inc.

Newbould J.

Heard: December 8, 2014; January 6, 2015

Judgment: January 12, 2015

Docket: CV-1410791-00CL

Counsel: Robert I. Thornton, John T. Porter, Lee M. Nicholson, Asim Iqbal for Applicant  
Harry M. Fogul for 22, former CLCA partners  
Orestes Pasparakis, Evan Cobb for Insurers  
Avram Fishman, Mark Meland for German and Canadian Bank Groups, Widdrington Estate and Trustee of Castor Holdings Limited  
James H. Grout for 22, former CLCA partners  
Chris Reed for 8, former CLCA partners  
Andrew Kent for 5, former CLCA partners  
Richard B. Jones for one, former CLCA partne  
John MacDonald for Pricewaterhouse Coopers LLP  
James A. Woods, Sylvain Vauclair, Bogdan Catanu, Neil Peden for Chrysler Canada Inc. and CIBC Mellon Trust Company  
Jay A. Swartz for proposed Monitor Ernst & Young Inc.

Subject: Insolvency

**Related Abridgment Classifications**

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

**Bankruptcy and insolvency**

XIX Companies' Creditors Arrangement Act

XIX.2 Initial application

XIX.2.b Grant of stay

XIX.2.b.vii Extension of order

**Bankruptcy and insolvency**

XIX Companies' Creditors Arrangement Act

XIX.2 Initial application

XIX.2.b Grant of stay

XIX.2.b.viii Miscellaneous

**Bankruptcy and insolvency**

XIX Companies' Creditors Arrangement Act

XIX.2 Initial application  
XIX.2.h Miscellaneous

#### Headnote

##### **Bankruptcy and insolvency — Companies' Creditors Arrangement Act — Initial application — Grant of stay — Extension of order**

Applicant was corporation and was partner in accounting firm — In 1993, 96 plaintiffs commenced negligence actions against accounting firm and 311 of its individual partners claiming approximately \$1 billion in damages — Test case in this litigation resulted in judgment of \$4,978,897.51, and leave to appeal this judgment was dismissed by Supreme Court of Canada in January 2014 — Applicant engaged in negotiations with remaining plaintiffs in negligence actions — These negotiations culminated with execution of term sheet outlining plan of arrangement under Companies' Creditors Arrangement Act (CCAA) that could achieve global resolution to outstanding litigation — In December 2014, applicant obtained initial order granting it and accounting firm protection under CCAA — C Inc., which had very large claim against accounting firm, had not been given notice of CCAA application — C Inc. brought motion to set aside initial order and to dismiss CCAA application — Motion dismissed — CCAA proceeding would permit applicant and its stakeholders means of attempting to arrive at global settlement of all claims — There was no issue as to good faith of applicant in CCAA proceeding — Initial order should not be set aside and CCAA application dismissed on basis of defence tactics in test case — Term sheet was supported by overwhelming number of creditors — C Inc. was seeking to impose its will on all other creditors by attempting to prevent them from voting on proposed plan — Court's primary concern under CCAA had to be for debtor and all of its creditors — There was no prejudice to C Inc. given that its contingent claim was not scheduled to be tried until 2017 at earliest — Issues raised by C Inc. with respect to term sheet were premature and could be dealt with later in proceedings as required.

##### **Bankruptcy and insolvency — Companies' Creditors Arrangement Act — Initial application — Miscellaneous**

Creditors' committee — Applicant was corporation and was partner in accounting firm — In 1993, 96 plaintiffs commenced negligence actions against accounting firm and 311 of its individual partners claiming approximately \$1 billion in damages — Test case in this litigation resulted in judgment of \$4,978,897.51, and leave to appeal this judgment was dismissed by Supreme Court of Canada in January 2014 — Applicant engaged in negotiations with remaining plaintiffs in negligence actions — These negotiations culminated with execution of term sheet outlining plan of arrangement under Companies' Creditors Arrangement Act (CCAA) that could achieve global resolution to outstanding litigation — In December 2014, applicant obtained initial order granting it and accounting firm protection under CCAA — Initial order provided for creditors' committee (committee), and it also provided that accounting firm should be entitled to pay reasonable fees and disbursements of legal counsel to committee — C Inc., which had very large claim against accounting firm, had not been given notice of CCAA application — C Inc. brought motion to vary initial order to delete appointment of committee and provision for payment of committee's legal fees and expenses — Motion dismissed — Committee was result of intensely negotiated term sheet that formed foundation of plan — Altering term sheet removing committee could frustrate applicant's ability to develop viable plan and could jeopardize existing support from majority of claimants — Other creditors had no objection if C Inc. wanted to join committee — C Inc.'s complaints about claim process proposed in term sheet was not reason to deny existence of committee, but rather would be matter for discussion when claims process came before court for approval — Costs of paying committee in relation to amounts at stake would be relatively minimal.

##### **Bankruptcy and insolvency — Companies' Creditors Arrangement Act — Initial application — Grant of stay — Miscellaneous**

Extending stay to include insurers of insolvent accounting firm.



**Table of Authorities****Cases considered by *Newbould J.*:**

*Alberta Treasury Branches v. Tallgrass Energy Corp* (2013), 8 C.B.R. (6th) 161, 2013 ABQB 432, 2013 CarswellAlta 1496 (Alta. Q.B.) — considered

*Alexis Paragon Limited Partnership, Re* (2014), 2014 ABQB 65, 2014 CarswellAlta 165, 9 C.B.R. (6th) 43 (Alta. Q.B.) — considered

*Calpine Canada Energy Ltd., Re* (2006), 19 C.B.R. (5th) 187, 2006 ABQB 153, 2006 CarswellAlta 446 (Alta. Q.B.) — followed

*Calpine Canada Energy Ltd., Re* (2007), 35 C.B.R. (5th) 27, 410 W.A.C. 25, 417 A.R. 25, 2007 ABCA 266, 2007 CarswellAlta 1097, 80 Alta. L.R. (4th) 60, 33 B.L.R. (4th) 94 (Alta. C.A. [In Chambers]) — referred to

*Canwest Publishing Inc./Publications Canwest Inc., Re* (2010), 63 C.B.R. (5th) 115, 2010 CarswellOnt 212, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) — followed

*Crystallex International Corp., Re* (2011), 2011 ONSC 7701, 2011 CarswellOnt 15034, 89 C.B.R. (5th) 313 (Ont. S.C.J. [Commercial List]) — considered

*First Leaside Wealth Management Inc., Re* (2012), 2012 CarswellOnt 2559, 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]) — referred to

*Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84, 1990 CarswellBC 394, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*) [1991] 2 W.W.R. 136 (B.C. C.A.) — considered

*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — followed

*Montreal, Maine & Atlantic Canada Co. (Montreal, Maine & Atlantique Canada Cie), Re* (2013), 2013 CarswellQue 8420, 2013 QCCS 3777 (Que. Bkcty.) — considered

*Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 54, 2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]) — considered

*Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 57, 2006 CarswellOnt 720 (Ont. S.C.J. [Commercial List]) — considered

*Prizm Income Fund, Re* (2011), 2011 ONSC 2061, 2011 CarswellOnt 2258, 75 C.B.R. (5th) 213 (Ont. S.C.J.) — referred to

*Stelco Inc., Re* (2004), 48 C.B.R. (4th) 299, [2004] O.T.C. 284, 2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List]) — considered

*Stelco Inc., Re* (2004), 2004 CarswellOnt 2936 (Ont. C.A.) — referred to

**Statutes considered:**

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3  
s. 2 "insolvent person" — considered

*Canada Business Corporations Act*, R.S.C. 1985, c. C-44  
Generally — referred to

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36  
Generally — referred to

s. 2(1) "debtor company" (a) — considered

s. 3(1) — considered

s. 11 — considered

*Partnerships Act*, R.S.O. 1990, c. P.5  
Generally — referred to

MOTION by creditor of insolvent accounting firm to set aside or vary initial order issued under *Companies' Creditors Arrangement Act*; MOTION by partner of accounting firm to extend stay contained in initial order to include insurers of accounting firm.

***Newbould J.:***

1 On December 8, 2014 the applicant 4519922 Canada Inc. ("451"), applied for an Initial Order granting it protection under the *Companies' Creditors Arrangement Act* ("CCAA"), extending the protection of the Initial Order to the partnership Coopers & Lybrand Chartered Accounts ("CLCA"), of which it is a partner and to CLCA's insurers, and to stay the outstanding litigation in the Quebec Superior Court relating to Castor Holdings Limited ("Castor") during the pendency of these proceedings. The relief was supported by the Canadian and German bank groups who are plaintiffs in the Quebec litigation, by the Widdrington Estate that has a final judgment against CLCA, by the insurers of CLCA and by 22 former CLCA partners who appeared on the application.

2 The material in the application included a term sheet which the applicant wishes to use as a basis of a plan and which provides for an injection of approximately \$220 million in return for a release from any further litigation. The term sheet was supported by all parties who appeared.

3 I granted the order with a stay to January 7, 2015 for reasons to follow, but in light of the fact that Chrysler Canada Inc., with a very large claim against CLCA in the litigation, had not been given notice of the application, ordered that Chrysler be given notice to make any submissions regarding the Initial Order if it wished to do so.

4 Chrysler has now moved to set aside the Initial Order, or in the alternative to vary it to delete the appointment of a creditors' committee and the provision for payment of the committee's legal fees and expenses. On the return of Chrysler's motion, a number of other former CLCA partners and PricewaterhouseCoopers appeared in support of the granting of the Initial Order.

**Structure of Coopers & Lybrand Chartered Accounts**

5 The applicant 451 is a corporation continued pursuant to the provisions of the *Canada Business Corporations Act*, and its registered head office is in Toronto, Ontario. It and 4519931 Canada Inc. ("4519931") are the only partners of CLCA.

6 CLCA is a partnership governed by the *Partnerships Act (Ontario)* with its registered head office located in Toronto, Ontario. It was originally established in 1980 under the name of "Coopers & Lybrand" and was engaged in the accountancy profession. On September 2, 1985, the name "Coopers & Lybrand" was changed to "Coopers & Lybrand Chartered Accountants" and the partnership continued in the accountancy profession operating under the new name. Until 1998, CLCA was a national firm of chartered accountants that provided audit and accounting services from offices located across Canada and was a member of a global network of professional firms.

7 In order to comply with the requirements of the various provincial Institutes of Chartered Accountants across Canada, many of which restricted chartered accountants providing audit services from being partners with persons who were not chartered accountants, Coopers & Lybrand Consulting Group ("CLCG") was established under the *Partnerships Act (Ontario)* in September 1985 to provide management consulting services. Concurrent with the formation of CLCG, Coopers & Lybrand ("OpCo") was established as a partnership of CLCA, CLCG and two other parties to develop and manage the CLCA audit and CLCG management consulting practices that had to remain separate. Until 1998, OpCo owned most of the operating assets of CLCA and CLCG. OpCo is governed by the *Partnerships Act (Ontario)* and its registered head office is in Toronto.

8 In 1998, the member firms of the global networks of each of Coopers & Lybrand and Price Waterhouse agreed upon a business combination of the two franchises. To effect the transaction in Canada, substantially all of CLCA's and CLCG's business assets were sold to PricewaterhouseCoopers LLP ("PwC"), which entity combined the operations of the Coopers & Lybrand entities and Price Waterhouse entities, and the partners of CLCA and CLCG at that time became partners of PwC. Subsequent to the closing of the PwC transaction, CLCA continued for the purpose of winding up its obligations and CLCA and CLCG retained their partnership interests in OpCo. By 2006, all individual CLCA partners had resigned and been replaced by two corporate partners to ensure CLCA's continued existence to deal with the continuing claims and obligations.

9 Since 1998, OpCo has administered the wind up of CLCA and CLCG's affairs, in addition to its own affairs, including satisfying outstanding legacy obligations, liquidating assets and administering CLCA's defence in the Castor litigation. In conjunction with OpCo, 451 and 4519931 have overseen the continued wind up of CLCA's affairs. The sole shareholders of 451 and 4519931 are two former CLCA partners. 451 and 4519931 have no assets or interests aside from their partnership interests in CLCA.

#### **Castor Holdings litigation**

10 Commencing in 1993, 96 plaintiffs commenced negligence actions against CLCA and 311 of its individual partners claiming approximately \$1 billion in damages. The claims arose from financial statements prepared by Castor and audited by CLCA, as well as certain share valuation letters and certificates for "legal for life" opinions. The claims are for losses relating to investments in or loans made to Castor in the period 1988 to 1991. A critical issue in the Castor litigation was whether CLCA was negligent in doing its work during the period 1988-1991.

11 Fifty-six claims have either been settled or discontinued. Currently, with interest, the plaintiffs in the Castor litigation collectively claim in excess of \$1.5 billion.

12 Due to the commonality of the negligence issues raised in the actions, it was decided that a single case, brought by Peter Widdrington claiming damages in the amount of \$2,672,960, would proceed to trial and all other actions in the Castor litigation would be suspended pending the outcome of the Widdrington trial. All plaintiffs in the Castor litigation were given status in the Widdrington trial on the issues common to the various claims and the determination regarding common issues, including the issues of negligence and applicable law, was to be binding in all other cases.

13 The first trial in the Widdrington action commenced in September 1998, but ultimately was aborted in 2006 due to the presiding judge's illness and subsequent retirement. The new trial commenced in January 2008 before Madam Justice St. Pierre. A decision was rendered in April 2011 in which she held that Castor's audited consolidated financial statements for the period of 1988-1990 were materially misstated and misleading and that CLCA was negligent in performing its services as auditor to Castor during that period. She noted that the overwhelming majority of CLCA's partners did not have any involvement with Castor or the auditing of the financial statements prepared by Castor.

14 The decision in the Widdrington action was appealed to the Quebec Court of Appeal which on the common issues largely upheld the lower court's judgment. The only common issue that was overturned was the nature of the defendant partners' liability. The Quebec Court of Appeal held that under Quebec law, the defendant partners were severally liable. As such, each individual defendant partner is potentially and contingently responsible for his or her several share of the damages suffered by each plaintiff in each action in the Castor litigation for the period that he or she was a partner in the years of the negligence.

15 On January 9, 2014, the defendants' application for leave to appeal the Widdrington decision to the Supreme Court of Canada was dismissed.

16 The Widdrington action has resulted in a judgment in the amount of \$4,978,897.51, inclusive of interest, a cost award in the amount of \$15,896,297.26 plus interest, a special fee cost award in the amount of \$2.5 million plus interest, and a determination of the common issue that CLCA was negligent in performing its services as auditor to Castor during the relevant period.

17 There remain 26 separate actions representing 40 claims that have not yet been tried. Including interest, the remaining plaintiffs now claim more than \$1.5 billion in damages. Issues of causation, reliance, contributory negligence and damages are involved in them.

18 The Castor Litigation has given rise to additional related litigation:

(a) Castor's trustee in bankruptcy has challenged the transfer in 1998 of substantially all of the assets used in CLCA's business to PwC under the provisions of Quebec's bulk sales legislation. As part of the PwC transaction, CLCA, OpCo and CLCG agreed to indemnify PwC from any losses that it may suffer arising from any failure on the part of CLCA, OpCo or CLCG to comply with the requirements of any bulk sales legislation applicable to the PwC transaction. In the event that PwC suffers any loss arising from the bulk sales action, it has the right to assert an indemnity claim against CLCA, OpCo and CLCG.

(b) Certain of the plaintiffs have brought an action against 51 insurers of CLCA. They seek a declaration that the policies issued by the insurers are subject to Quebec law. The action would determine whether the insurance coverage is costs-inclusive (i.e. defence costs and other expenses are counted towards the total insurance coverage) or costs-in-addition (i.e. amounts paid for the defence of claims do not erode the policy limits). The insurers assert that any insurance coverage is costs-inclusive and has been exhausted. If the insurers succeed, there will be no more insurance to cover claims. If the insurers do not succeed and the insurance policies are deemed to be costs-in-addition, the insurers may assert claims against CLCA for further premiums resulting from the more extensive coverage.

(c) The claim against the insurers was set to proceed to trial in mid-January 2015 for approximately six months. CLCA is participating in the litigation as a mis-en-cause and it has all the rights of a defendant to contest the action and is bound by the result. As a result of the stay in the Initial Order, the trial has been put off.

(d) There have been eight actions brought in the Quebec Superior Court challenging transactions undertaken by certain partners and parties related to them (typically a spouse) (the "Paulian Actions").

(e) There is a pending appeal to the Quebec Court of Appeal involving an order authorizing the examination after judgment in the Widdrington action of Mr. David W. Smith.

19 The next trial to proceed against CLCA and the individual partners will be in respect of claims made by three German banks. It is not expected to start until at the least the fall of 2015 and a final determination is unlikely until 2017 at the earliest, with any appeals taking longer. It is anticipated that the next trial after the three German banks trial will be in respect of Chrysler's claim. Mr. Woods, who acts for Chrysler, anticipates that it will not start until 2017 with a trial decision perhaps being given in 2019 or 2020, with any appeals taking longer. The remaining claims will not proceed until after the Chrysler trial.

20 The fees incurred by OpCo and CLCA in the defence of the Widdrington action are already in excess of \$70 million. The total spent by all parties already amounts to at least \$150 million. There is evidence before me of various judges in Quebec being critical of the way in which the defence of the Widdrington action has been conducted in a "scorched earth" manner.

#### **Individual partner defendants**

21 Of the original 311 defendant partners, twenty-seven are now deceased. Over one hundred and fifty are over sixty-five years of age, and sixty-five more will reach sixty-five years of age within five years. There is a dispute about the number of defendant partners who were partners of CLCA at the material time. CLCA believes that twenty-six were wrongly named in the Castor litigation (and most have now been removed), a further three were named in actions that were subsequently discontinued, some were partners for only a portion of the 1988-1991 period and some were named in certain actions but not others. Six of the defendant partners have already made assignments in bankruptcy.

#### **Analysis**

##### **(i) Applicability of the CCAA**

22 Section 3(1) of the CCAA provides that it applies to a debtor company where the total claims against the debtor company exceed \$5 million. By virtue of section 2(1)(a), a debtor company includes a company that is insolvent. Chrysler contends that the applicant has not established that it is insolvent.

23 The insolvency of a debtor is assessed at the time of the filing of the CCAA application. While the CCAA does not define "insolvent", the definition of "insolvent person" under the *Bankruptcy and Insolvency Act* is commonly referred to for guidance although the BIA definition is given an expanded meaning under the CCAA. See Holden, Morawetz & Sarra, *the 2013-2014 Annotated Bankruptcy and Insolvency Act* (Carswell) at N§12 and *Stelco Inc., Re* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]) (per Farley J.); leave to appeal to the C of A refused 2004 CarswellOnt 2936 (Ont. C.A.).

24 The BIA defines "insolvent person" as follows:

"insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

25 The applicant submits that it is insolvent under all of these tests.

26 The applicant 451 is a debtor company. It is a partner of CLCA and is liable as a principal for the partnership's debts incurred while it is a partner.

27 At present, CLCA's outstanding obligations for which the applicant 451 is liable include: (i) various post-retirement obligations owed to former CLCA partners, the present value of which is approximately \$6.25 million (the "Pre-71 Entitlements"); (ii) \$16,026,189 payable to OpCo on account of a loan advanced by OpCo on October 17, 2011 to allow CLCA to pay certain defence costs relating to the Castor litigation; (iii) the Widdrington costs award in the amount of \$18,783,761.66, inclusive of interest as at December 1, 2014, which became due and payable to the plaintiff's counsel on November 27, 2014; (iv) the special fee in the amount of \$2,675,000, inclusive of interest as at December 1, 2014, awarded to the plaintiff's counsel in the Widdrington action; and (v) contingent liabilities relating to or arising from the Castor litigation, the claims of which with interest that have not yet been decided being approximately \$1.5 billion.

28 The only asset of the applicant 451 on its balance sheet is its investment of \$100 in CLCA. The applicant is a partner in CLCA which in turn is a partner in OpCo. At the time of the granting of the Initial Order, Ernst & Young Inc., the proposed Monitor, stated in its report that the applicant was insolvent based on its review of the financial affairs of the applicant, CLCA and OpCo.

29 Mr. Peden in argument on behalf of Chrysler analyzed the balance sheets of CLCA and OpCo and concluded that there were some \$39 million in realizable assets against liabilities of some \$21 million, leaving some \$18 million in what he said were liquid assets. Therefore he concluded that these assets of \$18 million are available to take care of the liabilities of 451.

30 I cannot accept this analysis. It was unsupported by any expert accounting evidence and involved assumptions regarding netting out amounts, one of some \$6.5 million owing to pre-1971 retired partners, and one of some \$16 million owing by CLCA to OpCo for defence costs funded by OpCo. He did not consider the contingent claims against the \$6.5 million under the indemnity provided to PWC, nor did he consider that the \$16 million was unlikely to be collectible by OpCo as explained in the notes to the financial statements of 451.

31 This analysis also ignored the contingent \$1.5 billion liabilities of CLCA in the remaining Castor litigation and the effect that would have on the defence costs and for which the applicant 451 will have liability and a contingent liability for cost awards rendered in that litigation against CLCA. These contingent liabilities must be taken into account in an insolvency analysis under the subsection (c) definition of an insolvent person in the BIA which refers to obligations due and accruing due. In *Stelco Inc., Re, supra*, Farley J. stated that all liabilities, contingent or unliquidated, have to be taken into account. See also *Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 54 (Ont. S.C.J. [Commercial List]) (per Farley J.).

32 It is obvious in this case that if the litigation continues, the defence costs for which the applicant 451 will have liability alone will continue and will more than eat up whatever cash OpCo may have. As well, the contingent liabilities of CLCA in the remaining \$1.5 billion in claims cannot be ignored just because CLCA has entered defences in all of them. The negligence of CLCA has been established for all of these remaining cases in the Widdrington test case. The term sheet provides that the claims of the German and Canadian banks, approximately \$720 million in total, and the claim of the Trustee of CLCA of approximately \$108 million, will be accepted for voting and distribution purposes in a plan of arrangement. While there is no evidence before me at this stage what has led to the decision of CLCA and its former partners to now accept these claims, I can only conclude that in the circumstances it was considered by these defendants that there was exceptional risk in the actions succeeding. I hesitate to say a great deal about this as the agreement in the term sheet to accept these claims for voting and distribution purposes will no doubt be the subject of further debate in these proceedings at the appropriate time.

33 As stated, the balance sheet of the applicant 451 lists as its sole asset its investment of \$100 in CLCA. The notes to the financial statements state that CLCA was indebted to OpCo at the time, being June 30, 2014, for approximately \$16 million and that its only asset available to satisfy that liability was its investment in OpCo on which it was highly likely that there would be no recovery. As a result 451 would not have assets to support its liabilities to OpCo.

34 For this reason, as well as the contingent risks of liability of CLCA in the remaining claims of \$1.5 billion, it is highly likely that the \$100 investment of the applicant 451 in CLCA is worthless and unable to fund the current and future obligations of the applicant caused by the CLCA litigation.

35 I accept the conclusion of Ernst & Young Inc. that the applicant 451 is insolvent. I find that the applicant has established its insolvency at the time of the commencement of this CCAA proceeding.

**(ii) Should an Initial Order be made and if so should it extend to CLCA?**

36 The applicant moved for a stay in its favour and moved as well to extend the stay to CLCA and all of the outstanding Castor litigation. I granted that relief in the Initial Order. Chrysler contends that there should be no stay of any kind. It has not expressly argued that if a stay is granted against the applicant it should not be extended to CLCA, but the tenor of its arguments would encompass that.

37 I am satisfied that if the stay against the applicant contained in the Initial Order is maintained, it should extend to CLCA and the outstanding Castor litigation. A CCAA court may exercise its jurisdiction to extend protection by way of the stay of proceedings to a partnership related to an applicant where it is just and reasonable or just and convenient to do so. The courts have held that this relief is appropriate where the operations of a debtor company are so intertwined with those of a partner or limited partnership in question that not extending the stay would significantly impair the effectiveness of a stay in respect of the debtor company. See *Prizm Income Fund, Re* (2011), 75 C.B.R. (5th) 213 (Ont. S.C.J.) per Morawetz J. The stay is not granted under section 11 of the CCAA but rather under the court's inherent jurisdiction. It has its genesis in *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) and has been followed in several cases, including *Canwest Publishing Inc./Publications Canwest Inc., Re* (2010), 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]) per Pepall J. (as she then was) and *Calpine Canada Energy Ltd., Re* (2006), 19 C.B.R. (5th) 187 (Alta. Q.B.) per Romaine J.

38 The applicant 451's sole asset is its partnership interest in the CLCA partnership and its liabilities are derived solely from that interest. The affairs of the applicant and CLCA are clearly intertwined. Not extending the stay to CLCA and the Castor litigation would significantly impair the effectiveness of the stay in respect of 451. It would in fact denude it of any force at all as the litigation costs would mount and it would in all likelihood destroy any ability to achieve a global settlement of the litigation. CLCA is a necessary party to achieve a resolution of the outstanding litigation, and significant contributions from its interest in OpCo and from its former partners are anticipated under the term sheet in exchange for releases to be provided to them.

39 Chrysler relies on the principle that if the technical requirements for a CCAA application are met, there is discretion in a court to deny the application, and contends that for several reasons the equities in this case require the application to be met. It says that there is no business being carried on by the applicant or by CLCA and that there is no need for a CCAA proceeding to effect a sale of any assets as a going concern. It says there will be no restructuring of a business.

40 Cases under the CCAA have progressed since the earlier cases such as *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.) which expressed the purpose of the CCAA to be to permit insolvent companies to emerge and continue in business. The CCAA is not restricted to companies that are to be kept in business. See *First Leaside Wealth Management Inc., Re*, 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]) at para. 33 (per Brown J. as he then was). There are numerous cases in which CCAA proceedings were permitted without any business being conducted.



41 To cite a few, in *Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 54 (Ont. S.C.J. [Commercial List]) the applicants sought relief under the CCAA principally as a means of achieving a global resolution of a large number of product liability and other lawsuits. The applicants had sold all of its operating assets prior to the CCAA application and had no remaining operating business. In *Montreal, Maine & Atlantic Canada Co. (Montreal, Maine & Atlantique Canada Cie), Re*, 2013 QCCS 3777 (Que. Bkcty.) arising out of the Lac-Mégant train disaster, it was acknowledged that the debtor would be sold or dismantled in the course of the CCAA proceedings. The CCAA proceedings were brought to deal with litigation claims against it and others. In *Crystallex International Corp., Re*, 2011 ONSC 7701 (Ont. S.C.J. [Commercial List]) the CCAA is currently being utilized by a company with no operating business, the only asset of which is an arbitration claim.

42 Chrysler contends, as stated in its factum, that the pith and substance of this case is not about the rescue of a business; it is to shield the former partners of CLCA from their liabilities in a manner that should not be approved by this court. Chrysler refers to several statements by judges beginning in 2006 in the Castor litigation who have been critical of the way in which the Widdrington test case has been defended, using such phrases as "a procedural war of attrition" and "scorched earth" strategies. Chrysler contends that now that the insurance proceeds have run out and the former partners face the prospect of bearing the cost of litigation which that plaintiffs have had to bear throughout the 22-year war of attrition, the former partners have convinced the German and Canadian banks to agree to the compromise set out in the term sheet. To grant them relief now would, it is contended, reward their improper conduct.

43 Chrysler refers to a recent decision in Alberta, *Alexis Paragon Limited Partnership, Re*, 2014 ABQB 65 (Alta. Q.B.) in which a CCAA application was denied and a receiver appointed at the request of its first secured creditor. In that case Justice Thomas referred to a statement of Justice Romaine in *Alberta Treasury Branches v. Tallgrass Energy Corp*, 2013 ABQB 432 (Alta. Q.B.) in which she stated that an applicant had to establish that it has acted and is acting in good faith and with due diligence. Justice Thomas referred to past failures of the applicant to act with due diligence in resolving its financial issues and on that ground denied the CCAA application. Chrysler likens that to the manner in which the Widdrington test case was defended by CLCA.

44 I am not entirely sure what Justice Romaine precisely had in mind in referring to the need for an applicant to establish that "it has acted and is acting with good faith and with due diligence" but I would think it surprising that a CCAA application should be defeated on the failure of an applicant to have dealt with its affairs in a diligent manner in the past. That could probably said to have been the situation in a majority of cases, or at least arguably so, and in my view the purpose of CCAA protection is to attempt to make the best of a bad situation without great debate whether the business in the past was properly carried out. Did the MM&A railway in Lac-Mégantic act with due diligence in its safety practices? It may well not have, but that could not have been a factor considered in the decision to give it CCAA protection.

45 I do understand that need for an applicant to act in the CCAA process with due diligence and good faith, but I would be reluctant to lay down any fixed rule as to how an applicant's actions prior to the CCAA application should be considered. I agree with the statement of Farley J. in *Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 57 (Ont. S.C.J. [Commercial List]) that it is the good faith of an applicant in the CCAA proceedings that is the issue:

Allegations ... of bad faith as to past activities have been made against the CCAA applicants and the Gardiner interests. However, the question of good faith is with respect to how these parties are conducting themselves in these CCAA proceedings.

46 There is no issue as to the good faith of the applicant in this CCAA proceeding. I would not set aside the Initial Order and dismiss the application on the basis of the defence tactics in the Widdrington test case.

47 The Castor litigation has embroiled CLCA and the individual partners for over 20 years. If the litigation is not settled, it will take many more years. Chrysler concedes that it likely will take at least until 2020 for the trial process on



its claim to play out and then several more years for the appellate process to take its course. Other claims will follow the Chrysler claim. The costs have been enormous and will continue to escalate.

48 OpCo has dedicated all of its resources to the defence of the Castor litigation and it will continue to do so. OpCo has ceased distributions to its partners, including CLCA, in order to preserve funds for the purpose of funding the defence of the litigation. If the Castor litigation continues, further legal and other costs will be incurred by OpCo and judgments may be rendered against CLCA and its partners. If so, those costs and judgments will have to be paid by OpCo through advances from OpCo to CLCA. Since CLCA has no sources of revenue or cash inflow other than OpCo, the liabilities of CLCA, and therefore the applicant, will only increase.

49 If the litigation is not settled, CLCA's only option will be to continue in its defence of the various actions until either it has completely depleted its current assets (thereby exposing the defendant partners to future capital calls), or a satisfactory settlement or judicial determination has been reached. If no such settlement or final determination is achieved, the cost of the defence of the actions could fall to the defendant partners in their personal capacities. If a resolution cannot be reached, the amount that will be available for settlement will continue to decrease due to ongoing legal costs and other factors while at the same time, the damages claimed by the plaintiffs will continue to increase due to accruing interest. With the commencement of further trials, the rate of decrease of assets by funding legal costs will accelerate.

50 After a final determination had been reached on the merits in the Widdrington action, CLCA's board of directors created a committee comprised of certain of its members to consider the next steps in dealing with CLCA's affairs given that, with the passage of time, the defendant partners may ultimately be liable in respect of negligence arising from the Castor audits without a settlement.

51 Over the course of several months, the committee and the defendant partners evaluated many possible settlement structures and alternatives and after conferring with counsel for various plaintiffs in the Castor litigation, the parties agreed to participate in a further mediation. Multiple attempts had earlier been made to mediate a settlement. Most recently, over the course of four weeks in September and October 2014, the parties attended mediation sessions, both plenary and individually. Chrysler participated in the mediation.

52 Although a settlement could not be reached, the applicant and others supporting the applicant believe that significant progress was achieved in the mediation. In light of this momentum, the applicant and CLCA continued settlement discussions with certain plaintiffs willing to engage in negotiations. These discussions culminated with the execution of a term sheet outlining a plan of arrangement under the CCAA that could achieve a global resolution to the outstanding litigation.

53 A CCAA proceeding will permit the applicant and its stakeholders a means of attempting to arrive at a global settlement of all claims. If there is no settlement, the future looks bleak for everyone but the lawyers fighting the litigation.

54 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 is also intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Without a stay, such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan would succeed. See *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) per Farley J.

55 In this case it would be unfair to one plaintiff who is far down the line on a trial list to have to watch another plaintiff with an earlier trial date win and collect on a judgment from persons who may not have the funds to pay a later judgment. That would be chaos that should be avoided. A recent example of a stay being made to avoid such a

possibility is the case of *Montreal, Maine & Atlantic Canada Co. (Montreal, Maine & Atlantique Canada Cie)*, Re which stayed litigation arising out of the Lac-Mégant train disaster. See also *Muscletech Research & Development Inc., Re*.

56 In this case, the term sheet that the applicant anticipates will form the basis of a proposed Plan includes, among other elements:

- (a) the monetization of all assets of CLCA and its partnership OpCo to maximize the net proceeds available to fund the plan, including all applicable insurance entitlements that are payable or may become payable, which proceeds will be available to satisfy the determined or agreed claims of valid creditors;
- (b) contributions from a significant majority of the defendant partners;
- (c) contributions from non-defendant partners of CLCA and CLCG exposed under the PwC indemnity;
- (d) contributions from CLCA's insurers and other defendants in the outstanding litigation;
- (e) the appointment of Ernst & Young Inc. as Monitor to oversee the implementation of the plan, including to assist with the realization and monetization of assets and to oversee (i) the capital calls to be made upon the defendant partners, (ii) a claims process, and (iii) the distribution of the aggregate proceeds in accordance with the plan; and
- (f) provision to all parties who contribute amounts under the plan, of a court-approved full and final release from and bar order against any and all claims, both present and future, of any kind or nature arising from or in any way related to Castor.

57 This term sheet is supported by the overwhelming number of creditors, including 13 German banks, 8 Canadian banks, over 100 creditors of Castor represented by the Trustee in bankruptcy of Castor and the Widdrington estate. It is also supported by the insurers. The plaintiffs other than Chrysler, representing approximately 71.2% of the face value of contingent claims asserted in the outstanding litigation against CLCA, either support, do not oppose or take no position in respect of the granting of the Initial Order. Chrysler represents approximately 28.8% of the face value of the claims.

58 Counsel for the German and Canadian banks points out that it has been counsel to them in the Castor claims and was counsel for the Widdrington estate in its successful action. The German and Canadian banks in their factum agree that during the course of the outstanding litigation over the past 20 years, they have been subjected to a "scorched earth", "war of attrition" litigation strategy adopted by CLCA and its former legal counsel. Where they seriously part company with Chrysler is that they vigorously disagree that such historical misconduct should prevent the CLCA group from using the CCAA to try to achieve the proposed global settlement with their creditors in order to finally put an end to this war of attrition and to enable all valid creditors to finally receive some measure of recovery for their losses.

59 It is argued by the banks and others that if Chrysler is successful in defeating the CCAA proceedings, the consequence would be to punish all remaining Castor plaintiffs and to deprive them of the opportunity of arriving at a global settlement, thus exacerbating the prejudice which they have already suffered. Chrysler, as only one creditor of the CLCA group, is seeking to impose its will on all other creditors by attempting to prevent them from voting on the proposed Plan; essentially, the tyranny of the minority over the majority. I think the banks have a point. The court's primary concern under the CCAA must be for the debtor and all of its creditors. While it is understandable that an individual creditor may seek to obtain as much leverage as possible to enhance its negotiating position, the objectives and purposes of a CCAA should not be frustrated by the self-interest of a single creditor. See *Calpine Canada Energy Ltd., Re*, 2007 ABCA 266 (Alta. C.A. [In Chambers]), at para 38, per O'Brien J.A.

60 The German and Canadian banks deny that their resolve has finally been broken by the CLCA in its defence of the Castor litigation. On the contrary, they state a belief that due to litigation successes achieved to date, the time is now ripe to seek to resolve the outstanding litigation and to prevent any further dissipation of the assets of those stakeholders

funding the global settlement. Their counsel expressed their belief that if the litigation continues as suggested by Chrysler, the former partners will likely end up bankrupt and unable to put in to the plan what is now proposed by them. They see a change in the attitude of CLCA by the appointment of a new committee of partners to oversee this application and the appointment of new CCAA counsel in whom they perceive an attitude to come to a resolution. They see CLCA as now acting in good faith.

61 Whether the banks are correct in their judgments and whether they will succeed in this attempt remains to be seen, but they should not be prevented from trying. I see no prejudice to Chrysler. Chrysler's contingent claim is not scheduled to be tried until 2017 at the earliest, and it will likely still proceed to trial as scheduled if a global resolution cannot be achieved in the course of this CCAA proceeding. Further, since Chrysler has not obtained a judgment or settlement in respect of its contingent claim, the Initial Order has not stayed any immediate right available to Chrysler. The parties next scheduled to proceed to trial in the outstanding litigation who have appeared, the insurers and then the three German banks, which are arguably the most affected by the issuance of a stay of proceedings, have indicated their support for this CCAA proceeding and Initial Order, including the stay of proceedings.

62 What exactly Chrysler seeks in preventing this CCAA application from proceeding is not clear. It is hard to think that it wants another 10 years of hard fought litigation before its claim is finally dealt with. During argument, Mr. Vaclair did say that Chrysler participated in the unsuccessful mediation and that it has been willing to negotiate. That remains to be seen, but this CCAA process will give it that opportunity.

63 Chrysler raises issues with the term sheet, including the provision that the claims of the German and Canadian banks and the Trustee of Castor will be accepted but that the Chrysler claim will be determined in a claims process. Chrysler raises issues regarding the proposed claims process and whether the individual CLCA former partners should be required to disclose all of their assets. These issues are premature and can be dealt with later in the proceedings as required.

64 Mr. Kent, who represents a number of former CLCA partners, said in argument that the situation cries out for settlement and that there are many victims other than the creditors, namely the vast majority of the former CLCA partners throughout Canada who had nothing to do with the actions of the few who were engaged in the Castor audit. The trial judge noted that the main CLCA partner who was complicit in the Castor Ponzi scheme hid from his partners his relationships with the perpetrators of the scheme.

65 Mr. Kent's statement that the situation cries out for settlement has support in the language of the trial judge in the Widdrington test case. Madame Justice St. Pierre said in her opening paragraph on her lengthy decision:

1 Time has come to put an end to the longest running judicial saga in the legal history of Quebec and Canada.

66 At the conclusion of her decision, she stated:

3637 Defendants say litigation is far from being finished since debates will continue on individual issues (reliance and damages), on a case by case basis, in the other files. They might be right. They might be wrong. They have to remember that litigating all the other files is only one of multiple options. Now that the litigants have on hand answers to all common issues, resolving the remaining conflicts otherwise is clearly an option (for example, resorting to alternative modes of conflict resolution).

67 In my view the CCAA is well able to provide the parties with a structure to attempt to resolve the outstanding Castor litigation. The Chrysler motion to set aside the Initial Order and to dismiss the CCAA application is dismissed.

*(iii) Should the stay be extended to the insurers?*

68 The applicant 451 moves as well to extend the stay to the insurers of CLCA. This is supported by the insurers. The trial against the insurers was scheduled to commence on January 12, 2015 but after the Initial Order was made, it was adjourned pending the outcome of the motion by Chrysler to set aside the Initial Order. Chrysler has made no

argument that if the Initial Order is permitted to stand that it should be amended to remove the stay of the action against the insurers.

69 Under the term sheet intended to form the basis of a plan to be proposed by the applicant, the insurers have agreed to contribute a substantial amount towards a global settlement. It could not be expected that they would be prepared to do so if the litigation were permitted to proceed against them with all of the costs and risks associated with that litigation. Moreover, it could well have an effect on the other stakeholders who are prepared to contribute towards a settlement.

70 A stay is in the inherent jurisdiction of a court if it is in the interests of justice to do so. While many third party stays have been in favour of partners to applicant corporations, the principle is not limited to that situation. It could not be as the interests of justice will vary depending on the particulars of any case.

71 In *Montreal, Maine & Atlantic Canada Co. (Montreal, Maine & Atlantique Canada Cie), Re*, Castonguay, J.C.S. stayed litigation against the insurers of the railway. In doing so, he referred to the exceptional circumstances and the multiplicity of proceedings already instituted and concluded it was in the interests of sound administration of justice to stay the proceedings, stating:

En raison des circonstances exceptionnelles de la présente affaire et devant la multiplicité des recours déjà intentés et de ceux qui le seront sous peu, il est dans l'intérêt d'une saine administration de la justice d'accorder cette demande de MMA et d'étendre la suspension des recours à XL.

72 In my view, it is in the interests of justice that the stay of proceedings extend to the action against the insurers.

**(iv) Should a creditors' committee be ordered and its fees paid by CLCA?**

73 The Initial Order provides for a creditors' committee comprised of one representative of the German bank group, one representative of the Canadian bank group, and the Trustee in bankruptcy of Castor. It also provides that CLCA shall be entitled to pay the reasonable fees and disbursements of legal counsel to the creditors' committee. Chrysler opposes these provisions.

74 The essential argument of Chrysler is that a creditors' committee is not necessary as the same law firm represents all of the banks and the Trustee of Castor. Counsel for the banks and the Trustee state that the German bank group consists of 13 distinct financial institutions and the Canadian bank group consists of 8 distinct financial institutions and that there is no evidence in the record to the effect that their interests do not diverge on material issues. As for the Castor Trustee, it represents the interests of more than 100 creditors of Castor, including Chrysler, the German and Canadian bank groups, and various other creditors. They says that a creditors' committee brings order and allows for effective communication with all creditors.

75 CCAA courts routinely recognize and accept *ad hoc* creditors' committees. It is common for critical groups of critical creditors to form an *ad hoc* creditors' committee and confer with the debtor prior to a CCAA filing as part of out-of-court restructuring efforts and to continue to function as an *ad hoc* committee during the CCAA proceedings. See Robert J. Chadwick & Derek R. Bulas, "Ad Hoc Creditors' Committees in CCAA Proceedings: The Result of a Changing and Expanding Restructuring World", in Janis P. Sarra, ed, Annual Review of Insolvency Law 2011 (Toronto:Thomson Carswell) 119 at pp 120-121.

76 Chrysler refers to the fact that it is not to be a member of the creditors' committee. It does not ask to be one. Mr. Meland, counsel for the two bank groups and for the Trustee of Castor said during argument that they have no objection if Chrysler wants to join the committee. If Chrysler wished to join the committee, however, it would need to be considered as to whether antagonism, if any, with other members would rob the committee of any benefit.

77 Chrysler also takes exception to what it says is a faulty claims process proposed in the term sheet involving the creditors' committee. Whether Chrysler is right or not in its concern, that would not be a reason to deny the existence

of the committee but rather would be a matter for discussion when a proposed claims process came before the court for approval.

78 The creditors' committee in this case is the result of an intensely negotiated term sheet that forms the foundation of a plan. The creditors' committee was involved in negotiating the term sheet. Altering the terms of the term sheet by removing the creditors' committee could frustrate the applicant's ability to develop a viable plan and could jeopardize the existing support from the majority of claimants. I would not accede to Chrysler's request to remove the Creditors' committee.

79 So far as the costs of the committee are concerned, I see this as mainly a final *cri de couer* from Chrysler. The costs in relation to the amounts at stake will no doubt be relatively minimal. Chrysler says it is galling to see it having to pay 28% (the size of its claim relative to the other claims) to a committee that it thinks will work against its interests. Whether the committee will work against its interests is unknown. I would note that it is not yet Chrysler's money, but CLCA's. If there is no successful outcome to the CCAA process, the costs of the committee will have been borne by CLCA. If the plan is successful on its present terms, there will be \$220 million available to pay claims, none of which will have come from Chrysler. I would not change the Initial Order and deny the right of CLCA to pay the costs of the creditors' committee.

80 Finally, Chrysler asks that if the costs are permitted to be paid by CLCA, a special detailed budget should be made and provided to Chrysler along with the amounts actually paid. I see no need for any particular order. The budget for these fees is and will be continued to be contained in the cash flow forecast provided by the Monitor and comparisons of actual to budget will be provided by the Monitor in the future in the normal course.

#### **Conclusion**

81 The motion of Chrysler is dismissed. The terms of the Initial Order are continued.

*Order accordingly.*

**TAB 3**

**Most Negative Treatment:** Distinguished

**Most Recent Distinguished:** Stelco Inc., Re | 2005 CarswellOnt 743, 7 C.B.R. (5th) 310, 137 A.C.W.S. (3d) 476, [2005] O.J. No. 730 | (Ont. S.C.J. [Commercial List], Feb 28, 2005)

1991 CarswellBC 494  
British Columbia Supreme Court

Alberta-Pacific Terminals Ltd., Re

1991 CarswellBC 494, [1991] B.C.W.L.D. 1413, [1991] B.C.J. No. 1065, 26 A.C.W.S. (3d) 958, 8 C.B.R. (3d) 99

**Re COMPANY ACT, R.S.B.C. 1979, c. 59; Re BUSINESS CORPORATIONS ACT, S.A. 1981, c. B-15; Re COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36; Re ALBERTA-PACIFIC TERMINALS LTD., FRASER SURREY DOCKS LTD., PACIFIC TERMINALS LTD., JOHNSON MARINE TERMINALS LIMITED and JOHNSTON INTERNATIONAL SERVICES (HONG KONG) LTD.**

Huddart J. [in Chambers]

Heard: April 18-19, 1991

Judgment: May 8, 1991

Docket: Doc. Vancouver A903661

Counsel: *M. Copping Hollis* and *G. Hughes*, for applicants Fraser River Harbour Commission.

*R. Holmes* and *G. Matei*, for petitioners.

*J. Dixon* and *A. Perry*, for Her Majesty the Queen in right of the Province of Alberta and Alberta Treasury Branch.

*S. Jermyn*, for Rico Equipment, an unsecured creditor.

Subject: Corporate and Commercial; Insolvency

#### Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

#### Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act

XIX.5 Miscellaneous

#### Headnote

**Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act**

Companies' Creditors Arrangement Act — Petitioners operating terminal for Harbour Commission — Order made under Companies' Creditors Arrangement Act staying all proceedings against petitioners and enjoining Commission from terminating operating agreement — Commission's application for order directing payment by petitioners of amounts falling due monthly under operating agreement dismissed — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

The harbour commission had an agreement (the "operating agreement") with FSDL under which FSDL operated a terminal for the commission. FSDL and its associated companies (collectively, the "petitioners") ran into financial difficulties and sought protection under the *Companies' Creditors Arrangement Act*. An order was made under the

Act staying all proceedings against the petitioners, enjoining the commission from taking any steps to terminate the operating agreement (which was the primary asset of FSDL), and ordering that contracts that might give a benefit to any petitioner be maintained in full force and effect pending a further order. The commission applied for an order directing the payment by the practitioners of the amounts that fell due monthly under the operating agreement, and also asked the court to determine the nature of the relationship between the commission and the practitioners.

**Held:**

The application was dismissed.

This was not the appropriate time to consider the relationship between the parties.

The petitioners should not be ordered to pay moneys pursuant to the operating agreement pending the termination of the stay orders. There was no evidence of any hardship to the commission; the commission's only concern was that its position not be eroded relative to the position of other creditors. The petitioners did not appear to have the money to make the payments sought. The orders under the Act left to the management of the petitioners a considerable area of discretion in the application of its current cash flow. Given the terms of the operating agreement, the history of the relationship between the commission and the petitioners, the nature of the terminal operation, the nature of the line of credit facility, and the petitioners' cash flow statements, it was inappropriate for the court to intervene in the exercise of that discretion without some reason, such as perhaps evidence of hardship to the commission or of erosion of its property value.

**Table of Authorities**

**Cases considered:**

*Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84, [1991] 2 W.W.R. 136 (C.A.) — *applied*

**Statutes considered:**

Bank Act, R.S.C. 1985, c. B-1 —

s. 178 [am. R.S.C. 1985 (3rd Supp.), c. 25, s. 26(1) and (2)]

Business Corporations Act, S.A. 1981, c. B-15.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Company Act, R.S.B.C. 1979, c. 59.

Harbour Commissions Act, R.S.C. 1985, c. H-1.

Application for order directing payment of moneys due under agreement in spite of stay under *Companies' Creditors Arrangement Act*.

**Huddart J. [In Chambers]:**

1 This application is about the right of the Fraser River Harbour Commission to be paid moneys pursuant to its agreement with Fraser Surrey Docks Ltd. ("FSDL"), under which FSDL operates the deep-sea common user terminal



of the Fraser port, while all proceedings against FSDL and its associated companies are stayed by orders made under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

2 Under the terms of the operating agreement made January 1, 1989, FSDL is the terminal agent and wharfinger for the commission. The commission administers the Fraser port under the *Harbour Commissions Act*, R.S.C. 1985, c. H-1. The Johnston Group of companies has operated the terminal for more than 20 years, but since the 1989 agreement and related expansion, it has run into financial difficulties. The petitioners attribute these difficulties to a chemical spill in August 1989, and consequential claims for damages; a very high debt/equity ratio and the refusal of the Alberta treasury branch and government to convert their debt to equity; a fire on November 14, 1990; and finally, the commission's threat on November 16, 1990, to terminate the operating agreement.

3 To assist FSDL with the earlier of these difficulties, the commission had agreed on July 27, 1990, to defer payments due under the operating agreement for the months of June to September inclusive, the same to be paid on December 31, 1990. When FSDL defaulted on the regular payment for October due on November 15, 1990, the commission refused a request for a further deferral, advising that it would consider termination of the operating agreement if payment was not made within the 7 days of grace allowed under the contract.

4 FSDL considers that the commission has the right to terminate the operating agreement only upon its insolvency. When FSDL and its related companies admitted they were insolvent and sought the protection available to them under the *Companies' Creditors Arrangement Act* (the "CCAA") on November 22, 1990, FSDL owed the commission about \$976,000. The commission claims that Johnston Marine Terminals Limited ("JMTL") then owed it \$353,000. The total debt of the petitioners to the Alberta government and the Alberta treasury branches ("Alberta") was \$13 million, some of it secured.

5 The operating agreement is the primary asset of FSDL. Without it and the operating line of credit from the Alberta treasury branches, the petitioners would be unable to operate the terminal.

6 The ex parte order Mr. Justice Skipp made on November 22, 1990, stayed all proceedings against the petitioners until May 31, 1991, specifically enjoined the commission from taking any steps to terminate the operating agreement and the option to lease in favour of Pacific Terminals Ltd. ("Pacific") without further order, and ordered that contracts that might give a benefit to any petitioner "be maintained in full force and effect pending further order of this Court."

7 In December, the petitioners paid \$28,544 to the commission, the amount attributable to the period in November following the CCAA order.

8 On December 18, Mr. Justice Spencer varied the order to provide for the continued provision by the Alberta treasury branches of the "existing \$1.25 million operating credit facility" to the petitioners or any of them. Included in that order was a provision that "interest calculated on the daily outstanding principal amount under the Facility is to be paid monthly." The order was made with the consent of the petitioners, Alberta, and the commission. No similar provision was made with regard to the monthly payments required by the operating agreement.

9 FSDL did not make the payment due on January 15, or any subsequent payments. The payments due exceed \$200,000 per month. FSDL claimed that it could not afford to make the payments, that the payments were prohibited under the order, and that, in any event, to make any payment on account of the operating agreement would be to favour an equity participant over general creditors.

10 The commission interpreted the order and its relationship with FSDL differently. It considered that the order required payments under the operating agreement to be continued. The matter came before Mr. Justice Arkell, who concluded on March 28:

The present orders of the court require the Commission to continue and maintain the operating agreement for the benefit of the Petitioners, pending the reorganization plan, or further order of the court. The present court orders neither prohibit nor do they require the continuation of the monthly payments due under the operating agreement.

The Commission is at liberty to apply to the court to vary the present court orders for a right of preference over other creditors and to receive continuing payments under the terms of the operating agreement. Alternatively, the Commission may apply to the Court for leave to commence an action against the Petitioners and sue for damages or ultimately for termination of the operating agreement.

Because he had reached this conclusion accepting the position of the commission that it was a "creditor" within the meaning of the CCAA, Mr. Justice Arkell did not find it necessary to resolve the dispute as to the nature of the relationship between the petitioners and the commission.

11 This application is a sequel to the application before Mr. Justice Arkell. It revisits the issue as to the nature of the relationship between the petitioners and the commission, and it asks this court to direct the payment by the petitioners of the amounts that fall due monthly under the operating agreement.

12 I find that I need consider only the second issue. The authorities cited by both counsel persuade me that the categorization of any commercial relationship will vary with the issue before the court. If and when a determination of the rights and obligations of the parties to the operating agreement is required, the court may be called upon to determine the nature of their relationship. If and when the court is called upon to fix the classes of creditors for the purpose of voting on a reorganization plan, the court may be required to determine whether or not the commission is a "creditor" within the meaning of the CCAA. Until some such occasion arises, I can see no reason for saying anything about their relationship.

13 It may be that the commission is anxious that the court determine the nature of its relationship with FSDL, JMTL, and Alberta-Pacific Terminals Ltd., before the fixing of the classes of creditors. If so, it did not say so.

14 There is no doubt that the commission is concerned at the hint in the petitioners' argument that they may be seeking the court's and the creditors' approval of a reorganization plan that will restructure their "revenue sharing arrangements" with the commission without the approval of the commission. A question about the judicial nature of the relationship might arise if the petitioners successfully exclude the commission from voting as a creditor, then seek to have it bound by any reorganization plan. From the information available to me on this application and from my understanding of the purpose and scheme of the CCAA, I consider such an idea so far-fetched as not to require further comment.

15 It may be that the commission considers the nature of the relationship material to the issue as to whether or not it should be paid the moneys that have fallen due since November 30 or that will fall due before May 31, or any later termination of the stay. I do not find it to be so because I have not had recourse to the arguments put forward by the petitioners based on joint venture, debt or equity contribution, or equitable subordination, in reaching the conclusion that I should not order the petitioners or any of them to pay moneys pursuant to the operating agreement pending the termination of the stay orders.

16 I have come to that conclusion having regard to the purpose and scheme of the CCAA, the terms of the operating agreement, and the financial circumstances of the petitioners as revealed in the monitor's report.

17 The purpose of the CCAA is to facilitate a compromise between an insolvent corporate debtor and its creditors so that the company is able to continue in business, said Mr. Justice Gibbs in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84, [1991] 2 W.W.R. 136 (C.A.), at p. 88 [B.C.L.R.]. No creditor is exempted. But neither is anyone who is not a creditor included within its ambit.

18 At p. 90 of the *Chef Ready* case, Mr. Justice Gibbs said of the effect of the CCAA on the property interest acquired by a bank under s. 178 [*Bank Act*, R.S.C. 1985, c. B-1] security:

But, it must be asked, in what respect does the preservation of the status quo qua creditors under the C.C.A.A. for a temporary period infringe upon the rights of the bank under ss. 178 and 179? It does not detract from the bank's title; it does not distort the mechanics of realization of the security in the sense of the steps to be taken; ... it does not breach the 'complete code'. All that it does is postpone the exercise of the right to seize and sell. And here the bank had already allowed at least five days to expire between the accrual of the right and the taking of a step to exercise.

19 From a similar perspective, it can be said that all that the orders pursuant to the CCAA do with regard to the commission's rights under the operating agreement is to postpone the exercise of the right to terminate the agreement on insolvency or to sue for payments not made as they fall due. The commission had already allowed a 4-month postponement. So the petitioners argue. However, the commission seeks neither to sue nor to terminate the agreement. It does not wish to prevent FSDL from carrying on business. It recognizes the purpose of the stay of proceedings.

20 Rather, it says that the orders requiring it to continue to provide its land and facilities without current recompense and without any guarantee of future recompense make it unique among the creditors of the petitioners, unlike the Alberta treasury branches, who are to continue the line of credit facility, but who are to receive current interest on the credit advanced under it, and unlike those creditors who are paid for current supply of goods and services. In effect, it says that the monthly payments should be made in the ordinary course of business for the continued use of the land and facilities, because if they are not, the commission's position is eroding relative to other creditors. Its debt is growing each month, not only by accrual of interest, but by an additional \$200,000, on average. It is providing the land and facilities from the use of which income is being derived without any compensation from that income. Thus it seeks an order for payment of the moneys as they accrue due to "preserve the status quo."

21 The petitioners say that to accede to the commission's request to be paid would be to give it a preference over general creditors to which it is not entitled, given the terms of the operating agreement and particularly the way in which the payments are structured. The commission disagrees, saying that the operating agreement is valid and enforceable, there being neither an agreement nor an order suspending or prohibiting payments under it, and that to require current payments to be made would not be to prefer one creditor over another with regard to debt accumulated before the stay orders.

22 In *Chef Ready*, supra, Mr. Justice Gibbs described the court's function on applications such as these at pp. 88 and 89, in these words:

When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11.

23 The status quo is not always easy to find. It is difficult to freeze any ongoing business at a moment in time long enough to make an accurate picture of its financial condition. Such a picture is at best an artist's view, more so if the real value of the business, including goodwill, is to be taken into account. Nor is the status quo easy to define. The preservation of the status quo cannot mean merely the preservation of the relative pre-stay debt status of each creditor. Other interests are served by the CCAA. Those of investors, employees, and landlords among them, and in the case of the Fraser Surrey terminal, the public too, not only of British Columbia, but also of the prairie provinces. The status quo is to be preserved in the sense that manoeuvres by creditors that would impair the financial position of the company while it attempts to reorganize are to be prevented, not in the sense that all creditors are to be treated equally or to be maintained at the same relative level. It is the company and all the interests its demise would affect that must be considered.

24 Obviously, the commission is one of the most important of those interests, because it holds and administers the public's interest in the land and facilities.

25 When I have regard to all of the materials put before me by the commission, I find no proof of hardship or even of need. For example, I see no suggestion that the commission is incurring expenses related to the Fraser Surrey dock that it must pay from other sources of revenue. Its only concern is that its position not be eroded relative to the position of other creditors. If the reorganization is successful, it is unlikely the commission will suffer any loss in the value of its position to which it has not agreed. If the reorganization turns out not to be possible, the commission's loss because of the stay may be substantial. Or it may not be. The owner of land and facilities is not in the same position as a creditor owed a fixed sum of money, easily valued.

26 When I have regard to the monitor's cash flow statements, I do not find the money to make the payments sought. The original ex parte order and the subsequent consent order left to management of the petitioners a considerable area of discretion in the application of its current cash flow. Given the terms of the operating agreement, the history of the relationship between the commission and the petitioners, the nature of the terminal operation, the nature of the line of credit facility, and those cash flow statements, I have decided that it is inappropriate for the court to intervene in management's exercise of that discretion without some reason, perhaps evidence of hardship to the commission or of erosion of its property value.

27 I have reached that conclusion despite some considerable reservations about the way in which management has exercised that discretion, as revealed in the monitor's reports. Those reports suggest that payments have been made to other creditors from the petitioners' cash flows, contrary to this court's orders. I do not consider that I should discuss this matter further in these reasons. I advised counsel at the hearing of this application that such matters should be considered on another occasion on notice to all interested parties. On this hearing, only one unsecured creditor appeared. That creditor did not suggest that it had reason to remain after ascertaining the nature of the application and that its presentation would require the disclosure of information contained in the monitor's reports, sealed by order of Mr. Justice Spencer. It may be that unsecured creditors will wish to request further information if they receive notice of an application authorizing other payments.

*Application dismissed.*

**TAB 4**

2001 CarswellOnt 1325  
Ontario Superior Court of Justice [Commercial List]

Anvil Range Mining Corp., Re

2001 CarswellOnt 1325, [2001] O.J. No. 1453, 104 A.C.W.S. (3d) 812, 25 C.B.R. (4th) 1

**In the Matter of Anvil Range Mining Corporation**

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

In the Matter of the Courts of Justice Act, R.S.O. 1990 c. C-43, as Amended

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, C.B-3, as Amended

In the Matter of a Plan of Compromise or Arrangement of Anvil Range Mining Corporation, Applicants

Farley J.

Heard: March 22, 2001

Judgment: March 29, 2001

Docket: Doc. 98-BK-001208

Counsel: *Kenneth Kraft* and *George Karayannides*, for Deloitte & Touche Inc. in its capacity as Interim Receiver of Anvil Range Mining Corporation and Anvil Mining Properties Inc.

*Tony Reyes*, for Golden Hills Ventures Ltd., MacMillan Mining Contractors Ltd., and Vortex Mining Inc.

*John Porter*, for Her Majesty the Queen in Right of Canada as represented by the Department of Indian Affairs and Northern Development

*Kevin R. Aalto* and *David Estrin*, for Cumberland Asset Management, Berner Company Inc., Global Securities Corporation, Peel Brooke Inc., Robert N. Granger, Adrian M.S. White, and Hyundai Corporation

*Derek T. Ground*, for Ross River Dena Council and Ross River Development Corporation

*Richard B. Jones*, for Rose Creek Vangorda Mines and Pelly River Mines Limited (NPL)

*David Hager*, for Cominco Ltd.

*Geoffrey B. Morawetz*, for Yukon Energy Corporation and as agent for James Grout representing "Leitch Lien Claimants"

*Frederick L. Myers*, for Government of Yukon

Subject: Insolvency; Corporate and Commercial

**Related Abridgment Classifications**

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

**Bankruptcy and insolvency**

XIX Companies' Creditors Arrangement Act

XIX.3 Arrangements

XIX.3.b Approval by court

XIX.3.b.i "Fair and reasonable"

**Business associations**

V Legal proceedings involving business associations

V.3 Practice and procedure in proceedings involving corporations

V.3.q Costs

V.3.q.ii Scale and quantum of costs

#### Headnote

**Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"**

Interim receiver brought motion for sanctioning of plan of arrangement pursuant to Companies' Creditors Arrangement Act — Motion granted — Plan of arrangement was fair and reasonable — Plan had to be evaluated based upon what was known at time and what was realistic in future — Approval of plan of arrangement would allow secured and unsecured creditors and shareholders of company to move on with activities while mining properties would be under proper stewardship — Mere fact that opponents of plan were advocating alternative did not mean interim receiver had lost its neutrality — Plan was compromise of claims of those creditors who had true stake in company — Secured claims were far in excess of value of assets — Valuation of assets on speculative basis, such as possibility of spike in mining prices, was not appropriate — Plan proposed solely to secured creditors is not unfair where insolvent's assets are of insufficient value to yield any recovery to unsecured creditors — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

#### Table of Authorities

##### Cases considered by *Farley J.*:

*J.S. McMillan Fisheries Ltd., Re* (1998), 1 C.B.R. (4th) 226, 50 B.C.L.R. (3d) 167 (B.C. S.C.) — considered

*Kostiuk, Re*, 2000 BCSC 1115, 2000 CarswellBC 1523, 19 C.B.R. (4th) 109 (B.C. S.C.) — referred to

*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]) — considered

*New Quebec Raglan Mines Ltd. v. Blok-Andersen* (1993), 9 B.L.R. (2d) 93 (Ont. Gen. Div. [Commercial List]) — considered

*Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*, 34 B.C.L.R. (2d) 122, 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363 (B.C. C.A.) — considered

*Olympia & York Developments Ltd., Re* (1995), 34 C.B.R. (3d) 93 (Ont. Gen. Div. [Commercial List]) — considered

*Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1, (sub nom. *Olympia & York Developments Ltd., Re*) 12 O.R. (3d) 500 (Ont. Gen. Div.) — considered

*Ontario (Registrar of Mortgage Brokers) v. Matrix Financial Corp.*, 106 D.L.R. (4th) 132, 67 O.A.C. 49 (Ont. C.A.) — considered

*Philip Services Corp., Re*, 13 C.B.R. (4th) 159, 1999 CarswellOnt 4673 (Ont. S.C.J. [Commercial List]) — considered

*Royal Bank v. Fracmaster Ltd.*, 1999 CarswellAlta 539, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.*) 244 A.R. 93, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.*) 209 W.A.C. 93, 11 C.B.R. (4th) 230, [1999] A.J. No. 675 (Alta. C.A.) — considered

**Statutes considered:**

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3  
Generally — considered

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36  
Generally — considered

*Miners Lien Act*, R.S.Y. 1986, c. 116  
Generally — referred to

MOTION by interim receiver for sanctioning of plan of arrangement pursuant to *Companies' Creditors Arrangement Act*.

**Endorsement. Farley J.:**

1 This hearing involved the return of the motion of the Interim Receiver ("IR") which I adjourned on February 21, 2001 as a result of the Cumberland Group's complaint that the IR had not provided a "valuation" pursuant to Cameron J.'s Order of January 16, 2001 [properly December 19, 2000] required the IR's "report to include and updated valuation of the assets". The IR's motion was for the sanctioning of a plan of arrangement (the "Plan") of Anvil Range Mining Corporation and Anvil Mining Properties Inc. (collectively, "Anvil") as approved by certain classes of creditors of Anvil pursuant to the *Companies' Creditors Arrangement Act* ("CCAA") or in the alternative, the approval of a sale of the assets of Anvil on terms substantially similar to those provided in the Plan. The IR's further motion record served on March 14<sup>th</sup>, contained a March 12, 2001 Anvil Range Mining Corporation Valuation Assessment of Strathcona Mineral Services Limited prepared by Graham Farquharson, together with a March 13, 2001 valuation of the assets of Anvil Range Mining Corporation of Deloitte & Touche Corporate Finance Canada Inc. prepared by Jim Horvath and Mark Keuleman. The Strathcona and Deloitte & Touche reports were advanced by the IR in satisfaction of its obligations to provide the updated valuation of assets.

2 The IR also sought approval of its budgets and authorization for expenditures for the operating period April 1, 2001 - March 31, 2002 and authorization for the funding of special environmental projects for the period January 1 - March 31, 2001. This aspect was not opposed. This request appears reasonable in the circumstances and is therefore approved.

3 As I expressed in my February 21<sup>st</sup> reasons:

Certainly, the cited paragraphs in Farquharson's letter would point it to being unlikely that there was any significant value for the assets in question. Certainly Mr. Farquharson's letter is a gloomy one as to the prospect for the mining operations. (emphasis in original)

It should not come as a surprise to anyone then that the updated valuation of Strathcona and Deloitte & Touche do not present a rosy picture. Farquharson concludes:

Consequently, for Anvil Range the Plimsoll Line as a continuing mining operation is well below the current water level. It is most unlikely that any mining company would purchase the property on the basis of obtaining value from the resumption of mining operations and without considering the assumption of any portion of the environmental liabilities. Anvil Range, therefore, has no value to the beneficiaries of the estate under this scenario.

.....

The total amount realized from the sale or disposition of the foregoing assets on a salvage basis would appear to be in the order of \$10 - \$15 million without making any contribution towards the ongoing care and maintenance costs



for the property or the reclamation requirements which we understand have become the responsibility of DIAND. There may also be some value ascribed to tax pools that remain from operating losses, capital expenditures and exploration expenditures by Anvil Range. However, presumably most of the value, if any, of those tax pools would only be applicable upon the resumption of mining operations on the property, and the Interim Receiver would be best positioned to comment on this item.

The Deloitte & Touche report concluded:

Based on the scope of our review, assumptions and analysis, the estimated fair market value of all the assets of Anvil Range is in the range of \$11.1 million - \$19.9 million (Schedule 1), as at January 31, 2001. If asked to be more specific, we would suggest the mid-point of the foregoing range being \$15.5 million. Based on the above, there is no value remaining for the unsecured creditors as the amount owed to secured creditors of over \$90.0 million exceeds the value of the assets of Anvil Range.

4 This was not good news for the Cumberland Group as unsecured creditors nor for Hyundai Corporation as a holder of more than 20% of the shares of Anvil. Certainly it cannot have been unexpected news although one can readily appreciate that human nature may often lead those who have suffered great losses (as the unsecured creditors and shareholders of Anvil certainly have) to hope for a miracle to happen or to present hope as fact and speculation as a firm foundation and to ignore probability in opting for (remote) possibility.

5 The Plan was unanimously approved by the three classes of secured creditors of Anvil on February 2, 2001. Given the Strathcona and Deloitte & Touche valuations, it was concluded that there was no material change to the circumstances under which these three classes voted and therefore it would be redundant to hold a fresh vote. The unsecured creditors were not part of the Plan and were not eligible pursuant to the Plan to vote.

6 The Cumberland Group and Hyundai urged that the Plan should not be approved by this Court for a variety of reasons. Chief among these was the proposition that the secured debt really ahead of the unsecured may not be great as \$90 million and that under certain scenarios there may be more value in the Anvil assets than the range of \$10 - \$19.9 million. *However, what must be appreciated is that one has to look at the situation based upon what is currently known as to existing facts and what is realistic in the foreseeable future.*

7 On December 7, 1999, Blair J. granted leave to the IR or the secured creditors to file a plan of arrangement. The decision amongst them eventually was made amongst all the secured creditors was that the IR should prepare such a plan, with the costs being shared among the secured creditors including DIAND.

8 The three general criteria which must be met for the Court to sanction a plan of arrangement under the CCAA are:

1. Has there been compliance with all statutory requirements and with all Court orders?
2. To determine, based on all materials filed and procedures carried out, if anything has been done or purported to be done that is not authorized by the CCAA; and
3. Is the Plan fair and reasonable?

See *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.) at p. 506; *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada* (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.) at p. 201.

9 Dealing with the first two elements, it appears that the meetings called for voting on the Plan were held pursuant to an order of the Court with the classification of creditors being as approved by this Court. The voting was as contemplated and the Plan was unanimously approved. However, an objection was raised by Messrs. Jones and Aalto that the CCAA did not allow a plan of arrangement to be advanced by an interim receiver and further according to Mr. Aalto that this role being assumed by the IR destroyed the neutrality of the IR. However I would note that similarly there is no

provision specifically in the *Bankruptcy and Insolvency Act* for an interim receiver to file a proposal under that legislation. Notwithstanding that in *Re J.S. McMillan Fisheries Ltd.* (1998), 1 C.B.R. (4th) 226 (B.C. S.C.), Tysoe J. stated at p. 231:

As the Company had no management, the Order appointing Ernst & Young Inc. as Interim Receiver authorized it to negotiate and file a Proposal in relation to the Company.

Further, Blair J. authorized the filing of a Plan by either the IR or the secured creditors and there was no appeal of his order. See the Court of Appeal decision in *Ontario (Registrar of Mortgage Brokers) v. Matrix Financial Corp.*, [1993] O.J. No. 2102 (Ont. C.A.). I would further point out that while the secured creditors had the opportunity of filing a Plan, they did not do so but rather they agreed amongst themselves that the authorized alternate, the IR, do so. The IR is an officer of the Court and pursuant to this court appointment, it owes a duty to be objective and neutral as amongst all of the affected parties in this insolvency, including the unsecured creditors and the shareholders. Given where the Plimsoll Line is in this situation, it is extremely inappropriate for the objectors to assert, without any evidence of substance, that the IR has adopted an adversarial role. Given my reasons of February 21, I would not have expected that barrage to have been repeated. That is not to say that, merely because the IR files a Plan, it should be taken by this Court as being fair and reasonable and further that objections not be received on this point. However, merely because the objectors (Cumberland Group) were advocating an alternative plan (a plan which in my view is unrealistic in the circumstances in light of the unsecureds being so far under water, the unworkability of this alternate, the concerns for remediation and the retention of \$600,000 as working capital out of the purse of those who have a look at the Plimsoll Line) does not mean that the IR has lost its neutrality. Rather, this demonstrates in my view that the IR has exercised its judgment in a reasoned, practical and functional way, as it should.

10 The Plan as presented is a compromise of the creditor claims of those creditors who have now (on a foreseeable future and realistic basis) a true or "actual" stake in Anvil — as opposed to those claims of the unsecured creditors and shareholders who unfortunately have only a chimera. Therefore although in *Northland McEachern C.J.B.C.* at p. 205, was not dealing with a situation where a class of creditors, as here, the unsecured, were not participating, when he observed:

First, the authorities warn us against second-guessing businessmen (see *Re Alabama, supra* at p.244). In this case, the companies and their advisors, the bank and its advisors, and all the creditors except the two appellants, all voted for the Plan. As the authorities say, we should not be astute in finding technical arguments to overcome the decision of such a majority.

it would seem to me that his observation would hold true in these circumstances.

11 While it is recognized that the main thrust of the CCAA is geared at a reorganization of the insolvent company — or enterprise, even if the company does not survive, the CCAA may be utilized to effect a sale, winding up or a liquidation of a company and its assets in appropriate circumstances. See *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at p. 32; *Re Olympia & York Developments Ltd.* (1995), 34 C.B.R. (3d) 93 (Ont. Gen. Div. [Commercial List]) at p. 104. Integral to those circumstances would be where a Plan under the CCAA would maximize the value of the stakeholders' pie.

12 The CCAA permits a debtor to propose a compromise or arrangement with its secured creditors. A Plan proposed solely to secured creditors is not unfair where the insolvent's assets are of insufficient value to yield any recovery to unsecured creditors. It is not unreasonable for a court in such circumstances to sanction a plan which is directly solely at secured creditors. See *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), *supra* at pp. 513-8; *Re Philip Services Corp.*, [1999] O.J. No. 4232 (Ont. S.C.J. [Commercial List]) at paras. 20-1. That the plan does not include any agreement with a class a creditors does not, by virtue solely of that omission, make it unfair where that class is not being legally affected. Nothing is being imposed upon the unsecureds; none of their rights are being confiscated. See *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), *supra* at pp. 508, 517-8.

13 I have concluded that the secured claims are far in excess of the value of the assets. That value has to be determined on a current basis. See *Re Kostiuk*, 2000 CarswellBC 1523, 2000 BCSC 1115 (B.C. S.C.) at paras. 38-41. It is inappropriate to value the assets on a speculative or (remote) possibility basis. The Strathcona report used reasonable assumptions as to future metal prices. This should be contrasted to the Cumberland Group's assertions that it is possible that prices may spike at some future time. What must be appreciated is that the Anvil ore body as developed presently has a very short life but that the prices must be viewed as sustainable over that period. See my views about spike prices in *New Quebec Raglan Mines Ltd. v. Blok-Andersen* (1993), 9 B.L.R. (2d) 93 (Ont. Gen. Div. [Commercial List]).

14 The Watts, Griffis & McOuat letter of March 21, 2001 has been hastily prepared in an attempt to throw doubt on some of the Strathcona observations and conclusions — but not to discredit them. In fact in numerous instances the letter concurs with the Strathcona report. Rather the author of the letter has some questions. It must be appreciated that Strathcona/Farquharson has had significant involvement with the Anvil mining facilities over the past several years, whereas Watts, Griffis & McOuat has only had this rather peripheral engagement. I do not find it unusual that two experienced consultants in this mining field may have different views or approaches, nor that one may feel the need for more information than it was able to glean from reviewing the listed documents before reaching a conclusion. In the result, I think it reasonable to accept the views of Farquharson, an established and recognized expert in this field, who has had, as indicated, considerable experience with this matter over the past several years. Further, I think it inappropriate and unnecessary to further delay and incur additional costs to engage upon a further study.

15 It appears that Mr. Aalto's clients have accepted the Cominco secured claim of \$24 million. The *Miners Lien Act* ("MLA") claims of \$18 million appear also to be undisputed. There was argument as to the DIAND claims since part of DIAND's claim is and always has been acknowledged as contingent since it relates to reclamation costs in the future. However, it has approximately \$6 million of claims as to monies already expended. As a side note, I would observe there appears to be every likelihood to a certainty that every dollar in the budget for the year ending March 31, 2002 earmarked for reclamation will be spent. If one were to ignore any future remediation costs, the secured creditors in all three classes would have claims in excess of \$50 million. This is 2 <sup>1</sup>/<sub>2</sub> times the highest value of the assets. The Cumberland Group in another tack then asserts that DIAND and any other governmental authorities should not look to settle the remediation costs onto these assets at the present time based upon the recognized philosophy of "polluter pays" present in the environmental legislation. Ralph Sultan, a former director of Anvil, swore a March 21, 2001 affidavit (i.e. the day before this hearing) that:

11. Prior to Anvil Range, which operated the Faro Mine for approximately 3 years, there had been a number of operators of the Faro Mine. Prior operators created the basic mine plan for the development and operation of the site which is subject to reclamation. Among those prior operators are Curragh, Cypress Anvil Mining Corporation, and Dome Petroleum. I believe that Cypress Anvil Mining Corporation is a subsidiary of Cyprus Amex Minerals Company which is now owned by Phelps Dodge Corporation a huge international mine conglomerate based in the United States. I believe that Cypress Amex held insurance for environmental reclamation costs which may include the Faro Mine. Others of the predecessors or their successors may also have some form of insurance for this type of claim. So far as I am aware, DIAND has taken no steps to pursue prior operators or insurance which may be available to satisfy any reclamation costs relative to the Faro Mine. Nor am I aware of any efforts made by the Interim Receiver to require DIAND to pursue other avenues of recovery apart from ascertaining a reclamation claim in these proceedings. Attached hereto is Exhibit "F" is a copy of a reference to insurance held by Cypress Amex in a report on Mining prepared by KPMG.

It is always, of course, important to test the theoretical against the real world. It is not disputed by anyone that each of the predecessors would have contributed in part to the overall environmental condition of the Anvil property as such condition now exists. Each successor has "inherited" not only the benefit of the assets but the obligations inherent or attached to those assets — for our purposes, the environmental liability existing as of acquisition. Should DIAND go after the predecessors, *to the exclusion* of looking to the present assets. The answer must reasonably be "no". The most

it could do on a reliance solely of "polluter pays" would be to go after each predecessor for what it contributed. It is recognizable that Anvil contributed for 3 years. Curragh and Dome Petroleum have evaporated. Sultan only alludes to insurance which a parent of Cypress Anvil Mining Corporation may hold which might extend to their subsidiary whose continued existence has not been indicated, together with insurance other predecessors may have had. He has no direct knowledge of this insurance being in existence or being able to be called on in accordance with its terms and conditions at this date. It does not appear that the board and management of Anvil, of which Sultan was a member, concerned themselves with establishing what insurance of others it might call upon if Anvil were required during its regime to do reclamation work including these contributions of past polluters. For the purposes of this exercise then it seems to me that the objections as to the environmental concerns is a diversionary tactic. In any event, in or out, the environmental claims merely meant that the objectors are drowned either in 50 feet of water or at a depth of 100 feet after falling overboard from the heavily listing Anvil ship which was taking on water.

16 The other secured creditors-always recognized, as did DIAND, that the significant value of DIAND's claim was contingent in the sense it related to future obligations. To suggest that the vote of the secureds would be any different if they had the "advantage" of my observations above before voting is to my view underestimating their intelligence.

17 With respect to the tax pools, they only have value if there are profits from the mine. There does not appear to be any reasonable likelihood of this in the foreseeable future. The Memorandum of Understanding, dated August 10, 1999, among Cominco Ltd., Government of Yukon and DIAND in reciting its purpose should not be taken as establishing as a fact something which is not so established when it indicates:

This MOU is to facilitate the protection of the environment and the preservation and protection of assets referred to in this MOU so that the mining operation may recommence in a cost effective and economic manner.

That is not any foundation for concluding that the mining operation will ever be economic so that it may recommence. Further this MOU statement and the MOU itself does not contradict that there is no present value to the mine. It does not appear that anyone will restart the mine under foreseeable circumstances. But it is conceivable that unforeseen circumstances may occur especially the longer one goes out on the horizon.

18 In my view, the approval of this Plan will allow the creditors (both secured and unsecured) and the shareholders of Anvil to move on with their lives and activities while the mining properties including the mine will be under proper stewardship.

19 The objectors assert that no value was attributed to Anvil's interest in the Kassandra Mines in Greece. Aside from the fact that on December 30, 1999 I decided that Anvil had no such interest, which decision was affirmed by the Court of Appeal on November 1, 2000, in a short six paragraph decision which indicated that I had correctly decided the matters in issue, all that the Cumberland Group has to point to is that its leave to appeal to the Supreme Court of Canada has not been heard yet.

20 Mr. Aalto referred to *Royal Bank v. Fracmaster Ltd.*, [1999] A.J. No. 675 (Alta. C.A.) at para. 16 with respect to the CCAA not being used to provide for a liquidation in a guise of a CCAA reorganization. But see my views above. In any event, the IR has sought alternative relief allowing it to sell the assets, which sale would be on a commercially equivalent basis as the Plan under the CCAA contemplates. Given that the Plan would operate more efficiently in that respect, I see no reason to provide that this proceed as a sale by the IR.

21 In the end result, I am of the view that the Plan is fair and reasonable for the foregoing reasons and therefore the three part test has been met. The Plan is sanctioned and approved.

22 I may be spoken to as to costs if necessary by booking an appointment through the Commercial List Office.

*Motion granted.*

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2002 CarswellOnt 2254  
Ontario Court of Appeal

Anvil Range Mining Corp., Re

2002 CarswellOnt 2254, [2002] O.J. No. 2606, 115 A.C.W.S. (3d) 923, 34 C.B.R. (4th) 157

**IN THE MATTER OF ANVIL RANGE MINING CORPORATION; AND  
IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT  
ACT, R.S.C. 1985, C. c-36, AS AMENDED; IN THE MATTER OF THE  
COURTS OF JUSTICE ACT, R.S.O. 1990, c. C-43, AS AMENDED; AND IN  
THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C.  
1985, C. B-3, AS AMENDED; AND IN THE MATTER OF THE PLAN OF  
COMPROMISE OR ARRANGEMENT OF ANVIL RANGE MINING CORPORATION**

Morden, Borins, Feldman JJ.A.

Heard: March 6, 2002  
Judgment: July 5, 2002  
Docket: CA C36919

Proceedings: affirming (2001), 25 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List])

Counsel: *Kevin R. Aalto, David Estrin*, for Appellants, Cumberland Asset Management, Berner & Company, Global Securities Corporation, Peel Brooke Inc, Inukshuk Resources Inc., Robert N. Granger, Adrian M.S. White  
*George Karayannides, Kenneth Kraft*, for Respondent, Deloitte & Touche Inc., Interim Receiver of Anvil Range Mining Corporation and Anvil Mining Properties Inc.

*David Hager*, for Respondent, Cominco Ltd.

*John Porter*, for Respondent, Department of Indian Affairs and Northern Development

*Jeremy Dacks*, for Respondent, Yukon Territories Government

*Derek T. Ross*, for Respondent, Ross River Dena Council, Ross River Development Corporation

*Geoffrey B. Morawetz*, for Respondent, Yukon Energy Corporation

Subject: Corporate and Commercial; Insolvency

**Related Abridgment Classifications**

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

**Bankruptcy and insolvency**

XIX Companies' Creditors Arrangement Act

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XIX.3.b Approval by court

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**Business associations**

V Legal proceedings involving business associations

V.3 Practice and procedure in proceedings involving corporations

V.3.q Costs

V.3.q.ii Scale and quantum of costs

**Headnote**

**Corporations --- Arrangements and compromises --- Under Companies' Creditors Arrangement Act --- Arrangements --- Approval by court --- "Fair and reasonable"**

Company purchased mine, refurbished it and operated mine until early 1998 — Company received protection from creditors under Companies' Creditors Arrangement Act and interim receiver was appointed — Secured creditors of company reached settlement which was to be implemented by plan under Act — Plan provided for distribution of company's assets among three classes of secured creditor — Affected creditors approved plan — Interim receiver's motion for sanction of plan of arrangement pursuant to Act was granted — Motions judge's findings were based on two reports valuing company's assets between \$10,000,000 and \$19,900,000 — Motions judge concluded that secured claims were far in excess of value of assets — Other creditors appealed — Appeal dismissed — In context of purchase price for mine, that mine's resources underwent depletion, cost of putting mine into state where it could recommence operations and that no one had expressed interest in purchasing mine, reports formed reasonable basis for motions judge's findings — Secured claims totalled far more than maximum possible total value of company's assets — Plan reflected compromise of priority issues among secured creditors and approval allowed creditors to move on while mining properties were under proper stewardship — Alternative plan by other creditors had no viability — As assets were insufficient to pay half of secured creditors' claims, approval occasioned no prejudice to other creditors — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

**Table of Authorities**

**Cases considered:**

*Equity Waste Management of Canada Corp. v. Halton Hills (Town)*, 1997 CarswellOnt 3270, 40 M.P.L.R. (2d) 107, 103 O.A.C. 324, 35 O.R. (3d) 321 (Ont. C.A.) — considered

*Northland Properties Ltd., Re*, (sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*) 34 B.C.L.R. (2d) 122, (sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*) 73 C.B.R. (N.S.) 195, (sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*) [1989] 3 W.W.R. 363, 1989 CarswellBC 334 (B.C. C.A.) — referred to

**Statutes considered:**

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

Generally — considered

s. 5 — considered

s. 6 — considered

APPEAL by creditors from judgment reported at 2001 CarswellOnt 1325, 25 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]) sanctioning plan of arrangement under *Companies' Creditors Arrangement Act*.

**The Court:**

1 Cumberland Asset Management, and others, appeal from orders made by Farley J. dated March 29, 2001 and May 7, 2001. In the March 29, 2001 order Farley J. sanctioned a plan of arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (C.C.A.A.) proposed by Deloitte & Touche Inc., the Interim Receiver of Anvil Range Mining Range Mining Corporation and Anvil Range Properties Inc. In his May 7, 2001 order, Farley J. ordered that the appellants pay costs relating to the sanction motion in the total amount of \$28,500.



2 The facts respecting the sanctioning of the plan are set forth in Farley J.'s reasons which are reported at (2001), 25 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]) and need not be repeated in detail. The following is an outline, which contains some history of this proceeding which is not included in Farley J.'s reasons.

3 Anvil Range Mining Corporation is the owner of a lead and zinc mine, known as the Faro Mine, in the Yukon Territory. It bought this mine for about \$27,000,000 in 1994 from KPMG Inc., in its capacity as Interim Receiver of the then owner, Curragh Inc.

4 Anvil Range began production in August 1995 after conducting a nine-month \$75,000,000 pre-stripping and mill refurbishment program. It suspended mining operations in December 1996 and milling operations in the spring of 1997 because of falling metal prices. It recommenced operations in the fall of 1997 but ceased mining and milling early in 1998.

5 In January 1998, Anvil Range applied for and received protection from its creditors under the C.C.A.A. This was the beginning of the proceeding in which the orders under appeal were, eventually, made. In March 1998, Cominco Ltd., a secured creditor of Anvil Range, moved for the appointment of an interim receiver and termination of the stay provided for in the C.C.A.A. proceeding. Deloitte & Touche Inc. was appointed Interim Receiver and the court directed it to report to the court on certain matters, including seeking advice and directions respecting a marketing plan for the mine.

6 In response to this, the Interim Receiver filed its second report dated June 17, 1998 in which it recommended that "no funds be spent on marketing the mine for the present". This was based on several different facts, one of them being "the fact that no prospective purchasers had emerged to that date . . . to express even minimal interest in the mine site despite the well publicized facts in the industry press".

7 As part of the ongoing dispute among the parties, the Interim Receiver brought a motion before Blair J., which was heard on August 20, 1998, seeking approval to sell certain assets at the mine. Blair J. noted that the Interim Receiver had expressed the opinion on the basis of its market analysis that it was "unlikely that the Faro Mine can be reopened within the next 2-3 years and possibly as long as 5 years." He then said:

I agree that it is difficult to be very optimistic about the future prospects of the Faro Mine, including the chance of its re-opening. On the other hand, Strathcona (acknowledged by all to be expert in the field) seems to feel strongly that the best chance of recovery is if the Grum Pit at least is kept on a "standby-mode" ready to be made operative quickly when a period of good metal prices arrives. To do this the equipment in question will be necessary. To replace it would be costly and it may well be a non-starter if what is being considered is only a 3 year operation or so.

8 Blair J. did not dismiss the request for approval to sell the equipment but adjourned it to October 29, 1998 to enable the Yukon Territorial Government to do further analysis. This was because of the importance of the mine to the fabric of the Yukon Territory.

9 After extensive negotiations and a filing of the Yukon Territorial Government report, a funding formula was established in December 1998 whereby the Department of Indian Affairs and Northern Development ("DIAND") assumed most of the funding obligations of going forward. This funding was secured by a charge against the real property.

10 In December 1999, the court granted leave to the Interim Receiver or the secured creditors to file a plan of arrangement. About a year of negotiations among the secured creditors followed, eventually leading to an extensive settlement conference held in Vancouver under the direction of Justice Kierans, sitting as a justice of the Supreme Court of the Yukon Territory. The conference resulted in a settlement among three groups of secured creditors: (1) the Mining Lien Act Claimants; (2) Cominco Ltd.; and (3) DIAND, the Yukon Territorial Government and the Yukon Workers' Compensation, Health and Safety Board. The settlement was to be implemented by a plan under the C.C.A.A.

11 As will be set forth in more detail later in these reasons, the three groups of secured creditors were the only parties with a legal and economic interest in the assets of Anvil Range. The plan settled a series of complex priority disputes

both within creditor classes and among creditor classes and also dealt with allocating funds in the Interim Receiver's possession.

12 The plan divides the creditors who are affected by it (the "Affected Creditors") into three classes (the three groups mentioned above):

1. The Mining Lien Act Claimants.
2. Cominco Ltd.
3. The government creditors, DIAND, the Yukon Territorial Government, and the Yukon Workers' Compensation, Health and Safety Board.

13 The plan provides for the class 3 creditors to acquire the mine and the mill located on it and certain other assets (the "Excluded Assets") and to assume responsibility for funding the ongoing necessary environmental, maintenance and security programs. The other two classes of Affected Creditors are to share in the proceeds of the sale of the remaining assets (the "Realization Assets").

14 The Interim Receiver recommended approval of the plan as the best alternative for settling the outstanding priority issues in dispute and because there was no recovery possible other than to the Affected Creditors.

15 The class 1 creditors' secured claims against Anvil Range property, as judicially declared by judgments of the Supreme Court of the Yukon Territory, total \$18,312,169. The claim of the class 2 creditor, Cominco Ltd., was judicially determined by the Superior Court of Justice (Ontario) on January 27, 1999 to be \$24,353,657 with post-judgment interest accruing on this amount at 8.5% per annum.

16 With respect to the class 3 creditors, the Yukon Territorial Government and the Yukon Workers' Compensation and Health and Safety Board claim is about \$1,000,000. The claim advanced on behalf of DIAND is said to total over \$60,000,000 for funding the Interim Receiver's expenses and, also, the environmental remediation costs. We shall deal with the salient details of it shortly.

17 The Affected Creditors unanimously approved the plan which was then sanctioned by the order of Farley J. dated March 29, 2001.

18 The appellants' appeal is substantially based on the following submissions:

1. The plan is not "fair and reasonable" in all of its circumstances as it effectively eliminates the opportunity for unsecured creditors to realize anything.
2. The plan is contrary to the purposes underlying the C.C.A.A.
3. DIAND's reclamation claim is inconsistent with the "fair and reasonable principles" of the C.C.A.A. and environmental remediation legislation.

19 Underlying these submissions is the submission that Farley J. erred in not requiring a more complete and in-depth valuation of Anvil Range's assets be obtained by the Interim Receiver.

20 This last submission should be dealt with first because it is fundamental to the success of the appeal. Farley J.'s findings were based on two reports, one by Strathcona Mineral Services Ltd. dated March 12, 2001 and the other by Deloitte & Touche Corporate Finance Canada, Inc. dated March 13, 2001. In preparing its report, Deloitte & Touche reviewed the Strathcona report, among other materials.

21 In its report Strathcona noted that in the Interim Receiver's 22nd report there was an estimate of the capital expenditures that would be required to resume mining activity at the Grum deposit (which was the only accessible

resource base on the Anvil property) including the purchase of mining equipment, rehabilitation of the pit walls, and modifications and repairs to the process facilities. Strathcona said:

The total is estimated at \$80 to \$100 million before working capital requirements and we consider this estimate to be reasonable and in the general range of what could be expected. It is clear that the capital expenditures to restart mining operations are going to exceed, perhaps by a factor of two, the cumulative gross operating margins for three years of operation that are indicated.

22 Strathcona concluded its report as follows:

The total amount realized from the sale or disposition of the foregoing assets on a salvage basis would appear to be in the order of \$10-\$15 million without making any contribution towards the ongoing care and maintenance costs for the property or the reclamation requirements which we understand have become the responsibility of DIAND. There may also be some value ascribed to tax pools that remain from operating losses, capital expenditures and exploration expenditures by Anvil Range. However, presumably most of the value, if any, of those tax pools would only be applicable upon the resumption of mining operations on the property, and the Interim Receiver would be best positioned to comment on this item.

23 Deloitte & Touche Corporate Finance Canada, Inc. concluded that the established market value of all the assets to be "in the range of \$11.1 to \$19.9 million (Schedule 1), as at January 31, 2001" and that, if it were asked to be more specific, "[it] would suggest the mid-point of the foregoing range, being \$15.5 million." It concluded: "Based on the above, there is no value remaining for the unsecured creditors, as the amount owed to secured creditors of over \$90.0 million exceeds the value of the assets of Anvil Range."

24 The appellants submitted a letter from Watts, Griffis & McOuat, Consulting Geologists and Engineers, dated March 21, 2001 which reviewed several documents, "in particular" the Strathcona report dated March 12, 2001. In this letter, Watts, Griffis & McOuat stated "a number of questions about the methodology and logic that Strathcona is using". It did not state an opinion on the value of the Anvil Range property.

25 On these materials, Farley J. concluded that "the secured claims are far in excess of the value of the assets" and that the value had to be determined "on a current basis" and not "on a speculative or (remote) possibility basis." He dealt with the evidence submitted by the appellant as follows:

The Watts, Griffis & McOuat letter of March 21, 2001 has been hastily prepared in an attempt to throw doubt on some of the Strathcona observations and conclusions - but not to discredit them. In fact in numerous instances [the] letter concurs with the Strathcona report. Rather the author of the letter has some questions. It must be appreciated that Strathcona/Farquharson has had significant involvement with the Anvil mining facilities over the past several years, whereas Watts, Griffis & McOuat has only had this rather peripheral engagement. I do not find it unusual that two experienced consultants in this mining field may have different views or approaches, nor that one may feel the need for more information than it was able to glean from reviewing the listed documents before reaching a conclusion. In the result, I think it reasonable to accept the views of Farquharson, an established and recognized expert in this field, who has had, as indicated, considerable experience with this matter over the past several years. Further, I think it inappropriate and unnecessary to further delay and incur additional costs to engage upon a further study.

26 In our view, Farley J. did not err in accepting the respondent's evidence as affording a reasonable basis for his findings and, further, he did not make any error in his assessment of this evidence that would justify our interfering with his conclusions: *Equity Waste Management of Canada Corp. v. Halton Hills (Town)* (1997), 35 O.R. (3d) 321 (Ont. C.A.) at 333-336.

27 It may be that the Strathcona report, as a free standing document, could have been more detailed but this is far from saying that it was not capable, particularly in the context of this proceeding, which began in 1998, of forming a

reasonable basis for Farley J.'s findings. This context includes the evidence that Anvil Range bought the property in 1994 for \$27,000,000, that its resources underwent depletion since then, that the cost of putting the property in a state where it could recommence operations was some \$80,000,000 to \$100,000,000 and, although it had been known for sometime in the industry that the property was "available", no one had expressed any interest in it.

28 We turn now to the three basic submissions of the appellant set forth in paragraph 18 of these reasons.

29 It will be helpful to deal with the third submission first, that relating to the DIAND claim. The total DIAND claim is for something over \$60,000,000. The appellants submit that by reason of the "polluter pays" principle, it is wrong that DIAND should have a secured claim against the assets of Anvil Range for environmental remediation at the expense of the unsecured creditors. There are several facets to this submission but, because of the particular facts of this case, we need not explore them. Of the total DIAND claim, some \$16,000,000 relates to funds expended under court orders for the Interim Receiver and this is, undeniably, a valid secured claim. As will be apparent, it is sufficient to resolve this appeal if only this part of DIAND's claim is taken into account - and it may well not be necessary to take any part of the claim into account.

30 We turn now to the first two of the appellant's specific submissions. The first is that the plan is not fair and reasonable because it effectively eliminates the opportunity for unsecured creditors to realize anything.

31 From the accepted valuation the maximum possible total value of Anvil Range's assets is \$19,900,000. After eliminating the portion of DIAND's claim for remediation costs, the secured claims total at least \$60,000,000. Accordingly, even after allowing for a fair margin of error on each side of the equation (the assets side and the claims side) it can be seen that the unsecured creditors have no legal or economic interest in the assets in question.

32 The second submission is that the plan is contrary to the purposes of the C.C.A.A. Courts have recognized that the purpose of the C.C.A.A. is to enable compromises to be made for the common benefit of the creditors and the company and to keep the company alive and out of the hands of liquidators. See, for example, *Northland Properties Ltd., Re* (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.) at 201. Farley J. recognized this but also expressed the view in paragraph 11 of his reasons that:

The CCAA may be utilized to effect a sale, winding up or a liquidation of a company and its assets in appropriate circumstances. See *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at p. 32; *Re Olympia & York Developments Ltd.* (1995), 34 C.B.R. (3d) 93 (Ont. Gen. Div. [Commercial List]) at p. 104. Integral to those circumstances would be where a Plan under the CCAA would maximize the value of the stakeholders' pie.

33 Further to this it may be noted that the plan in this case reflected a compromise of difficult priority issues among the secured creditors and, as stated later in Farley J.'s reasons, "the approval of this Plan will allow the creditors (both secured and unsecured) and the shareholders of Anvil to move on with their lives and activities while the mining properties including the mine will be under proper stewardship."

34 It may also be noted that s. 5 of the C.C.A.A. contemplates a plan which is a compromise between a debtor company and its secured creditors and that by the terms of s. 6 of the Act, applied to the facts of this case, the plan is binding only on the secured creditors and the company and not on the unsecured creditors.

35 Relevant to this issue is the fact that the appellants put forward an alternative plan, which involved their receiving the corporate shell of Anvil Range together with \$500,000, and other terms. This plan, however, had no viability. As Farley J. noted in his reasons for the costs disposition it was "doomed to failure given the stated opposition to same [the alternate plan] of the secureds-Cominco Lien and Claimants and DIAND".

36 It is not necessary to resolve this issue to decide the appeal. If the order under appeal was not properly made under the C.C.A.A., there is no doubt that it could have been made by Farley J. in response to the alternative relief sought,

which was that of approving a sale of Anvil Range's assets by the Interim Receiver on terms substantially similar to those provided for in the plan. Taking into account that the assets are insufficient to pay even half of the secured creditors claims, it is clear that the order under appeal occasioned no prejudice whatsoever to the appellants. Accordingly we do not give effect to this submission.

37 In the complex circumstances of the operation of the mine and given that there is no hope of the sale generating sufficient funds to satisfy the secured creditors, it cannot be said that Farley J. erred in approving the plan as being fair and reasonable.

### COSTS

38 The other appeal is from Farley J.'s order requiring the appellants to pay costs relating to the motion which he fixed in the total amount of \$28,500 and allocated as follows:

\$15,000 to the Interim Receiver;

\$7,000 to Cominco;

\$5,000 to DIAND;

\$1,500 to Yukon Energy Corporation

39 The appellants submit that Farley J. erred in this costs disposition because parties with an interest in a company governed by the C.C.A.A. should be free to appear in court and oppose the sanctioning of a plan on legitimate grounds without the threat of the penalty of the costs being imposed against them.

40 The award of costs, of course, was a matter within the discretion of the judge and we are not entitled to interfere with the exercise of the discretion just because we may have exercised it differently. To succeed the appellants must show that the exercise of discretion was affected by some error in principle or by misapprehension of the facts. In this case, while we might have been inclined simply to deprive the appellant of costs relating to the motion, we cannot say that there was no principled basis for the disposition which Farley J. made. He was entitled to conclude, as he did, that there was no realistic basis supporting the appellants' opposition to the plan.

### DISPOSITION

41 In the result, the appeal is dismissed with costs payable by the appellants to the respondents who delivered factums and appeared on the hearing of the appeal. These respondents should deliver their submissions respecting the costs of the appeal, in writing, within seven days of the release of these reasons and the appellants should deliver their submissions within fourteen days of the release of the reasons.

*Appeal dismissed.*

**TAB 5**

*Case Name:*

**ATB Financial v. Metcalfe & Mansfield Alternative  
Investments II Corp.**

**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 and  
Arrangement Involving Metcalfe & Mansfield Alternative  
Investments II Corp., Metcalfe & Mansfield Alternative  
Investments III Corp., Metcalfe & Mansfield Alternative  
Investments V Corp., Metcalfe & Mansfield Alternative  
Investments XI Corp., Metcalfe & Mansfield Alternative  
Investments XII Corp., 6932819 Canada Inc. and 4446372  
Canada Inc., Trustees of the Conduits Listed In  
Schedule "A" Hereto**

**Between**

**The Investors represented on the Pan-Canadian Investors  
Committee for Third-Party Structured Asset-backed  
Commercial Paper listed in Schedule "B" hereto,**

**Applicants, and**

**Metcalfe & Mansfield Alternative Investments II Corp.,  
Metcalfe & Mansfield Alternative Investments III Corp.,  
Metcalfe & Mansfield Alternative Investments V Corp.,  
Metcalfe & Mansfield Alternative Investments XI Corp.,  
Metcalfe & Mansfield Alternative Investments XII Corp.,  
6932819 Canada Inc. and 4446372 Canada Inc., Trustees  
of the Conduits listed in Schedule "A" hereto,**

**Respondents**

[2008] O.J. No. 1818

42 C.B.R. (5th) 90

2008 CarswellOnt 2652

45 B.L.R. (4th) 201

168 A.C.W.S. (3d) 245

Court File No. 08-CL-7440

Ontario Superior Court of Justice  
Commercial List

**C.L. Campbell J.**

Heard: March 17, 2008.

Judgment: April 8, 2008.

(56 paras.)

*Insolvency law -- Proposals -- Court approval -- Application for initial order under the Companies' Creditors Arrangement Act allowed -- The applicants were investors holding more than \$21 billion of the \$32 billion of asset-backed commercial paper (ABCP) issued by the respondents -- They sought an initial order as essential to the resolution of an ABCP liquidity crisis -- The court found that the application was consistent with the remedial purposes of the Act -- It was appropriate to treat holders of ABCP as a single class of creditors, as fragmentation of classes would render it excessively difficult to obtain approval of a plan under the Act -- Companies' Creditors Arrangement Act, s. 2.*

*Corporations, partnerships and associations law -- Corporations -- Borrowing -- Trust indenture -- Enforcement -- Application for initial order under the Companies' Creditors Arrangement Act allowed -- The applicants were investors holding more than \$21 billion of the \$32 billion of asset-backed commercial paper (ABCP) issued by the respondents -- They sought an initial order as essential to the resolution of an ABCP liquidity crisis -- The court found that the application was consistent with the remedial purposes of the Act -- It was appropriate to treat holders of ABCP as a single class of creditors, as fragmentation of classes would render it excessively difficult to obtain approval of a plan under the Act -- Companies' Creditors Arrangement Act, s. 2.*

Application by the Investors represented on the Pan-Canadian Investors Committee for Third-Party Structure Asset-backed Commercial Paper (ABCP), for an initial order under the Companies' Creditors Arrangement Act. The applicants were comprised of investors holding more than \$21 billion of the \$32 billion of ABCP issued by at least one of the respondents. Each series of ABCP was issued pursuant to a trust indenture. In order to facilitate the within application, the respondents replaced the trust companies under the indentures. Each respondent assumed legal ownership of assets held for each series in the conduit of which it was trustee, and became the debtor with respect to the ABCP issued thereunder. Each ABCP note provided that recourse was limited to the assets of the trust. Since August 2007, the trustees of each conduit had insufficient liquidity to make payments on the ABCP to the applicants and other noteholders. Accordingly, each of the respondents was insolvent. The applicants sought an initial order under the Act as consistent with



the underlying statutory policy, and as essential to the resolution of an ABCP liquidity crisis. Nobody challenged the entitlement of the applicants to the initial order sought. At issue was whether the application complied with the Act's requirements, whether the relief sought was consistent with its purpose, and whether the classification of creditors was appropriate for voting and distribution purposes.

HELD: Application allowed. The respondents were debtor companies within the meaning of the Act. As trustees, the respondents were the obligors under the trusts' covenants to pay. The respondents were insolvent for the purposes of the Act. That insolvency was not negated by provisions in the notes and trust indentures that limited noteholders' recourse to the trust assets. Practical restructuring of the ABCP claims could only be implemented on a global basis. The claims for relief by the applicants involved common questions of law and fact. Joining of the claims promoted the convenient administration of justice. The application was consistent with the remedial purposes of the Act. It was appropriate to treat holders of ABCP as a single class of creditors, as fragmentation of classes would render it excessively difficult to obtain approval of a plan under the Act.

**Statutes, Regulations and Rules Cited:**

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 2, s. 2, s. 3(1), s. 4, s. 5, s. 8, s. 11

Ontario Rules of Civil Procedure, Rule 5.01, Rule 5.02

**Counsel:**

*B. Zarnett, F. Myers, and B. Empey*, for the Applicants.

*R.S. Harrison*, for Metcalfe & Mansfield Alternative Investments Corps.

*Scott Bomhof and John Laskin*, for National Bank of Canada.

*Peter Howard and William Scott*, for Asset Providers/Liquidity Providers.

*Jeff Carhart, Joe Marin and Jay Hoffman*, for Ad Hoc Committee of ABCP Holders.

*T. Sutton*, for Securitrus.

*Jay Swartz and Natasha MacParland*, for New Shore Conduits.

*Aubrey Kauffman*, for 4446372 Canada Inc.

*Stuart Brotman*, for 6932819 Canada Inc.

*Robin B. Schwill and James Rumball*, for Coventree Capital Inc., Coventree Administration Corp.

and Nereus Financial Inc.

*Ian D. Collins*, for Desjardins Group.

*Harvey Chaiton*, for CIBC.

*Kevin McEicheran and Geoff R. Hall*, for Bank of Montreal, Bank of Nova Scotia, CIBC, Royal Bank of Canada and Toronto Dominion Bank.

*Marc S. Wasserman*, for Blackrock Financial.

*S. Richard Orzy*, for CIBC Mellon, Computershare and Bank of New York as Indenture Trustee.

*Dan Macdonald and Andrew Kent*, for Bank of Nova Scotia.

*Virginie Gauthier and Mario Forte*, for Caisse de Dépôt.

*Junior Sirivar*, for Navcan.

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## REASONS FOR DECISION

**1 C.L. CAMPBELL J.:**-- These are the reasons for this Court having granted on March 17, 2008 an Initial Order under the *Companies Creditors Arrangement Act* ("CCAA") in respect of various corporate trustees in respect of what is known as Asset Backed Commercial Paper ("ABCP.")

**2** This highly unusual and hopefully not to be repeated procedure (given its magnitude and implications) represents the culmination of a great deal of work and effort on the part of the Applicants known informally as the Investors' Committee under the leadership of a leading Canadian lawyer and businessman, Purdy Crawford.

**3** Assuming approval of the proposed Plan under the CCAA, the process will result in the successful restructuring of the ABCP market in Canada and avoid a liquidity crisis that would result in certain loss to many of the various participants in the ABCP market.

**4** It is neither necessary nor appropriate in these Reasons to describe in detail just what is involved in the products and operation of the ABCP market.

**5** The Information Circular that is part of the Application and will be sent to each of the affected Noteholders (and is also found on the website of the Monitor, Ernst & Young), contains a complete description of the nature of the products, the various market participants, the problem giving rise to the liquidity crisis and the proposed Plan that, if approved, will allow for recovery by most

Noteholders of at least their capital over time in return for releases of other market participant parties.

**6** An equally informative but less detailed description of the market for ABCP and its problems can be found in the affidavit of Mr. Crawford in the sites referred to above.

**7** The Applicants include Crown corporations, business corporations, pension funds and financial institutions. Together, they hold more than \$21 billion of the approximately \$32 billion of ABCP at issue in this proceeding. Each Applicant holds ABCP for which at least one of the Respondents is the debtor. Each Applicant has a significant ABCP claim.

**8** Each series of ABCP was issued pursuant to a trust indenture or supplemental trust indenture. Each trust indenture appointed an "Indenture Trustee" to serve as trustee for the investors, and gave that trustee certain rights, on behalf of investors, to enforce obligations under ABCP. However, the Indenture Trustee has no economic interest in the underlying debt and, under the circumstances, it is neither practical nor realistic to expect the Indenture Trustees to put forward a restructuring plan.

**9** In this proceeding, the Applicants seek to put forward and obtain approval of the restructuring plan they have developed in their own right as holders of ABCP and as the real creditors of the Respondents.

**10** Each Respondent is a corporation which is the trustee of one or more Conduits. Each Respondent is the legal owner of the assets held for each series in the Conduit of which it is the trustee, and is the debtor with respect to the ABCP issued by the trustee of that Conduit. The ABCP debt for which each Respondent is liable exceeds \$5 million.

**11** Each ABCP note provides that recourse under it is limited to the assets of the trust. The trust indentures pursuant to which each series of notes were issued provide that each note is to be repaid from the assets held for that series.

**12** Since mid-August, 2007, the trustees of each of the Conduits have, in respect of each series of ABCP, had insufficient liquidity to make payments that were due and payable on their maturing ABCP. Each remains unable to meet its liabilities to the Applicants and to the other holders of each series of ABCP as those obligations become due, from assets held for that series. Accordingly, each of the Respondents is insolvent.

**13** Most of the Conduits originally had trustees that were trust companies. The original trustees that were trust companies were replaced by certain of the Respondents, in accordance with applicable law and the terms of the applicable declarations of trust, in order to facilitate the making of this Application. The Respondents that replaced the trust companies assumed legal ownership of the assets of each Conduit for which they serve as trustees and assumed all of the obligations of the original trustees whom they replaced.

**14** The Applicants chose court proceedings under the CCAA because the issuer trustees of the Conduits, as currently structured, are insolvent because they cannot satisfy their liabilities as they become due. The CCAA process allows meaningful efficiencies by restructuring all of the affected ABCP simultaneously while also providing stakeholders, including Noteholders, with more certainty that the Plan will be implemented. In addition, the CCAA provides a process to obtain comprehensive releases, which releases bind Noteholders and other parties who are not directly affected by the Plan. The granting of these comprehensive releases is a condition of participation by certain key parties.

**15** The CCAA expresses a public policy favouring compromise and consensual restructuring over piecemeal liquidation and the attendant loss of value. It is designed to encourage and facilitate consensual compromises and arrangements among businesspeople; indeed the essence of a CCAA proceeding is the determination of whether a sufficient consensus exists among them to justify the imposition of a statutory compromise. It is only after this determination is made that the Court will examine whether a plan is otherwise fair and reasonable.

**16** On the first day of a CCAA proceeding, the Court should strive to maintain the *status quo* while the plan is developed. The Court will exercise its power under the statute and at common law in order to maintain a level playing field while allowing the debtor the breathing space it needs to develop the required consensus. At this stage, the goal is to seek consensus - to allow the business people and individual investors to make their judgments and to express those judgments by voting. The Court's primary concern on a first day application is to ensure that the business people have a chance to exercise their judgment and vote on the Plan.

**17** The Applicants submitted that the Initial Order sought should be granted and the creditors given an opportunity to vote on the Plan, because (a) this application complies with all requirements of the CCAA and is properly brought as a single proceeding; (b) the relief sought is available under the CCAA. It is also consistent with the purpose and policy of the CCAA and essential to the resolution of the ABCP crisis; and (c) the classification of creditors set out in the Plan for voting and distribution purposes is appropriate.

**18** ABCP programs have been used to fund the acquisition of long-term assets, such as mortgages and auto loans. Even when funding short-term assets such as trade receivables, ABCP issuers still face the inherent timing mismatch between cash generated by the underlying assets and the cash needed to repay maturing ABCP. Maturing ABCP is typically repaid with the proceeds of newly issued ABCP, a process commonly referred to as "rolling." Because ABCP is a highly rated commercial obligation with a long history of market acceptance, market participants in Canada formed the view that, absent a "general market disruption," ABCP would readily be saleable without the need for extraordinary funding measures.

**19** There are three questions that need to be answered before the Court makes an Order accepting an Initial Plan under the CCAA.

**20** The first question is, does the Application comply with the requirements of the CCAA? The second question involves determining that the relief sought in the circumstances is available under the CCAA and is consistent with the purpose and policy of the statute. The third question asks whether the classification of creditors set out in the Plan for voting and distribution purposes is appropriate.

**21** I am satisfied that all three questions can be answered in the affirmative.

**22** The CCAA, despite its relative brevity and lack of specifics, has been accepted by the Courts across Canada as a vehicle to encourage and facilitate consensual compromise and arrangements among various creditor interests in circumstances of insolvent corporations.

**23** At the stage of accepting a Plan for filing, the Court seeks to maintain a status quo and provide a "structured environment for the negotiation of compromises between a company and its creditors." The ultimate decision on the acceptance of a Plan will be made by those directly affected and vote in favour of it.<sup>1</sup>

**24** Section 3(1) of the CCAA applies in respect of a "debtor company" or "affiliate debtor companies" with claims against them of \$5 million.

**25** The problem faced by the applicants in this proceeding is that the terms "company" and "debtor company" as defined in s. 2 of the CCAA do not include trust entities.

**26** For the purpose of this Application and proposed Plan, those entities that did not qualify as "companies" for the purposes of the CCAA were replaced by Companies (the Respondents) that do meet the definition.

**27** I am satisfied in the circumstances that these steps are an appropriate exercise of legally available rights to satisfy the threshold requirements of the CCAA. I am satisfied that the change in trustees was undertaken in good faith to facilitate the making of this application.

**28** The use of what have been called "instant" trust deeds has been judicially accepted as legitimate devices that can satisfy the requirement of s. 3 of the CCAA as long as they reflect legitimate transactions that actually occurred and are not shams.<sup>2</sup>

**29** I am satisfied that the Respondents are "debtor companies" within the meaning of the CCAA because they are companies that meet the s. 2 definition and they are insolvent. The Conduits (referred to above) are trusts and the Respondents are trustees of those trusts. The trustee is the obligor under the trusts covenant to pay. I am satisfied that the trustee corporations are "insolvent" within the judicially accepted meaning under the CCAA.

**30** The decision in *Re Stelco*<sup>3</sup> sets out three disjunctive tests. A company will be an insolvent "debtor company" under the CCAA if: (a) it is for any reason unable to meet its obligations as they

generally become due; or (b) it has ceased paying its current obligations in the ordinary course of business as they generally become due; or (c) the aggregate of its property is not, at a fair valuation, sufficient or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all its obligations, due and accruing due.

**31** I am satisfied that on the material filed as of August 13, 2007 and the stoppage of payment by trustees of the Conduits (which continues), the Conduits and now the Respondents remain unable to meet their liabilities at the present time.

**32** The Conduits and now trustees in my view meet the test accepted by the Court in *Re Stelco* of being "reasonably expected to run out of liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring."<sup>4</sup> Indeed, it was that very circumstance that brought about the standstill agreement and the ensuing discussions and negotiations to formulate a Plan.

**33** Finally on this point I am satisfied that the insolvency of the Respondents is not affected or negated by contractual provisions in the applicable notes and trust indentures that limit Noteholders' recourse to the trust assets held in the Conduits. This statement should not be taken as a determination of the rights or remedies of any creditor.

**34** It was urged and I accept that the applicants are creditors under ss. 4 and 5 of the CCAA and as such are entitled to standing to propose a Plan for restructuring the ABCP.

**35** On the return of the motion for the Initial Order, while the proceeding was technically "ex parte," a significant number of interested parties were represented. None of those parties opposed the making of the Initial Order and since then no one has come forward to challenge the entitlement of the Applicants to the Initial Order.

**36** S. 8 of the CCAA renders ineffective any provisions in the trust indentures that otherwise purport to restrict, directly or indirectly, the rights of the Applicants to bring this application:

8. This Act extends and does not limit the provisions of any instrument now or hereafter existing that governs the rights of creditors or any class of them and has full force and effect notwithstanding anything to the contrary contained in that instrument.

**37** See also the following for the proposition that a trust indenture cannot by its terms restrict recourse to the CCAA.<sup>5</sup>

**38** Another feature of this Application is the joining within a single proceeding of claims by many parties against each of the Respondents. Rules 5.01 and 5.02 of the *Rules of Civil Procedure* allow for the joinder of claims by multiple applicants against multiple respondents. It is not necessary that all relief claimed by each applicant be claimed against each respondent. Here the

Applicants assert claims for relief against the Respondents involving common questions of law and fact. Joining of the claims in one proceeding promotes the convenient administration of justice.

**39** I am satisfied that in the unique circumstances that prevail here, the practical restructuring of the ABCP claims can only be implemented on a global basis; accordingly, if there were separate proceedings, each individual plan would of necessity have been conditional upon approval of all the other plans.

**40** One further somewhat unusual aspect of this Application has been the filing of the proposed Plan along with the request for the Initial Order. This is not unusual in what have come to be known as "liquidating" CCAA applications where the creditors are in agreement when the matter first comes to Court. It is more unusual where there are a large number of creditors who are agreed but a significant number of investors who have yet to be consulted.

**41** In general terms, besides complying with the technical requirements of the CCAA, this Application is consistent with the purpose and policy underlying the Act. It is well established that the CCAA is remedial legislation, intended to facilitate compromises and arrangements. The Court should give the statute a broad and liberal interpretation so as to encourage and facilitate successful restructurings whenever possible.

**42** The CCAA is to be broadly interpreted as giving the Court a good deal of power and flexibility. The very brevity of the CCAA and the fact that it is silent on details permits a wide and liberal construction to enable it to serve its remedial purpose.

**43** A restructuring under the CCAA may take any number of forms, limited only by the creativity of those proposing the restructuring. The courts have developed new and creative remedies to ensure that the objectives of the CCAA are met.

[45] The CCAA is designed to be a flexible instrument, and it is that very flexibility which gives it its efficacy. ... It is not infrequently that judges are told, by those opposing a particular initiative at a particular time, that if they make a particular order that is requested it will be the first time in Canadian jurisprudence (sometimes in global jurisprudence, depending upon the level of the rhetoric) that such an order has been made! *Nonetheless, the orders are made, if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation.* [Emphasis added.]<sup>6</sup>

**44** Similarly, the courts have acknowledged the need to maintain flexibility in CCAA matters, discouraging importation of any statutory provisions, restrictions or requirements that might impede creative use of the CCAA without a demonstrated need or statutory direction.

**45** I am satisfied that a failure of the Plan would cause far-reaching negative consequences to investors, including pension funds, governments, business corporations and individuals.

46 All those involved, particularly the individuals, may not yet appreciate the consequences involved with a Plan failure.

47 In order that those who are affected have an opportunity to consider all the consequences and decide whether or not they are prepared to vote in favour of the proposed or any other Plan, the stay of proceedings sought in favour of those parties integrally involved in the financial management of the Conduits or whose support is essential to the Plan is appropriate.

48 S. 11 of the CCAA provides for stays of proceedings against the debtor companies. It is silent as to the availability of stays in favour of non-parties. The granting of stays in favour of non-parties has been held to be an appropriate exercise of the Court's jurisdiction. A number of authorities have supported the concept of a stay to enable a "global resolution."<sup>7</sup>

49 More recently in *Re Calpine Canada Energy Limited*<sup>8</sup>, Romaine J. of the Alberta Court of Queens Bench permitted not only an initial order, but also one that extended after exit from CCAA without a plan so that the process of the CCAA would not be undermined against orders made during an unsuccessful plan.

50 Finally, I am satisfied at this stage of the approval of filing of the Initial Plan that all creditors be placed in a single class. The CCAA provides no statutory guidance to assist the Court in determining the proper classification of creditors. The tests for proper classification of creditors for the purpose of voting on a CCAA plan of arrangement have been developed in the case law.<sup>9</sup>

51 The Plan is, in essence, an offer to all investors that must be accepted by or made binding on all investors. In light of this reality, the Applicants propose that there be a single class of creditors consisting of all ABCP holders. It is urged that all holders of ABCP invested in the Canadian marketplace with its lack of transparency and other common problems. The Plan treats all ABCP holders equitably. While the risks differ as among traditional assets, ineligible assets and synthetic assets, I am advised that the calculation of the differing risks and corresponding interests has been taken into account consistently across all of the ABCP in the Plan.

52 I am satisfied that, at least at this stage, fragmentation of classes would render it excessively difficult to obtain approval of a CCAA plan and is therefore contrary to the purpose of the CCAA.

Not every difference in the nature of a debt due to a creditor or a group of creditors warrants the creation of a separate class. What is required is some community of interest and rights which are not so dissimilar as to make it impossible for the creditors in the class to consult with a view toward a common interest.<sup>10</sup>

53 The Court of Appeal for Ontario in *Re Stelco* noted that a "commonality of interest" applied. Likely fact-driven circumstances were at the heart of classification.



It is clear that classification is a fact-driven exercise, dependent upon the circumstances of each particular case. Moreover, given the nature of the CCAA process and the underlying flexibility of that process - a flexibility which is its genius - there can be no fixed rules that must apply in all cases.<sup>11</sup>

**54** For the above reasons the Initial Order and Meeting Ordered will issue in the form filed and signed.

**55** I note that the process includes sending to each investor a detailed and comprehensive description of the problems that developed in the ABCP market as well as its proposed solution. In a recognition that the understanding of the problem and its proposed solution might be difficult to understand, the Investor Committee is to be commended for arranging to hold information meetings across Canada.

**56** I am of the view that resolution of this difficult and complex problem will be best achieved by those directly affected reaching agreement in a timely fashion for a lasting resolution.

C.L. CAMPBELL J.

\* \* \* \* \*

**SCHEDULE "A"**

**CONDUITS**

Apollo Trust

Apsley Trust

Aria Trust

Aurora Trust

Comet Trust

Encore Trust

Gemini Trust

Ironstone Trust

MMAI-I Trust

Newshore Canadian Trust

Opus Trust

Planet Trust

Rocket Trust

Selkirk Funding Trust

Silverstone Trust

Slate Trust

Structured Asset Trust

Structured Investment Trust III

Symphony Trust

Whitehall Trust

**SCHEDULE "B"**

**APPLICANTS**

ATB Financial

Caisse de Dépôt et Placement du Québec

Canaccord Capital Corporation

Canada Post Corporation

Credit Union Central of Alberta Limited

Credit Union Central of British Columbia

Credit Union Central of Canada

Credit Union Central of Ontario

Credit Union Central of Saskatchewan

Desjardins Group

Magna International Inc.

National Bank Financial Inc./National Bank of Canada

NAV Canada

Northwater Capital Management Inc.

Public Sector Pension Investment Board

The Governors of the University of Alberta

1 See *Lehndorff General Partner, Re* (1993), 17 C.B.R. (3d) 24 at 31 (Ont. Gen. Div.) contrasted with *Re Royal Oak Mines Inc.* (1999), 6 C.B.R. (4th) 314 at 316.

2 *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289 (Ont. C.A.) per Doherty J.A. (in dissent on result but not on this point); also cases referred to in *Re Cadillac Fairview Inc.* (1995), 30 C.B.R. (3d) 29 (Ont. Gen. Div.).

3 *Re Stelco Inc.* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J.) at paras. 21-22; leave to appeal to C.A. refused, [2004] O.J. No. 1903; leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336.

4 *Supra* at (2004) paragraphs 26 and 28.

5 Instruments such as trust deeds may give specified rights to creditors or any class of them in certain circumstances. Some instruments may purport to provide that a creditor may not circumvent any limitation in the rights contained in the instrument by proposing an arrangement under the CCAA and thereby obtaining wider or extended rights. ... Relief under the CCAA is available notwithstanding the terms of any instrument. [Footnote omitted.] (John D. Honsberger, *Debt Restructuring: Principles and Practice*, vol. 1 (Aurora: Canada Law Book, 1997+) at 9-18). See also *Citibank Canada v. Chase Manhattan Bank of Canada*, [1991] O.J. No. 944, *supra*, at paras. 25-26 (Ont. Gen. Div.); *Re United Used Auto & Truck Parts Ltd.* (1999), 12 C.B.R. (4th) 144 at para. 11 (B.C.S.C.).

6 *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 at para. 45.

7 *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.) at paras. 23-25; *Re MuscleTech Research & Development* (2006), 19 C.B.R. (5th) 54 (Ont. S.C.J. - Commercial List) at para. 3.

8 *Re Calpine Canada Energy Limited* (2006), 19 C.B.R. (5th) 187 (Alta. Q.B.) at paras. 33-34; *Re Calpine Canada Energy Limited* (8 February 2008), Calgary 0501-17864 (Alta. Q.B.) at 5.

9 *Re Campeau Corp.* (1991), 10 C.B.R. (3d) 100 (Ont. Gen. Div.) at para. 18.

10 *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) at paras. 13-14.

11 *Re Stelco Inc.* (2005), 15 C.B.R. (5th) 307 (Ont. C.A.), at para. 22.

**TAB 6**

2008 ONCA 587  
Ontario Court of Appeal

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.

2008 CarswellOnt 4811, 2008 ONCA 587, [2008] O.J. No. 3164, 168 A.C.W.S. (3d) 698, 240  
O.A.C. 245, 296 D.L.R. (4th) 135, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 92 O.R. (3d) 513

**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 AND ARRANGEMENT INVOLVING  
METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., METCALFE & MANSFIELD  
ALTERNATIVE INVESTMENTS III CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS  
V CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP., METCALFE  
& MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 4446372 CANADA INC. AND  
6932819 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO

THE INVESTORS REPRESENTED ON THE PAN-CANADIAN INVESTORS COMMITTEE FOR THIRD-  
PARTY STRUCTURED ASSET-BACKED COMMERCIAL PAPER LISTED IN SCHEDULE "B" HERETO  
(Applicants / Respondents in Appeal) and METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II  
CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS III CORP., METCALFE & MANSFIELD  
ALTERNATIVE INVESTMENTS V CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS  
XI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 4446372 CANADA  
INC. AND 6932819 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO  
(Respondents / Respondents in Appeal) and AIR TRANSAT A.T. INC., TRANSAT TOURS CANADA  
INC., THE JEAN COUTU GROUP (PJC) INC., AÉROPORTS DE MONTRÉAL INC., AÉROPORTS DE  
MONTRÉAL CAPITAL INC., POMERLEAU ONTARIO INC., POMERLEAU INC., LABOPHARM INC.,  
DOMTAR INC., DOMTAR PULP AND PAPER PRODUCTS INC., GIRO INC., VÊTEMENTS DE SPORTS  
R.G.R. INC., 131519 CANADA INC., AIR JAZZ LP, PETRIFOND FOUNDATION COMPANY LIMITED,  
PETRIFOND FOUNDATION MIDWEST LIMITED, SERVICES HYPOTHÉCAIRES LA PATRIMONIALE  
INC., TECSYS INC. SOCIÉTÉ GÉNÉRALE DE FINANCEMENT DU QUÉBEC, VIBROSYSTEM INC.,  
INTERQUISA CANADA L.P., REDCORP VENTURES LTD., JURA ENERGY CORPORATION, IVANHOE  
MINES LTD., WEBTECH WIRELESS INC., WYNN CAPITAL CORPORATION INC., HY BLOOM INC.,  
CARDACIAN MORTGAGE SERVICES, INC., WEST ENERGY LTD., SABRE ENERTY LTD., PETROLIFERA  
PETROLEUM LTD., VAQUERO RESOURCES LTD. and STANDARD ENERGY INC. (Respondents / Appellants)

J.I. Laskin, E.A. Cronk, R.A. Blair JJ.A.

Heard: June 25-26, 2008

Judgment: August 18, 2008 \*

Docket: CA C48969

Proceedings: affirming *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 3523, 43 C.B.R. (5th) 269 (Ont. S.C.J. [Commercial List])

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Bank USA, National Association, Merrill Lynch International, Merrill Lynch Capital Services, Inc., Swiss Re Financial Products Corporation, UBS AG

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Craig J. Hill, Sam P. Rappos for Monitors (ABCP Appeals)

Jeffrey C. Carhart, Joseph Marin for Ad Hoc Committee, Pricewaterhouse Coopers Inc., in its capacity as Financial Advisor

Mario J. Forte for Caisse de Dépôt et Placement du Québec

John B. Laskin for National Bank Financial Inc., National Bank of Canada

Thomas McRae, Arthur O. Jacques for Ad Hoc Retail Creditors Committee (Brian Hunter, et al)

Howard Shapray, Q.C., Stephen Fitterman for Ivanhoe Mines Ltd.

Kevin P. McElcheran, Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia, T.D. Bank

Jeffrey S. Leon for CIBC Mellon Trust Company, Computershare Trust Company of Canada, BNY Trust Company of Canada, as Indenture Trustees

Usman Sheikh for Coventree Capital Inc.

Allan Sternberg, Sam R. Sasso for Brookfield Asset Management and Partners Ltd., Hy Bloom Inc., Cardacian Mortgage Services Inc.

Neil C. Saxe for Dominion Bond Rating Service

James A. Woods, Sebastien Richemont, Marie-Anne Paquette for Air Transat A.T. Inc., Transat Tours Canada Inc.,

Jean Coutu Group (PJC) Inc., Aéroports de Montréal, Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc.,

Pomerleau Inc., Labopharm Inc., Agence Métropolitaine de Transport (AMT), Giro Inc., Vêtements de sports RGR

Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc., Jazz Air LP

Scott A. Turner for Webtech Wireless Inc., Wynn Capital Corporation Inc., West Energy Ltd., Sabre Energy Ltd.,

Petrolifera Petroleum Ltd., Vaquero Resources Ltd., and Standard Energy Ltd.

R. Graham Phoenix for Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative

Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative

Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., Quanto Financial Corporation and

Metcalfe & Mansfield Capital Corp.

Subject: Insolvency; Civil Practice and Procedure

#### **Related Abridgment Classifications**

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

#### **Bankruptcy and insolvency**

XVII Practice and procedure in courts

XVII.7 Appeals

XVII.7.b To Court of Appeal

XVII.7.b.ii Availability

XVII.7.b.ii.D Miscellaneous cases

#### **Bankruptcy and insolvency**

XIX Companies' Creditors Arrangement Act

XIX.3 Arrangements

XIX.3.b Approval by court

XIX.3.b.iv Miscellaneous

#### **Headnote**

**Bankruptcy and insolvency — Proposal — Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous issues**

Releases — Parties were financial institutions, dealers and noteholders in market for Asset Backed Commercial Paper ("ABCP") — Canadian ABCP market experienced liquidity crisis — Plan of Compromise and Arrangement ("Plan") was put forward under Companies' Creditors Arrangement Act ("CCAA") — Plan included releases for claims against banks and dealers in negligence, misrepresentation and fraud, with "carve out" allowing fraudulent misrepresentations claims — Noteholders voted in favour of Plan — Minority noteholders ("opponents") opposed Plan based on releases — Applicants' application for approval of Plan was granted — Opponents brought application for leave to appeal and appeal from that decision — Application granted; appeal dismissed — CCAA permits inclusion of third party releases in plan of compromise or arrangement to be sanctioned by court where those releases were reasonably connected to proposed restructuring — It is implicit in language of CCAA that court has authority to sanction plans incorporating third-party releases that are reasonably related to proposed restructuring — CCAA is supporting framework for resolution of corporate insolvencies in public interest — Parties are entitled to put anything in Plan that could lawfully be incorporated into any contract — Plan of compromise or arrangement may propose that creditors agree to compromise claims against debtor and to release third parties, just as any debtor and creditor might agree to such terms in contract between them — Once statutory mechanism regarding voter approval and court sanctioning has been complied with, plan becomes binding on all creditors.

**Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Availability — Miscellaneous cases**

Leave to appeal — Parties were financial institutions, dealers and noteholders in market for Asset Backed Commercial Paper ("ABCP") — Canadian ABCP market experienced liquidity crisis — Plan of Compromise and Arrangement ("Plan") was put forward under Companies' Creditors Arrangement Act ("CCAA") — Plan included releases for claims against banks and dealers in negligence, misrepresentation and fraud, with "carve out" allowing fraudulent misrepresentations claims — Noteholders voted in favour of Plan — Minority noteholders ("opponents") opposed Plan based on releases — Applicants' application for approval of Plan was granted — Opponents brought application for leave to appeal and appeal from that decision — Application granted; appeal dismissed — Criteria for granting leave to appeal in CCAA proceedings was met — Proposed appeal raised issues of considerable importance to restructuring proceedings under CCAA Canada-wide — These were serious and arguable grounds of appeal and appeal would not unduly delay progress of proceedings.

**Table of Authorities**

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*Anvil Range Mining Corp., Re* (1998), 1998 CarswellOnt 5319, 7 C.B.R. (4th) 51 (Ont. Gen. Div. [Commercial List]) — referred to

*Bell ExpressVu Ltd. Partnership v. Rex* (2002), 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, 166 B.C.A.C. 1, 271 W.A.C. 1, 18 C.P.R. (4th) 289, 100 B.C.L.R. (3d) 1, 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — considered

*Canadian Airlines Corp., Re* (2000), [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 2000 CarswellAlta 662, 2000 ABQB 442, 265 A.R. 201 (Alta. Q.B.) — considered

*Canadian Airlines Corp., Re* (2000), 2000 CarswellAlta 919, [2000] 10 W.W.R. 314, 20 C.B.R. (4th) 46, 84 Alta. L.R. (3d) 52, 9 B.L.R. (3d) 86, 2000 ABCA 238, 266 A.R. 131, 228 W.A.C. 131 (Alta. C.A. [In Chambers]) — referred to



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*Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 1998 CarswellOnt 3346, 5 C.B.R. (4th) 299, 72 O.T.C. 99 (Ont. Gen. Div. [Commercial List]) — referred to

*Cineplex Odeon Corp., Re* (2001), 2001 CarswellOnt 1258, 24 C.B.R. (4th) 201 (Ont. C.A.) — followed

*Country Style Food Services Inc., Re* (2002), 158 O.A.C. 30, 2002 CarswellOnt 1038 (Ont. C.A. [In Chambers]) — followed

*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106, 1995 CarswellOnt 54 (Ont. Gen. Div. [Commercial List]) — considered

*Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd.* (1976), 1976 CarswellQue 32, [1978] 1 S.C.R. 230, 26 C.B.R. (N.S.) 84, 75 D.L.R. (3d) 63, (sub nom. *Employers' Liability Assurance Corp. v. Ideal Petroleum (1969) Ltd.*) 14 N.R. 503, 1976 CarswellQue 25 (S.C.C.) — referred to

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*Muscletech Research & Development Inc., Re* (2006), 25 C.B.R. (5th) 231, 2006 CarswellOnt 6230 (Ont. S.C.J.) — considered

*NBD Bank, Canada v. Dofasco Inc.* (1999), 1999 CarswellOnt 4077, 1 B.L.R. (3d) 1, 181 D.L.R. (4th) 37, 46 O.R. (3d) 514, 47 C.C.L.T. (2d) 213, 127 O.A.C. 338, 15 C.B.R. (4th) 67 (Ont. C.A.) — distinguished

*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1990 CarswellOnt 139, 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey*) 1 O.R. (3d) 289, (sub nom. *Elan Corp. v. Comiskey*) 41 O.A.C. 282 (Ont. C.A.) — considered

*Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1, (sub nom. *Olympia & York Developments Ltd., Re*) 12 O.R. (3d) 500, 1993 CarswellOnt 182 (Ont. Gen. Div.) — referred to

*Pacific Coastal Airlines Ltd. v. Air Canada* (2001), 2001 BCSC 1721, 2001 CarswellBC 2943, 19 B.L.R. (3d) 286 (B.C. S.C.) — distinguished

*Quebec (Attorney General) v. Bélanger (Trustee of)* (1928), 1928 CarswellNat 47, [1928] A.C. 187, [1928] 1 W.W.R. 534, [1928] 1 D.L.R. 945, (sub nom. *Quebec (Attorney General) v. Larue*) 8 C.B.R. 579 (Canada P.C.) — referred to

*Ravelston Corp., Re* (2007), 2007 CarswellOnt 2114, 2007 ONCA 268, 31 C.B.R. (5th) 233 (Ont. C.A. [In Chambers]) — referred to

*Reference re Companies' Creditors Arrangement Act (Canada)* (1934), [1934] 4 D.L.R. 75, 1934 CarswellNat 1, 16 C.B.R. 1, [1934] S.C.R. 659 (S.C.C.) — considered

*Reference re Refund of Dues Paid under s.47 (f) of Timber Regulations in the Western Provinces* (1933), [1934] 1 D.L.R. 43, 1933 CarswellNat 47, [1933] S.C.R. 616 (S.C.C.) — referred to

*Reference re Refund of Dues Paid under s.47 (f) of Timber Regulations in the Western Provinces* (1935), [1935] 1 W.W.R. 607, [1935] 2 D.L.R. 1, 1935 CarswellNat 2, [1935] A.C. 184 (Canada P.C.) — considered

*Rizzo & Rizzo Shoes Ltd., Re* (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 50 C.B.R. (3d) 163, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re*) 221 N.R. 241, (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re*) 106 O.A.C. 1, (sub nom. *Adrien v. Ontario Ministry of Labour*) 98 C.L.L.C. 210-006 (S.C.C.) — considered

*Royal Penfield Inc., Re* (2003), 44 C.B.R. (4th) 302, [2003] R.J.Q. 2157, 2003 CarswellQue 1711, [2003] G.S.T.C. 195 (C.S. Que.) — referred to

*Skydome Corp., Re* (1998), 1998 CarswellOnt 5914, 16 C.B.R. (4th) 125 (Ont. Gen. Div. [Commercial List]) — referred to

*Society of Composers, Authors & Music Publishers of Canada v. Armitage* (2000), 2000 CarswellOnt 4120, 20 C.B.R. (4th) 160, 50 O.R. (3d) 688, 137 O.A.C. 74 (Ont. C.A.) — referred to

*Steinberg Inc. c. Michaud* (1993), [1993] R.J.Q. 1684, 55 Q.A.C. 298, 1993 CarswellQue 229, 1993 CarswellQue 2055, 42 C.B.R. (5th) 1 (C.A. Que.) — referred to

*Stelco Inc., Re* (2005), 2005 CarswellOnt 6483, 15 C.B.R. (5th) 297 (Ont. S.C.J. [Commercial List]) — referred to

*Stelco Inc., Re* (2005), 2005 CarswellOnt 6818, 204 O.A.C. 205, 78 O.R. (3d) 241, 261 D.L.R. (4th) 368, 11 B.L.R. (4th) 185, 15 C.B.R. (5th) 307 (Ont. C.A.) — considered

*Stelco Inc., Re* (2006), 210 O.A.C. 129, 2006 CarswellOnt 3050, 21 C.B.R. (5th) 157 (Ont. C.A.) — referred to

*T&N Ltd., Re* (2006), [2007] Bus. L.R. 1411, [2007] 1 All E.R. 851, [2006] Lloyd's Rep. I.R. 817, [2007] 1 B.C.L.C. 563, [2006] B.P.I.R. 1283 (Eng. Ch. Div.) — considered

**Statutes considered:**

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3  
Generally — referred to

*Business Corporations Act*, R.S.O. 1990, c. B.16  
s. 182 — referred to

*Canada Business Corporations Act*, R.S.C. 1985, c. C-44  
s. 192 — referred to

*Code civil du Québec*, L.Q. 1991, c. 64  
en général — referred to

*Companies Act*, 1985, c. 6  
s. 425 — referred to

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36  
Generally — referred to

s. 4 — considered

s. 5.1 [en. 1997, c. 12, s. 122] — considered

s. 6 — considered

*Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

s. 91 ¶ 21 — referred to

s. 92 — referred to

s. 92 ¶ 13 — referred to

**Words and phrases considered:**

**arrangement**

"Arrangement" is broader than "compromise" and would appear to include any scheme for reorganizing the affairs of the debtor.

APPEAL by opponents of creditor-initiated plan from judgment reported at *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 3523, 43 C.B.R. (5th) 269, 47 B.L.R. (4th) 74 (Ont. S.C.J. [Commercial List]), granting application for approval of plan.

**R.A. Blair J.A.:**

**A. Introduction**

1 In August 2007 a liquidity crisis suddenly threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"). The crisis was triggered by a loss of confidence amongst investors stemming from the news of widespread defaults on U.S. sub-prime mortgages. The loss of confidence placed the Canadian financial market at risk generally and was reflective of an economic volatility worldwide.

2 By agreement amongst the major Canadian participants, the \$32 billion Canadian market in third-party ABCP was frozen on August 13, 2007 pending an attempt to resolve the crisis through a restructuring of that market. The Pan-Canadian Investors Committee, chaired by Purdy Crawford, C.C., Q.C., was formed and ultimately put forward the creditor-initiated Plan of Compromise and Arrangement that forms the subject-matter of these proceedings. The Plan was sanctioned by Colin L. Campbell J. on June 5, 2008.

3 Certain creditors who opposed the Plan seek leave to appeal and, if leave is granted, appeal from that decision. They raise an important point regarding the permissible scope of a restructuring under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended ("CCAA"): can the court sanction a Plan that calls for creditors to provide releases to third parties who are themselves solvent and not creditors of the debtor company? They also argue that, if the answer to this question is yes, the application judge erred in holding that this Plan, with its particular releases (which bar some claims even in fraud), was fair and reasonable and therefore in sanctioning it under the CCAA.

#### ***Leave to Appeal***

4 Because of the particular circumstances and urgency of these proceedings, the court agreed to collapse an oral hearing for leave to appeal with the hearing of the appeal itself. At the outset of argument we encouraged counsel to combine their submissions on both matters.

5 The proposed appeal raises issues of considerable importance to restructuring proceedings under the CCAA Canada-wide. There are serious and arguable grounds of appeal and — given the expedited time-table — the appeal will not unduly delay the progress of the proceedings. I am satisfied that the criteria for granting leave to appeal in CCAA proceedings, set out in such cases as *Cineplex Odeon Corp., Re* (2001), 24 C.B.R. (4th) 201 (Ont. C.A.), and *Country Style Food Services Inc., Re* (2002), 158 O.A.C. 30 (Ont. C.A. [In Chambers]), are met. I would grant leave to appeal.

#### ***Appeal***

6 For the reasons that follow, however, I would dismiss the appeal.

### **B. Facts**

#### ***The Parties***

7 The appellants are holders of ABCP Notes who oppose the Plan. They do so principally on the basis that it requires them to grant releases to third party financial institutions against whom they say they have claims for relief arising out of their purchase of ABCP Notes. Amongst them are an airline, a tour operator, a mining company, a wireless provider, a pharmaceuticals retailer, and several holding companies and energy companies.

8 Each of the appellants has large sums invested in ABCP — in some cases, hundreds of millions of dollars. Nonetheless, the collective holdings of the appellants — slightly over \$1 billion — represent only a small fraction of the more than \$32 billion of ABCP involved in the restructuring.

9 The lead respondent is the Pan-Canadian Investors Committee which was responsible for the creation and negotiation of the Plan on behalf of the creditors. Other respondents include various major international financial institutions, the five largest Canadian banks, several trust companies, and some smaller holders of ABCP product. They participated in the market in a number of different ways.

#### ***The ABCP Market***

10 Asset Backed Commercial Paper is a sophisticated and hitherto well-accepted financial instrument. It is primarily a form of short-term investment — usually 30 to 90 days — typically with a low interest yield only slightly better than that available through other short-term paper from a government or bank. It is said to be "asset backed" because the cash that is used to purchase an ABCP Note is converted into a portfolio of financial assets or other asset interests that in turn provide security for the repayment of the notes.

11 ABCP was often presented by those selling it as a safe investment, somewhat like a guaranteed investment certificate.

12 The Canadian market for ABCP is significant and administratively complex. As of August 2007, investors had placed over \$116 billion in Canadian ABCP. Investors range from individual pensioners to large institutional bodies. On the selling and distribution end, numerous players are involved, including chartered banks, investment houses and other financial institutions. Some of these players participated in multiple ways. The Plan in this proceeding relates to approximately \$32 billion of non-bank sponsored ABCP the restructuring of which is considered essential to the preservation of the Canadian ABCP market.

13 As I understand it, prior to August 2007 when it was frozen, the ABCP market worked as follows.

14 Various corporations (the "Sponsors") would arrange for entities they control ("Conduits") to make ABCP Notes available to be sold to investors through "Dealers" (banks and other investment dealers). Typically, ABCP was issued by series and sometimes by classes within a series.

15 The cash from the purchase of the ABCP Notes was used to purchase assets which were held by trustees of the Conduits ("Issuer Trustees") and which stood as security for repayment of the notes. Financial institutions that sold or provided the Conduits with the assets that secured the ABCP are known as "Asset Providers". To help ensure that investors would be able to redeem their notes, "Liquidity Providers" agreed to provide funds that could be drawn upon to meet the demands of maturing ABCP Notes in certain circumstances. Most Asset Providers were also Liquidity Providers. Many of these banks and financial institutions were also holders of ABCP Notes ("Noteholders"). The Asset and Liquidity Providers held first charges on the assets.

16 When the market was working well, cash from the purchase of new ABCP Notes was also used to pay off maturing ABCP Notes; alternatively, Noteholders simply rolled their maturing notes over into new ones. As I will explain, however, there was a potential underlying predicament with this scheme.

#### *The Liquidity Crisis*

17 The types of assets and asset interests acquired to "back" the ABCP Notes are varied and complex. They were generally long-term assets such as residential mortgages, credit card receivables, auto loans, cash collateralized debt obligations and derivative investments such as credit default swaps. Their particular characteristics do not matter for the purpose of this appeal, but they shared a common feature that proved to be the Achilles heel of the ABCP market: because of their long-term nature there was an inherent timing mismatch between the cash they generated and the cash needed to repay maturing ABCP Notes.

18 When uncertainty began to spread through the ABCP marketplace in the summer of 2007, investors stopped buying the ABCP product and existing Noteholders ceased to roll over their maturing notes. There was no cash to redeem those notes. Although calls were made on the Liquidity Providers for payment, most of the Liquidity Providers declined to fund the redemption of the notes, arguing that the conditions for liquidity funding had not been met in the circumstances. Hence the "liquidity crisis" in the ABCP market.

19 The crisis was fuelled largely by a lack of transparency in the ABCP scheme. Investors could not tell what assets were backing their notes — partly because the ABCP Notes were often sold before or at the same time as the assets backing them were acquired; partly because of the sheer complexity of certain of the underlying assets; and partly because of assertions of confidentiality by those involved with the assets. As fears arising from the spreading U.S. sub-prime mortgage crisis mushroomed, investors became increasingly concerned that their ABCP Notes may be supported by those crumbling assets. For the reasons outlined above, however, they were unable to redeem their maturing ABCP Notes.

#### *The Montreal Protocol*

20 The liquidity crisis could have triggered a wholesale liquidation of the assets, at depressed prices. But it did not. During the week of August 13, 2007, the ABCP market in Canada froze — the result of a standstill arrangement

orchestrated on the heels of the crisis by numerous market participants, including Asset Providers, Liquidity Providers, Noteholders and other financial industry representatives. Under the standstill agreement — known as the Montréal Protocol — the parties committed to restructuring the ABCP market with a view, as much as possible, to preserving the value of the assets and of the notes.

21 The work of implementing the restructuring fell to the Pan-Canadian Investors Committee, an applicant in the proceeding and respondent in the appeal. The Committee is composed of 17 financial and investment institutions, including chartered banks, credit unions, a pension board, a Crown corporation, and a university board of governors. All 17 members are themselves Noteholders; three of them also participated in the ABCP market in other capacities as well. Between them, they hold about two thirds of the \$32 billion of ABCP sought to be restructured in these proceedings.

22 Mr. Crawford was named the Committee's chair. He thus had a unique vantage point on the work of the Committee and the restructuring process as a whole. His lengthy affidavit strongly informed the application judge's understanding of the factual context, and our own. He was not cross-examined and his evidence is unchallenged.

23 Beginning in September 2007, the Committee worked to craft a plan that would preserve the value of the notes and assets, satisfy the various stakeholders to the extent possible, and restore confidence in an important segment of the Canadian financial marketplace. In March 2008, it and the other applicants sought CCAA protection for the ABCP debtors and the approval of a Plan that had been pre-negotiated with some, but not all, of those affected by the misfortunes in the Canadian ABCP market.

### ***The Plan***

#### *a) Plan Overview*

24 Although the ABCP market involves many different players and kinds of assets, each with their own challenges, the committee opted for a single plan. In Mr. Crawford's words, "all of the ABCP suffers from common problems that are best addressed by a common solution." The Plan the Committee developed is highly complex and involves many parties. In its essence, the Plan would convert the Noteholders' paper — which has been frozen and therefore effectively worthless for many months — into new, long-term notes that would trade freely, but with a discounted face value. The hope is that a strong secondary market for the notes will emerge in the long run.

25 The Plan aims to improve transparency by providing investors with detailed information about the assets supporting their ABCP Notes. It also addresses the timing mismatch between the notes and the assets by adjusting the maturity provisions and interest rates on the new notes. Further, the Plan adjusts some of the underlying credit default swap contracts by increasing the thresholds for default triggering events; in this way, the likelihood of a forced liquidation flowing from the credit default swap holder's prior security is reduced and, in turn, the risk for ABCP investors is decreased.

26 Under the Plan, the vast majority of the assets underlying ABCP would be pooled into two master asset vehicles (MAV1 and MAV2). The pooling is designed to increase the collateral available and thus make the notes more secure.

27 The Plan does not apply to investors holding less than \$1 million of notes. However, certain Dealers have agreed to buy the ABCP of those of their customers holding less than the \$1-million threshold, and to extend financial assistance to these customers. Principal among these Dealers are National Bank and Canaccord, two of the respondent financial institutions the appellants most object to releasing. The application judge found that these developments appeared to be designed to secure votes in favour of the Plan by various Noteholders, and were apparently successful in doing so. If the Plan is approved, they also provide considerable relief to the many small investors who find themselves unwittingly caught in the ABDP collapse.

#### *b) The Releases*

28 This appeal focuses on one specific aspect of the Plan: the comprehensive series of releases of third parties provided for in Article 10.

29 The Plan calls for the release of Canadian banks, Dealers, Noteholders, Asset Providers, Issuer Trustees, Liquidity Providers, and other market participants — in Mr. Crawford's words, "virtually all participants in the Canadian ABCP market" — from any liability associated with ABCP, with the exception of certain narrow claims relating to fraud. For instance, under the Plan as approved, creditors will have to give up their claims against the Dealers who sold them their ABCP Notes, including challenges to the way the Dealers characterized the ABCP and provided (or did not provide) information about the ABCP. The claims against the proposed defendants are mainly in tort: negligence, misrepresentation, negligent misrepresentation, failure to act prudently as a dealer/advisor, acting in conflict of interest, and in a few cases fraud or potential fraud. There are also allegations of breach of fiduciary duty and claims for other equitable relief.

30 The application judge found that, in general, the claims for damages include the face value of the Notes, plus interest and additional penalties and damages.

31 The releases, in effect, are part of a *quid pro quo*. Generally speaking, they are designed to compensate various participants in the market for the contributions they would make to the restructuring. Those contributions under the Plan include the requirements that:

- a) Asset Providers assume an increased risk in their credit default swap contracts, disclose certain proprietary information in relation to the assets, and provide below-cost financing for margin funding facilities that are designed to make the notes more secure;
- b) Sponsors — who in addition have cooperated with the Investors' Committee throughout the process, including by sharing certain proprietary information — give up their existing contracts;
- c) The Canadian banks provide below-cost financing for the margin funding facility and,
- d) Other parties make other contributions under the Plan.

32 According to Mr. Crawford's affidavit, the releases are part of the Plan "because certain key participants, whose participation is vital to the restructuring, have made comprehensive releases a condition for their participation."

#### ***The CCAA Proceedings to Date***

33 On March 17, 2008 the applicants sought and obtained an Initial Order under the CCAA staying any proceedings relating to the ABCP crisis and providing for a meeting of the Noteholders to vote on the proposed Plan. The meeting was held on April 25<sup>th</sup>. The vote was overwhelmingly in support of the Plan — 96% of the Noteholders voted in favour. At the instance of certain Noteholders, and as requested by the application judge (who has supervised the proceedings from the outset), the Monitor broke down the voting results according to those Noteholders who had worked on or with the Investors' Committee to develop the Plan and those Noteholders who had not. Re-calculated on this basis the results remained firmly in favour of the proposed Plan — 99% of those connected with the development of the Plan voted positively, as did 80% of those Noteholders who had not been involved in its formulation.

34 The vote thus provided the Plan with the "double majority" approval — a majority of creditors representing two-thirds in value of the claims — required under s. 6 of the CCAA.

35 Following the successful vote, the applicants sought court approval of the Plan under s. 6. Hearings were held on May 12 and 13. On May 16, the application judge issued a brief endorsement in which he concluded that he did not have sufficient facts to decide whether all the releases proposed in the Plan were authorized by the CCAA. While the application judge was prepared to approve the releases of negligence claims, he was not prepared at that point to

sanction the release of fraud claims. Noting the urgency of the situation and the serious consequences that would result from the Plan's failure, the application judge nevertheless directed the parties back to the bargaining table to try to work out a claims process for addressing legitimate claims of fraud.

36 The result of this renegotiation was a "fraud carve-out" — an amendment to the Plan excluding certain fraud claims from the Plan's releases. The carve-out did not encompass all possible claims of fraud, however. It was limited in three key respects. First, it applied only to claims against ABCP Dealers. Secondly, it applied only to cases involving an express fraudulent misrepresentation made with the intention to induce purchase and in circumstances where the person making the representation knew it to be false. Thirdly, the carve-out limited available damages to the value of the notes, minus any funds distributed as part of the Plan. The appellants argue vigorously that such a limited release respecting fraud claims is unacceptable and should not have been sanctioned by the application judge.

37 A second sanction hearing — this time involving the amended Plan (with the fraud carve-out) — was held on June 3, 2008. Two days later, Campbell J. released his reasons for decision, approving and sanctioning the Plan on the basis both that he had jurisdiction to sanction a Plan calling for third-party releases and that the Plan including the third-party releases in question here was fair and reasonable.

38 The appellants attack both of these determinations.

### C. Law and Analysis

39 There are two principal questions for determination on this appeal:

- 1) As a matter of law, may a CCAA plan contain a release of claims against anyone other than the debtor company or its directors?
- 2) If the answer to that question is yes, did the application judge err in the exercise of his discretion to sanction the Plan as fair and reasonable given the nature of the releases called for under it?

#### *(1) Legal Authority for the Releases*

40 The standard of review on this first issue — whether, as a matter of law, a CCAA plan may contain third-party releases — is correctness.

41 The appellants submit that a court has no jurisdiction or legal authority under the CCAA to sanction a plan that imposes an obligation on creditors to give releases to third parties other than the directors of the debtor company.<sup>1</sup> The requirement that objecting creditors release claims against third parties is illegal, they contend, because:

- a) on a proper interpretation, the CCAA does not permit such releases;
- b) the court is not entitled to "fill in the gaps" in the CCAA or rely upon its inherent jurisdiction to create such authority because to do so would be contrary to the principle that Parliament did not intend to interfere with private property rights or rights of action in the absence of clear statutory language to that effect;
- c) the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the *Constitution Act*, 1867;
- d) the releases are invalid under Quebec rules of public order; and because
- e) the prevailing jurisprudence supports these conclusions.

42 I would not give effect to any of these submissions.

#### *Interpretation, "Gap Filling" and Inherent Jurisdiction*



43 On a proper interpretation, in my view, the CCAA permits the inclusion of third party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. I am led to this conclusion by a combination of (a) the open-ended, flexible character of the CCAA itself, (b) the broad nature of the term "compromise or arrangement" as used in the Act, and (c) the express statutory effect of the "double-majority" vote and court sanction which render the plan binding on *all* creditors, including those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the Act in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to that interpretation. The second provides the entrée to negotiations between the parties affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity in fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

44 The CCAA is skeletal in nature. It does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme. The scope of the Act and the powers of the court under it are not limitless. It is beyond controversy, however, that the CCAA is remedial legislation to be liberally construed in accordance with the modern purposive approach to statutory interpretation. It is designed to be a flexible instrument and it is that very flexibility which gives the Act its efficacy: *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]). As Farley J. noted in *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]), at 111, "[t]he history of CCAA law has been an evolution of judicial interpretation."

45 Much has been said, however, about the "evolution of judicial interpretation" and there is some controversy over both the source and scope of that authority. Is the source of the court's authority statutory, discerned solely through application of the principles of statutory interpretation, for example? Or does it rest in the court's ability to "fill in the gaps" in legislation? Or in the court's inherent jurisdiction?

46 These issues have recently been canvassed by the Honourable Georgina R. Jackson and Dr. Janis Sarra in their publication "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters,"<sup>2</sup> and there was considerable argument on these issues before the application judge and before us. While I generally agree with the authors' suggestion that the courts should adopt a hierarchical approach in their resort to these interpretive tools — statutory interpretation, gap-filling, discretion and inherent jurisdiction — it is not necessary in my view to go beyond the general principles of statutory interpretation to resolve the issues on this appeal. Because I am satisfied that it is implicit in the language of the CCAA itself that the court has authority to sanction plans incorporating third-party releases that are reasonably related to the proposed restructuring, there is no "gap-filling" to be done and no need to fall back on inherent jurisdiction. In this respect, I take a somewhat different approach than the application judge did.

47 The Supreme Court of Canada has affirmed generally — and in the insolvency context particularly — that remedial statutes are to be interpreted liberally and in accordance with Professor Driedger's modern principle of statutory interpretation. Driedger advocated that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at para. 21, quoting E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983); *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.) at para. 26.

48 More broadly, I believe that the proper approach to the judicial interpretation and application of statutes — particularly those like the CCAA that are skeletal in nature — is succinctly and accurately summarized by Jackson and Sarra in their recent article, *supra*, at p. 56:

The exercise of a statutory authority requires the statute to be construed. The plain meaning or textualist approach has given way to a search for the object and goals of the statute and the intentionalist approach. This latter approach makes use of the purposive approach and the mischief rule, including its codification under interpretation

statutes that every enactment is deemed remedial, and is to be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. This latter approach advocates reading the statute as a whole and being mindful of Driedger's "one principle", that the words of the Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. It is important that courts first interpret the statute before them and exercise their authority pursuant to the statute, before reaching for other tools in the judicial toolbox. Statutory interpretation using the principles articulated above leaves room for gap-filling in the common law provinces and a consideration of purpose in *Québec* as a manifestation of the judge's overall task of statutory interpretation. Finally, the jurisprudence in relation to statutory interpretation demonstrates the fluidity inherent in the judge's task in seeking the objects of the statute and the intention of the legislature.

49 I adopt these principles.

50 The remedial purpose of the CCAA — as its title affirms — is to facilitate compromises or arrangements between an insolvent debtor company and its creditors. In *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.) at 318, Gibbs J.A. summarized very concisely the purpose, object and scheme of the Act:

Almost inevitably, liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A., to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business.

51 The CCAA was enacted in 1933 and was necessary — as the then Secretary of State noted in introducing the Bill on First Reading — "because of the prevailing commercial and industrial depression" and the need to alleviate the effects of business bankruptcies in that context: see the statement of the Hon. C.H. Cahan, Secretary of State, *House of Commons Debates (Hansard)* (April 20, 1933) at 4091. One of the greatest effects of that Depression was what Gibbs J.A. described as "the social evil of devastating levels of unemployment". Since then, courts have recognized that the Act has a broader dimension than simply the direct relations between the debtor company and its creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected: see, for example, *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (Ont. C.A.), *per* Doherty J.A. in dissent; *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 125 (Ont. Gen. Div. [Commercial List]); *Anvil Range Mining Corp., Re* (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div. [Commercial List]).

52 In this respect, I agree with the following statement of Doherty J.A. in *Elan, supra*, at pp. 306-307:

... [T]he Act was designed to serve a "broad constituency of investors, creditors and employees".<sup>3</sup> Because of that "broad constituency" the court must, when considering applications brought under the Act, *have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest.* [Emphasis added.]

#### *Application of the Principles of Interpretation*

53 An interpretation of the CCAA that recognizes its broader socio-economic purposes and objects is apt in this case. As the application judge pointed out, the restructuring underpins the financial viability of the Canadian ABCP market itself.

54 The appellants argue that the application judge erred in taking this approach and in treating the Plan and the proceedings as an attempt to restructure a financial market (the ABCP market) rather than simply the affairs between the debtor corporations who caused the ABCP Notes to be issued and their creditors. The Act is designed, they say, only to effect reorganizations between a corporate debtor and its creditors and not to attempt to restructure entire marketplaces.

55 This perspective is flawed in at least two respects, however, in my opinion. First, it reflects a view of the purpose and objects of the CCAA that is too narrow. Secondly, it overlooks the reality of the ABCP marketplace and the context of the restructuring in question here. It may be true that, in their capacity as ABCP *Dealers*, the releasee financial institutions are "third-parties" to the restructuring in the sense that they are not creditors of the debtor corporations. However, in their capacities as *Asset Providers* and *Liquidity Providers*, they are not only creditors but they are prior secured creditors to the Noteholders. Furthermore — as the application judge found — in these latter capacities they are making significant contributions to the restructuring by "foregoing immediate rights to assets and ... providing real and tangible input for the preservation and enhancement of the Notes" (para. 76). In this context, therefore, the application judge's remark at para. 50 that the restructuring "involves the commitment and participation of all parties" in the ABCP market makes sense, as do his earlier comments at paras. 48-49:

Given the nature of the ABCP market and all of its participants, it is more appropriate to consider all Noteholders as claimants and the object of the Plan to restore liquidity to the assets being the Notes themselves. The restoration of the liquidity of the market necessitates the participation (including more tangible contribution by many) of all Noteholders.

In these circumstances, *it is unduly technical to classify the Issuer Trustees as debtors and the claims of the Noteholders as between themselves and others as being those of third party creditors*, although I recognize that the restructuring structure of the CCAA requires the corporations as the vehicles for restructuring. [Emphasis added.]

56 The application judge did observe that "[t]he insolvency is of the ABCP market itself, the restructuring is that of the market for such paper ..." (para. 50). He did so, however, to point out the uniqueness of the Plan before him and its industry-wide significance and not to suggest that he need have no regard to the provisions of the CCAA permitting a restructuring as between debtor and creditors. His focus was on *the effect* of the restructuring, a perfectly permissible perspective, given the broad purpose and objects of the Act. This is apparent from his later references. For example, in balancing the arguments against approving releases that might include aspects of fraud, he responded that "what is at issue is a liquidity crisis that affects the ABCP market in Canada" (para. 125). In addition, in his reasoning on the fair-and-reasonable issue, he stated at para. 142: "Apart from the Plan itself, there is a need to restore confidence in the financial system in Canada and this Plan is a legitimate use of the CCAA to accomplish that goal."

57 I agree. I see no error on the part of the application judge in approaching the fairness assessment or the interpretation issue with these considerations in mind. They provide the context in which the purpose, objects and scheme of the CCAA are to be considered.

### **The Statutory Wording**

58 Keeping in mind the interpretive principles outlined above, I turn now to a consideration of the provisions of the CCAA. Where in the words of the statute is the court clothed with authority to approve a plan incorporating a requirement for third-party releases? As summarized earlier, the answer to that question, in my view, is to be found in:

- a) the skeletal nature of the CCAA;
- b) Parliament's reliance upon the broad notions of "compromise" and "arrangement" to establish the framework within which the parties may work to put forward a restructuring plan; and in
- c) the creation of the statutory mechanism binding all creditors in classes to the compromise or arrangement once it has surpassed the high "double majority" voting threshold and obtained court sanction as "fair and reasonable".

Therein lies the expression of Parliament's intention to permit the parties to negotiate and vote on, and the court to sanction, third-party releases relating to a restructuring.

59 Sections 4 and 6 of the CCAA state:

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

6. Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

#### Compromise or Arrangement

60 While there may be little practical distinction between "compromise" and "arrangement" in many respects, the two are not necessarily the same. "Arrangement" is broader than "compromise" and would appear to include any scheme for reorganizing the affairs of the debtor: Houlden & Morawetz, *Bankruptcy and Insolvency Law of Canada*, loose-leaf, 3rd ed., vol. 4 (Toronto: Thomson Carswell) at 10A-12.2, N§10. It has been said to be "a very wide and indefinite [word]": *Reference re Refund of Dues Paid under s.47 (f) of Timber Regulations in the Western Provinces*, [1935] A.C. 184 (Canada P.C.) at 197, affirming S.C.C. [1933] S.C.R. 616 (S.C.C.). See also, *Guardian Assurance Co., Re.*, [1917] 1 Ch. 431 (Eng. C.A.) at 448, 450; *T&N Ltd., Re* (2006), [2007] 1 All E.R. 851 (Eng. Ch. Div.).

61 The CCAA is a sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest. Parliament wisely avoided attempting to anticipate the myriad of business deals that could evolve from the fertile and creative minds of negotiators restructuring their financial affairs. It left the shape and details of those deals to be worked out within the framework of the comprehensive and flexible concepts of a "compromise" and "arrangement." I see no reason why a release in favour of a third party, negotiated as part of a package between a debtor and creditor and reasonably relating to the proposed restructuring cannot fall within that framework.

62 A proposal under the *Bankruptcy and Insolvency Act*, R.S., 1985, c. B-3 (the "BIA") is a contract: *Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd.*, [1978] 1 S.C.R. 230 (S.C.C.) at 239; *Society of Composers, Authors & Music Publishers of Canada v. Armitage* (2000), 50 O.R. (3d) 688 (Ont. C.A.) at para. 11. In my view, a compromise or arrangement under the CCAA is directly analogous to a proposal for these purposes, and therefore is to be treated as a contract between the debtor and its creditors. Consequently, parties are entitled to put anything into such a plan that could lawfully be incorporated into any contract. See *Air Canada, Re* (2004), 2 C.B.R. (5th) 4 (Ont. S.C.J. [Commercial List]) at para. 6; *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), [2 O.R. (3d) 500 (Ont. Gen. Div.) at 518.

63 There is nothing to prevent a debtor and a creditor from including in a contract between them a term providing that the creditor release a third party. The term is binding as between the debtor and creditor. In the CCAA context, therefore, a plan of compromise or arrangement may propose that creditors agree to compromise claims against the debtor and to release third parties, just as any debtor and creditor might agree to such a term in a contract between them. Once the statutory mechanism regarding voter approval and court sanctioning has been complied with, the plan — including the provision for releases — becomes binding on all creditors (including the dissenting minority).

64 *T&N Ltd.*, *Re, supra*, is instructive in this regard. It is a rare example of a court focussing on and examining the meaning and breadth of the term "arrangement". T&N and its associated companies were engaged in the manufacture, distribution and sale of asbestos-containing products. They became the subject of many claims by former employees, who had been exposed to asbestos dust in the course of their employment, and their dependents. The T&N companies applied for protection under s. 425 of the U.K. *Companies Act 1985*, a provision virtually identical to the scheme of the CCAA — including the concepts of compromise or arrangement.<sup>4</sup>

65 T&N carried employers' liability insurance. However, the employers' liability insurers (the "EL insurers") denied coverage. This issue was litigated and ultimately resolved through the establishment of a multi-million pound fund against which the employees and their dependants (the "EL claimants") would assert their claims. In return, T&N's former employees and dependants (the "EL claimants") agreed to forego any further claims against the EL insurers. This settlement was incorporated into the plan of compromise and arrangement between the T&N companies and the EL claimants that was voted on and put forward for court sanction.

66 Certain creditors argued that the court could not sanction the plan because it did not constitute a "compromise or arrangement" between T&N and the EL claimants since it did not purport to affect rights as between them but only the EL claimants' rights against the EL insurers. The Court rejected this argument. Richards J. adopted previous jurisprudence — cited earlier in these reasons — to the effect that the word "arrangement" has a very broad meaning and that, while both a compromise and an arrangement involve some "give and take", an arrangement need not involve a compromise or be confined to a case of dispute or difficulty (paras. 46-51). He referred to what would be the equivalent of a solvent arrangement under Canadian corporate legislation as an example.<sup>5</sup> Finally, he pointed out that the compromised rights of the EL claimants against the EL insurers were not unconnected with the EL claimants' rights against the T&N companies; the scheme of arrangement involving the EL insurers was "an integral part of a single proposal affecting all the parties" (para. 52). He concluded his reasoning with these observations (para. 53):

In my judgment it is not a necessary element of an arrangement for the purposes of s 425 of the 1985 Act that it should alter the rights existing between the company and the creditors or members with whom it is made. No doubt in most cases it will alter those rights. But, provided that the context and content of the scheme are such as properly to constitute an arrangement between the company and the members or creditors concerned, it will fall within s 425. It is ... neither necessary nor desirable to attempt a definition of arrangement. The legislature has not done so. To insist on an alteration of rights, or a termination of rights as in the case of schemes to effect takeovers or mergers, is to impose a restriction which is neither warranted by the statutory language nor justified by the courts' approach over many years to give the term its widest meaning. *Nor is an arrangement necessarily outside the section, because its effect is to alter the rights of creditors against another party or because such alteration could be achieved by a scheme of arrangement with that party.* [Emphasis added.]

67 I find Richard J.'s analysis helpful and persuasive. In effect, the claimants in *T&N* were being asked to release their claims against the EL insurers in exchange for a call on the fund. Here, the appellants are being required to release their claims against certain financial third parties in exchange for what is anticipated to be an improved position for all ABCP Noteholders, stemming from the contributions the financial third parties are making to the ABCP restructuring. The situations are quite comparable.

### The Binding Mechanism

68 Parliament's reliance on the expansive terms "compromise" or "arrangement" does not stand alone, however. Effective insolvency restructurings would not be possible without a statutory mechanism to bind an unwilling minority of creditors. Unanimity is frequently impossible in such situations. But the minority must be protected too. Parliament's solution to this quandary was to permit a wide range of proposals to be negotiated and put forward (the compromise or arrangement) and to bind *all* creditors by class to the terms of the plan, but to do so only where the proposal can gain

the support of the requisite "double majority" of votes<sup>6</sup> and obtain the sanction of the court on the basis that it is fair and reasonable. In this way, the scheme of the CCAA supports the intention of Parliament to encourage a wide variety of solutions to corporate insolvencies without unjustifiably overriding the rights of dissenting creditors.

### The Required Nexus

69 In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).

70 The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan. This nexus exists here, in my view.

71 In the course of his reasons, the application judge made the following findings, all of which are amply supported on the record:

- a) The parties to be released are necessary and essential to the restructuring of the debtor;
- b) *The claims to be released are rationally related to the purpose of the Plan and necessary for it;*
- c) The Plan cannot succeed without the releases;
- d) *The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;* and
- e) The Plan will benefit not only the debtor companies but creditor Noteholders generally.

72 Here, then — as was the case in *T&N* — there is a close connection between the claims being released and the restructuring proposal. The tort claims arise out of the sale and distribution of the ABCP Notes and their collapse in value, just as do the contractual claims of the creditors against the debtor companies. The purpose of the restructuring is to stabilize and shore up the value of those notes in the long run. The third parties being released are making separate contributions to enable those results to materialize. Those contributions are identified earlier, at para. 31 of these reasons. The application judge found that the claims being released are not independent of or unrelated to the claims that the Noteholders have against the debtor companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed. At paras. 76-77 he said:

[76] I do not consider that the Plan in this case involves a change in relationship among creditors "that does not directly involve the Company." Those who support the Plan and are to be released are "directly involved in the Company" in the sense that many are foregoing immediate rights to assets and are providing real and tangible input for the preservation and enhancement of the Notes. It would be unduly restrictive to suggest that the moving parties' claims against released parties do not involve the Company, since the claims are directly related to the value of the Notes. The value of the Notes is in this case the value of the Company.

[77] This Plan, as it deals with releases, doesn't change the relationship of the creditors apart from involving the Company and its Notes.

73 I am satisfied that the wording of the CCAA — construed in light of the purpose, objects and scheme of the Act and in accordance with the modern principles of statutory interpretation — supports the court's jurisdiction and authority to sanction the Plan proposed here, including the contested third-party releases contained in it.



*The Jurisprudence*

74 Third party releases have become a frequent feature in Canadian restructurings since the decision of the Alberta Court of Queen's Bench in *Canadian Airlines Corp., Re* (2000), 265 A.R. 201 (Alta. Q.B.), leave to appeal refused by (2000), 266 A.R. 131 (Alta. C.A. [In Chambers]), and (2001), 293 A.R. 351 (note) (S.C.C.). In *Muscletech Research & Development Inc., Re* (2006), 25 C.B.R. (5th) 231 (Ont. S.C.J.) Justice Ground remarked (para. 8):

[It] is not uncommon in CCAA proceedings, in the context of a plan of compromise and arrangement, to compromise claims against the Applicants and other parties against whom such claims or related claims are made.

75 We were referred to at least a dozen court-approved CCAA plans from across the country that included broad third-party releases. With the exception of *Canadian Airlines Corp., Re*, however, the releases in those restructurings — including *Muscletech Research & Development Inc., Re* — were not opposed. The appellants argue that those cases are wrongly decided, because the court simply does not have the authority to approve such releases.

76 In *Canadian Airlines Corp., Re* the releases in question were opposed, however. Paperny J. (as she then was) concluded the court had jurisdiction to approve them and her decision is said to be the well-spring of the trend towards third-party releases referred to above. Based on the foregoing analysis, I agree with her conclusion although for reasons that differ from those cited by her.

77 Justice Paperny began her analysis of the release issue with the observation at para. 87 that "[p]rior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company." It will be apparent from the analysis in these reasons that I do not accept that premise, notwithstanding the decision of the Quebec Court of Appeal in *Steinberg Inc. c. Michaud*,<sup>7</sup> of which her comment may have been reflective. Paperny J.'s reference to 1997 was a reference to the amendments of that year adding s. 5.1 to the CCAA, which provides for limited releases in favour of directors. Given the limited scope of s. 5.1, Justice Paperny was thus faced with the argument — dealt with later in these reasons — that Parliament must not have intended to extend the authority to approve third-party releases beyond the scope of this section. She chose to address this contention by concluding that, although the amendments "[did] not authorize a release of claims against third parties other than directors, [they did] not prohibit such releases either" (para. 92).

78 Respectfully, I would not adopt the interpretive principle that the CCAA permits releases because it does not expressly prohibit them. Rather, as I explain in these reasons, I believe the open-ended CCAA permits third-party releases that are reasonably related to the restructuring at issue because they are encompassed in the comprehensive terms "compromise" and "arrangement" and because of the double-voting majority and court sanctioning statutory mechanism that makes them binding on unwilling creditors.

79 The appellants rely on a number of authorities, which they submit support the proposition that the CCAA may not be used to compromise claims as between anyone other than the debtor company and its creditors. Principal amongst these are *Steinberg Inc. c. Michaud*, *supra*; *NBD Bank, Canada v. Dofasco Inc.* (1999), 46 O.R. (3d) 514 (Ont. C.A.); *Pacific Coastal Airlines Ltd. v. Air Canada* (2001), 19 B.L.R. (3d) 286 (B.C. S.C.); and *Stelco Inc., Re* (2005), 78 O.R. (3d) 241 (Ont. C.A.) ("*Stelco I*"). I do not think these cases assist the appellants, however. With the exception of *Steinberg Inc.*, they do not involve third party claims that were reasonably connected to the restructuring. As I shall explain, it is my opinion that *Steinberg Inc.* does not express a correct view of the law, and I decline to follow it.

80 In *Pacific Coastal Airlines Ltd.*, Tysoe J. made the following comment at para. 24:

[The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company.

81 This statement must be understood in its context, however. Pacific Coastal Airlines had been a regional carrier for Canadian Airlines prior to the CCAA reorganization of the latter in 2000. In the action in question it was seeking to assert separate tort claims against Air Canada for contractual interference and inducing breach of contract in relation to certain rights it had to the use of Canadian's flight designator code prior to the CCAA proceeding. Air Canada sought to have the action dismissed on grounds of *res judicata* or issue estoppel because of the CCAA proceeding. Tysoe J. rejected the argument.

82 The facts in *Pacific Coastal Airlines Ltd.* are not analogous to the circumstances of this case, however. There is no suggestion that a resolution of Pacific Coastal's separate tort claim against Air Canada was in any way connected to the Canadian Airlines restructuring, even though Canadian — at a contractual level — may have had some involvement with the particular dispute. Here, however, the disputes that are the subject-matter of the impugned releases are not simply "disputes between parties other than the debtor company". They are closely connected to the disputes being resolved between the debtor companies and their creditors and to the restructuring itself.

83 Nor is the decision of this Court in the *NBD Bank, Canada* case dispositive. It arose out of the financial collapse of Algoma Steel, a wholly-owned subsidiary of Dofasco. The Bank had advanced funds to Algoma allegedly on the strength of misrepresentations by Algoma's Vice-President, James Melville. The plan of compromise and arrangement that was sanctioned by Farley J. in the Algoma CCAA restructuring contained a clause releasing Algoma from all claims creditors "may have had against Algoma or its directors, officers, employees and advisors." Mr. Melville was found liable for negligent misrepresentation in a subsequent action by the Bank. On appeal, he argued that since the Bank was barred from suing Algoma for misrepresentation by its officers, permitting it to pursue the same cause of action against him personally would subvert the CCAA process — in short, he was personally protected by the CCAA release.

84 Rosenberg J.A., writing for this Court, rejected this argument. The appellants here rely particularly upon his following observations at paras. 53-54:

53 In my view, the appellant has not demonstrated that allowing the respondent to pursue its claim against him would undermine or subvert the purposes of the Act. As this court noted in *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289 at 297, the CCAA is remedial legislation "intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both". It is a means of avoiding a liquidation that may yield little for the creditors, especially unsecured creditors like the respondent, and the debtor company shareholders. However, the appellant has not shown that allowing a creditor to continue an action against an officer for negligent misrepresentation would erode the effectiveness of the Act.

54 In fact, to refuse on policy grounds to impose liability on an officer of the corporation for negligent misrepresentation would contradict the policy of Parliament as demonstrated in recent amendments to the CCAA and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. Those Acts now contemplate that an arrangement or proposal may include a term for compromise of certain types of claims against directors of the company except claims that "are based on allegations of misrepresentations made by directors". L.W. Houlden and C.H. Morawetz, the editors of *The 2000 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 1999) at p. 192 are of the view that the policy behind the provision is to encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized. I can see no similar policy interest in barring an action against an officer of the company who, prior to the insolvency, has misrepresented the financial affairs of the corporation to its creditors. It may be necessary to permit the compromise of claims against the debtor corporation, otherwise it may not be possible to successfully reorganize the corporation. The same considerations do not apply to individual officers. Rather, it would seem to me that it would be contrary to good policy to immunize officers from the consequences of their negligent statements which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement. [Footnote omitted.]



85 Once again, this statement must be assessed in context. Whether Justice Farley had the authority in the earlier Algoma CCAA proceedings to sanction a plan that included third party releases was not under consideration at all. What the Court was determining in *NBD Bank, Canada* was whether the release extended by its terms to protect a third party. In fact, on its face, it does not appear to do so. Justice Rosenberg concluded only that not allowing Mr. Melville to rely upon the release did not subvert the purpose of the CCAA. As the application judge here observed, "there is little factual similarity in *NBD Bank, Canada* to the facts now before the Court" (para. 71). Contrary to the facts of this case, in *NBD Bank, Canada* the creditors had not agreed to grant a release to officers; they had not voted on such a release and the court had not assessed the fairness and reasonableness of such a release as a term of a complex arrangement involving significant contributions by the beneficiaries of the release — as is the situation here. Thus, *NBD Bank, Canada* is of little assistance in determining whether the court has authority to sanction a plan that calls for third party releases.

86 The appellants also rely upon the decision of this Court in *Stelco I*. There, the Court was dealing with the scope of the CCAA in connection with a dispute over what were called the "Turnover Payments". Under an inter-creditor agreement one group of creditors had subordinated their rights to another group and agreed to hold in trust and "turn over" any proceeds received from Stelco until the senior group was paid in full. On a disputed classification motion, the Subordinated Debt Holders argued that they should be in a separate class from the Senior Debt Holders. Farley J. refused to make such an order in the court below, stating:

[Sections] 4, 5 and 6 [of the CCAA] talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis-à-vis the creditors themselves *and not directly involving the company*. [Citations omitted; emphasis added.]

See *Re Stelco Inc.* (2005), 15 C.B.R. (5th) 297 (Ont. S.C.J. [Commercial List]) at para. 7.

87 This Court upheld that decision. The legal relationship between each group of creditors and Stelco was the same, albeit there were inter-creditor differences, and creditors were to be classified in accordance with their legal rights. In addition, the need for timely classification and voting decisions in the CCAA process militated against enmeshing the classification process in the vagaries of inter-corporate disputes. In short, the issues before the Court were quite different from those raised on this appeal.

88 Indeed, the Stelco plan, as sanctioned, included third party releases (albeit uncontested ones). This Court subsequently dealt with the same inter-creditor agreement on an appeal where the Subordinated Debt Holders argued that the inter-creditor subordination provisions were beyond the reach of the CCAA and therefore that they were entitled to a separate civil action to determine their rights under the agreement: *Stelco Inc., Re* (2006), 21 C.B.R. (5th) 157 (Ont. C.A.) ("*Stelco II*"). The Court rejected that argument and held that where the creditors' rights amongst themselves were sufficiently related to the debtor and its plan, they were properly brought within the scope of the CCAA plan. The Court said (para. 11):

In [*Stelco I*] — the classification case — the court observed that it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company ... [*H*]owever, the present case is not simply an inter-creditor dispute that does not involve the debtor company; it is a dispute that is inextricably connected to the restructuring process. [Emphasis added.]

89 The approach I would take to the disposition of this appeal is consistent with that view. As I have noted, the third party releases here are very closely connected to the ABCP restructuring process.

90 Some of the appellants — particularly those represented by Mr. Woods — rely heavily upon the decision of the Quebec Court of Appeal in *Steinberg Inc. c. Michaud, supra*. They say that it is determinative of the release issue. In *Steinberg*, the Court held that the CCAA, as worded at the time, did not permit the release of directors of the debtor corporation and that third-party releases were not within the purview of the Act. Deschamps J.A. (as she then was) said (paras. 42, 54 and 58 — English translation):

[42] Even if one can understand the extreme pressure weighing on the creditors and the respondent at the time of the sanctioning, a plan of arrangement is not the appropriate forum to settle disputes other than the claims that are the subject of the arrangement. In other words, one cannot, under the pretext of an absence of formal directives in the Act, transform an arrangement into a potpourri.

.....

[54] The Act offers the respondent a way to arrive at a compromise with its creditors. It does not go so far as to offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse.

.....

[58] The [CCAA] and the case law clearly do not permit extending the application of an arrangement to persons other than the respondent and its creditors and, consequently, the plan should not have been sanctioned as is [that is, including the releases of the directors].

91 Justices Vallerand and Delisle, in separate judgments, agreed. Justice Vallerand summarized his view of the consequences of extending the scope of the CCAA to third party releases in this fashion (para. 7):

In short, the Act will have become the Companies' *and Their Officers and Employees Creditors Arrangement Act* — an awful mess — and likely not attain its purpose, which is to enable the company to survive in the face of its creditors and through their will, and not in the face of the creditors of its officers. This is why I feel, just like my colleague, that such a clause is contrary to the Act's mode of operation, contrary to its purposes and, for this reason, is to be banned.

92 Justice Delisle, on the other hand, appears to have rejected the releases because of their broad nature — they released directors from all claims, including those that were altogether unrelated to their corporate duties with the debtor company — rather than because of a lack of authority to sanction under the Act. Indeed, he seems to have recognized the wide range of circumstances that could be included within the term "compromise or arrangement". He is the only one who addressed that term. At para. 90 he said:

The CCAA is drafted in general terms. It does not specify, among other things, what must be understood by "compromise or arrangement". However, it may be inferred from the purpose of this [A]ct that these terms *encompass all that should enable the person who has recourse to it to fully dispose of his debts*, both those that exist on the date when he has recourse to the statute and *those contingent on the insolvency in which he finds himself ...* [Emphasis added.]

93 The decision of the Court did not reflect a view that the terms of a compromise or arrangement should "encompass all that should enable the person who has recourse to [the Act] to dispose of his debts ... and those contingent on the insolvency in which he finds himself," however. On occasion such an outlook might embrace third parties other than the debtor and its creditors in order to make the arrangement work. Nor would it be surprising that, in such circumstances, the third parties might seek the protection of releases, or that the debtor might do so on their behalf. Thus, the perspective adopted by the majority in *Steinberg Inc.*, in my view, is too narrow, having regard to the language, purpose and objects of the CCAA and the intention of Parliament. They made no attempt to consider and explain why a compromise or arrangement could not include third-party releases. In addition, the decision appears to have been based, at least partly, on a rejection of the use of contract-law concepts in analysing the Act — an approach inconsistent with the jurisprudence referred to above.

94 Finally, the majority in *Steinberg Inc.* seems to have proceeded on the basis that the CCAA cannot interfere with civil or property rights under Quebec law. Mr. Woods advanced this argument before this Court in his factum, but did not press it in oral argument. Indeed, he conceded that if the Act encompasses the authority to sanction a plan containing third-party releases — as I have concluded it does — the provisions of the CCAA, as valid federal insolvency

legislation, are paramount over provincial legislation. I shall return to the constitutional issues raised by the appellants later in these reasons.

95 Accordingly, to the extent *Steinberg Inc.* stands for the proposition that the court does not have authority under the CCAA to sanction a plan that incorporates third-party releases, I do not believe it to be a correct statement of the law and I respectfully decline to follow it. The modern approach to interpretation of the Act in accordance with its nature and purpose militates against a narrow interpretation and towards one that facilitates and encourages compromises and arrangements. Had the majority in *Steinberg Inc.* considered the broad nature of the terms "compromise" and "arrangement" and the jurisprudence I have referred to above, they might well have come to a different conclusion.

#### *The 1997 Amendments*

96 *Steinberg Inc.* led to amendments to the CCAA, however. In 1997, s. 5.1 was added, dealing specifically with releases pertaining to directors of the debtor company. It states:

5.1(1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

#### **Exception**

(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

#### **Powers of court**

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

#### **Resignation or removal of directors**

(4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.

1997, c. 12, s. 122.

97 Perhaps the appellants' strongest argument is that these amendments confirm a prior lack of authority in the court to sanction a plan including third party releases. If the power existed, why would Parliament feel it necessary to add an amendment specifically permitting such releases (subject to the exceptions indicated) in favour of directors? *Expressio unius est exclusio alterius*, is the Latin maxim sometimes relied on to articulate the principle of interpretation implied in that question: to express or include one thing implies the exclusion of the other.

98 The maxim is not helpful in these circumstances, however. The reality is that there *may* be another explanation why Parliament acted as it did. As one commentator has noted:<sup>8</sup>

Far from being a rule, [the maxim *expressio unius*] is not even lexicographically accurate, because it is simply not true, generally, that the mere express conferral of a right or privilege in one kind of situation implies the denial of

the equivalent right or privilege in other kinds. Sometimes it does and sometimes it does not, and whether it does or does not depends on the particular circumstances of context. Without contextual support, therefore there is not even a mild presumption here. Accordingly, the maxim is at best a description, after the fact, of what the court has discovered from context.

99 As I have said, the 1997 amendments to the CCAA providing for releases in favour of directors of debtor companies in limited circumstances were a response to the decision of the Quebec Court of Appeal in *Steinberg Inc.*. A similar amendment was made with respect to proposals in the BIA at the same time. The rationale behind these amendments was to encourage directors of an insolvent company to remain in office during a restructuring, rather than resign. The assumption was that by remaining in office the directors would provide some stability while the affairs of the company were being reorganized: see Houlden & Morawetz, vol.1, *supra*, at 2-144, E§11A; *Royal Penfield Inc., Re*, [2003] R.J.Q. 2157 (C.S. Que.) at paras. 44-46.

100 Parliament thus had a particular focus and a particular purpose in enacting the 1997 amendments to the CCAA and the BIA. While there is some merit in the appellants' argument on this point, at the end of the day I do not accept that Parliament intended to signal by its enactment of s. 5.1 that it was depriving the court of authority to sanction plans of compromise or arrangement in all circumstances where they incorporate third party releases in favour of anyone other than the debtor's directors. For the reasons articulated above, I am satisfied that the court does have the authority to do so. Whether it sanctions the plan is a matter for the fairness hearing.

#### *The Deprivation of Proprietary Rights*

101 Mr. Shapray very effectively led the appellants' argument that legislation must not be construed so as to interfere with or prejudice established contractual or proprietary rights — including the right to bring an action — in the absence of a clear indication of legislative intention to that effect: *Halsbury's Laws of England*, 4<sup>th</sup> ed. reissue, vol. 44 (1) (London: Butterworths, 1995) at paras. 1438, 1464 and 1467; Driedger, 2<sup>nd</sup> ed., *supra*, at 183; Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4<sup>th</sup> ed., (Markham: Butterworths, 2002) at 399. I accept the importance of this principle. For the reasons I have explained, however, I am satisfied that Parliament's intention to clothe the court with authority to consider and sanction a plan that contains third party releases is expressed with sufficient clarity in the "compromise or arrangement" language of the CCAA coupled with the statutory voting and sanctioning mechanism making the provisions of the plan binding on all creditors. This is not a situation of impermissible "gap-filling" in the case of legislation severely affecting property rights; it is a question of finding meaning in the language of the Act itself. I would therefore not give effect to the appellants' submissions in this regard.

#### *The Division of Powers and Paramountcy*

102 Mr. Woods and Mr. Sternberg submit that extending the reach of the CCAA process to the compromise of claims as between solvent creditors of the debtor company and solvent third parties to the proceeding is constitutionally impermissible. They say that under the guise of the federal insolvency power pursuant to s. 91(21) of the *Constitution Act, 1867*, this approach would improperly affect the rights of civil claimants to assert their causes of action, a provincial matter falling within s. 92(13), and contravene the rules of public order pursuant to the *Civil Code of Quebec*.

103 I do not accept these submissions. It has long been established that the CCAA is valid federal legislation under the federal insolvency power: *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.). As the Supreme Court confirmed in that case (p. 661), citing Viscount Cave L.C. in *Quebec (Attorney General) v. Bélanger (Trustee of)*, [1928] A.C. 187 (Canada P.C.), "the exclusive legislative authority to deal with all matters within the domain of bankruptcy and insolvency is vested in Parliament." Chief Justice Duff elaborated:

Matters normally constituting part of a bankruptcy scheme but not in their essence matters of bankruptcy and insolvency may, of course, from another point of view and in another aspect be dealt with by a provincial legislature;

but, when treated as matters pertaining to bankruptcy and insolvency, they clearly fall within the legislative authority of the Dominion.

104 That is exactly the case here. The power to sanction a plan of compromise or arrangement that contains third-party releases of the type opposed by the appellants is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action — normally a matter of provincial concern — or trump Quebec rules of public order is constitutionally immaterial. The CCAA is a valid exercise of federal power. Provided the matter in question falls within the legislation directly or as necessarily incidental to the exercise of that power, the CCAA governs. To the extent that its provisions are inconsistent with provincial legislation, the federal legislation is paramount. Mr. Woods properly conceded this during argument.

*Conclusion With Respect to Legal Authority*

105 For all of the foregoing reasons, then, I conclude that the application judge had the jurisdiction and legal authority to sanction the Plan as put forward.

**(2) The Plan is "Fair and Reasonable"**

106 The second major attack on the application judge's decision is that he erred in finding that the Plan is "fair and reasonable" and in sanctioning it on that basis. This attack is centred on the nature of the third-party releases contemplated and, in particular, on the fact that they will permit the release of some claims based in fraud.

107 Whether a plan of compromise or arrangement is fair and reasonable is a matter of mixed fact and law, and one on which the application judge exercises a large measure of discretion. The standard of review on this issue is therefore one of deference. In the absence of a demonstrable error an appellate court will not interfere: see *Ravelston Corp., Re* (2007), 31 C.B.R. (5th) 233 (Ont. C.A. [In Chambers]).

108 I would not interfere with the application judge's decision in this regard. While the notion of releases in favour of third parties — including leading Canadian financial institutions — that extend to claims of fraud is distasteful, there is no legal impediment to the inclusion of a release for claims based in fraud in a plan of compromise or arrangement. The application judge had been living with and supervising the ABCP restructuring from its outset. He was intimately attuned to its dynamics. In the end he concluded that the benefits of the Plan to the creditors as a whole, and to the debtor companies, outweighed the negative aspects of compelling the unwilling appellants to execute the releases as finally put forward.

109 The application judge was concerned about the inclusion of fraud in the contemplated releases and at the May hearing adjourned the final disposition of the sanctioning hearing in an effort to encourage the parties to negotiate a resolution. The result was the "fraud carve-out" referred to earlier in these reasons.

110 The appellants argue that the fraud carve-out is inadequate because of its narrow scope. It (i) applies only to ABCP Dealers, (ii) limits the type of damages that may be claimed (no punitive damages, for example), (iii) defines "fraud" narrowly, excluding many rights that would be protected by common law, equity and the Quebec concept of public order, and (iv) limits claims to representations made directly to Noteholders. The appellants submit it is contrary to public policy to sanction a plan containing such a limited restriction on the type of fraud claims that may be pursued against the third parties.

111 The law does not condone fraud. It is the most serious kind of civil claim. There is therefore some force to the appellants' submission. On the other hand, as noted, there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given: *Fotinis Restaurant Corp. v. White Spot Ltd* (1998), 38 B.L.R. (2d) 251 (B.C. S.C. [In Chambers]) at paras. 9 and 18. There may be disputes about the scope or extent of what is released, but parties are entitled to settle allegations of fraud in civil

proceedings — the claims here all being untested allegations of fraud — and to include releases of such claims as part of that settlement.

112 The application judge was alive to the merits of the appellants' submissions. He was satisfied in the end, however, that the need "to avoid the potential cascade of litigation that ... would result if a broader 'carve out' were to be allowed" (para. 113) outweighed the negative aspects of approving releases with the narrower carve-out provision. Implementation of the Plan, in his view, would work to the overall greater benefit of the Noteholders as a whole. I can find no error in principle in the exercise of his discretion in arriving at this decision. It was his call to make.

113 At para. 71 above I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here — with two additional findings — because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:

- a) The parties to be released are necessary and essential to the restructuring of the debtor;
- b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;
- c) The Plan cannot succeed without the releases;
- d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;
- e) The Plan will benefit not only the debtor companies but creditor Noteholders generally;
- f) The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,
- g) The releases are fair and reasonable and not overly broad or offensive to public policy.

114 These findings are all supported on the record. Contrary to the submission of some of the appellants, they do not constitute a new and hitherto untried "test" for the sanctioning of a plan under the CCAA. They simply represent findings of fact and inferences on the part of the application judge that underpin his conclusions on jurisdiction and fairness.

115 The appellants all contend that the obligation to release the third parties from claims in fraud, tort, breach of fiduciary duty, etc. is confiscatory and amounts to a requirement that they — as individual creditors — make the equivalent of a greater financial contribution to the Plan. In his usual lively fashion, Mr. Sternberg asked us the same rhetorical question he posed to the application judge. As he put it, how could the court countenance the compromise of what in the future might turn out to be fraud perpetrated at the highest levels of Canadian and foreign banks? Several appellants complain that the proposed Plan is unfair to them because they will make very little additional recovery if the Plan goes forward, but will be required to forfeit a cause of action against third-party financial institutions that may yield them significant recovery. Others protest that they are being treated unequally because they are ineligible for relief programs that Liquidity Providers such as Canaccord have made available to other smaller investors.

116 All of these arguments are persuasive to varying degrees when considered in isolation. The application judge did not have that luxury, however. He was required to consider the circumstances of the restructuring as a whole, including the reality that many of the financial institutions were not only acting as Dealers or brokers of the ABCP Notes (with the impugned releases relating to the financial institutions in these capacities, for the most part) but also as Asset and Liquidity Providers (with the financial institutions making significant contributions to the restructuring in these capacities).

117 In insolvency restructuring proceedings almost everyone loses something. To the extent that creditors are required to compromise their claims, it can always be proclaimed that their rights are being unfairly confiscated and that they

are being called upon to make the equivalent of a further financial contribution to the compromise or arrangement. Judges have observed on a number of occasions that CCAA proceedings involve "a balancing of prejudices," inasmuch as everyone is adversely affected in some fashion.

118 Here, the debtor corporations being restructured represent the issuers of the more than \$32 billion in non-bank sponsored ABCP Notes. The proposed compromise and arrangement affects that entire segment of the ABCP market and the financial markets as a whole. In that respect, the application judge was correct in adverting to the importance of the restructuring to the resolution of the ABCP liquidity crisis and to the need to restore confidence in the financial system in Canada. He was required to consider and balance the interests of *all* Noteholders, not just the interests of the appellants, whose notes represent only about 3% of that total. That is what he did.

119 The application judge noted at para. 126 that the Plan represented "a reasonable balance between benefit to all Noteholders and enhanced recovery for those who can make out specific claims in fraud" within the fraud carve-out provisions of the releases. He also recognized at para. 134 that:

No Plan of this size and complexity could be expected to satisfy all affected by it. The size of the majority who have approved it is testament to its overall fairness. No plan to address a crisis of this magnitude can work perfect equity among all stakeholders.

120 In my view we ought not to interfere with his decision that the Plan is fair and reasonable in all the circumstances.

#### **D. Disposition**

121 For the foregoing reasons, I would grant leave to appeal from the decision of Justice Campbell, but dismiss the appeal.

**J.I. Laskin J.A.:**

I agree.

**E.A. Cronk J.A.:**

I agree.

#### **Schedule A — Conduits**

Apollo Trust

Apsley Trust

Aria Trust

Aurora Trust

Comet Trust

Encore Trust

Gemini Trust

Ironstone Trust

MMAI-I Trust

Newshore Canadian Trust

Opus Trust

Planet Trust

Rocket Trust

Selkirk Funding Trust

Silverstone Trust

Slate Trust

Structured Asset Trust

Structured Investment Trust III

Symphony Trust

Whitehall Trust

**Schedule B — Applicants**

ATB Financial

Caisse de dépôt et placement du Québec

Canaccord Capital Corporation

Canada Mortgage and Housing Corporation

Canada Post Corporation

Credit Union Central Alberta Limited

Credit Union Central of BC

Credit Union Central of Canada

Credit Union Central of Ontario

Credit Union Central of Saskatchewan

Desjardins Group

Magna International Inc.

National Bank of Canada/National Bank Financial Inc.

NAV Canada

Northwater Capital Management Inc.

Public Sector Pension Investment Board

The Governors of the University of Alberta



**Schedule A — Counsel**

- 1) Benjamin Zarnett and Frederick L. Myers for the Pan-Canadian Investors Committee
- 2) Aubrey E. Kauffman and Stuart Brotman for 4446372 Canada Inc. and 6932819 Canada Inc.
- 3) Peter F.C. Howard and Samaneh Hosseini for Bank of America N.A.; Citibank N.A.; Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and not in any other capacity; Deutsche Bank AG; HSBC Bank Canada; HSBC Bank USA, National Association; Merrill Lynch International; Merrill Lynch Capital Services, Inc.; Swiss Re Financial Products Corporation; and UBS AG
- 4) Kenneth T. Rosenberg, Lily Harmer and Max Starnino for Jura Energy Corporation and Redcorp Ventures Ltd.
- 5) Craig J. Hill and Sam P. Rappos for the Monitors (ABCP Appeals)
- 6) Jeffrey C. Carhart and Joseph Marin for Ad Hoc Committee and Pricewaterhouse Coopers Inc., in its capacity as Financial Advisor
- 7) Mario J. Forte for Caisse de Dépôt et Placement du Québec
- 8) John B. Laskin for National Bank Financial Inc. and National Bank of Canada
- 9) Thomas McRae and Arthur O. Jacques for Ad Hoc Retail Creditors Committee (Brian Hunter, et al)
- 10) Howard Shapray, Q.C. and Stephen Fitterman for Ivanhoe Mines Ltd.
- 11) Kevin P. McElcheran and Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia and T.D. Bank
- 12) Jeffrey S. Leon for CIBC Mellon Trust Company, Computershare Trust Company of Canada and BNY Trust Company of Canada, as Indenture Trustees
- 13) Usman Sheikh for Coventree Capital Inc.
- 14) Allan Sternberg and Sam R. Sasso for Brookfield Asset Management and Partners Ltd. and Hy Bloom Inc. and Cardacian Mortgage Services Inc.
- 15) Neil C. Saxe for Dominion Bond Rating Service
- 16) James A. Woods, Sebastien Richemont and Marie-Anne Paquette for Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aéroports de Montréal, Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Métropolitaine de Transport (AMT), Giro Inc., Vêtements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc. and Jazz Air LP
- 17) Scott A. Turner for Webtech Wireless Inc., Wynn Capital Corporation Inc., West Energy Ltd., Sabre Energy Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd., and Standard Energy Ltd.
- 18) R. Graham Phoenix for Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., Quanto Financial Corporation and Metcalfe & Mansfield Capital Corp.

*Application granted; appeal dismissed.*

Footnotes

- \* Leave to appeal refused at *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 5432, 2008 CarswellOnt 5433 (S.C.C.).
- 1 Section 5.1 of the CCAA specifically authorizes the granting of releases to directors in certain circumstances.
- 2 Justice Georgina R. Jackson and Dr. Janis P. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in Sarra, ed., *Annual Review of Insolvency Law, 2007* (Vancouver: Thomson Carswell, 2007).
- 3 Citing Gibbs J.A. in *Chef Ready Foods*, *supra*, at pp.319-320.
- 4 The Legislative Debates at the time the CCAA was introduced in Parliament in April 1933 make it clear that the CCAA is patterned after the predecessor provisions of s. 425 of the *Companies Act 1985* (U.K.); see *House of Commons Debates (Hansard)*, *supra*.
- 5 See *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 192; *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16, s. 182.
- 6 A majority in number representing two-thirds in value of the creditors (s. 6)
- 7 *Steinberg Inc.* was originally reported in French: *Steinberg Inc. c. Michaud*, [1993] R.J.Q. 1684 (C.A. Que.). All paragraph references to *Steinberg Inc.* in this judgment are from the unofficial English translation available at 1993 CarswellQue 2055 (C.A. Que.)
- 8 Reed Dickerson, *The Interpretation and Application of Statutes* (1975) at pp.234-235, cited in Bryan A. Garner, ed., *Black's Law Dictionary*, 8th ed. (West Group, St. Paul, Minn., 2004) at 621.

**TAB 7**

2009 CarswellOnt 6184  
Ontario Superior Court of Justice [Commercial List]

Canwest Global Communications Corp., Re

2009 CarswellOnt 6184, [2009] O.J. No. 4286, 181 A.C.W.S. (3d) 853, 59 C.B.R. (5th) 72

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST  
GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

Pepall J.

Judgment: October 13, 2009

Docket: CV-09-8241-OOCL

Counsel: Lyndon Barnes, Edward Sellers, Jeremy Dacks for Applicants  
Alan Merskey for Special Committee of the Board of Directors  
David Byers, Maria Konyukhova for Proposed Monitor, FTI Consulting Canada Inc.  
Benjamin Zarnett, Robert Chadwick for Ad Hoc Committee of Noteholders  
Edmond Lamek for Asper Family  
Peter H. Griffin, Peter J. Osborne for Management Directors, Royal Bank of Canada  
Hilary Clarke for Bank of Nova Scotia  
Steve Weisz for CIT Business Credit Canada Inc.

Subject: Insolvency

**Related Abridgment Classifications**

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

**Bankruptcy and insolvency**

XIX Companies' Creditors Arrangement Act

XIX.3 Arrangements

XIX.3.e Miscellaneous

**Headnote**

**Bankruptcy and insolvency — Companies' Creditors Arrangement Act — Arrangements — Miscellaneous**

Debtor companies experienced financial problems due to deteriorating economic environment in Canada — Debtor companies took steps to improve cash flow and to strengthen their balance sheets — Economic conditions did not improve nor did financial circumstances of debtor companies — They experienced significant tightening of credit from critical suppliers and trade creditors, reduction of advertising commitments, demands for reduced credit terms by newsprint and printing suppliers, and restrictions on or cancellation of credit cards for certain employees — Application was brought for relief pursuant to Companies' Creditors Arrangement Act — Application granted — Proposed monitor was appointed — Companies qualified as debtor companies under Act — Debtor companies were in default of their obligations — Required statement of projected cash-flow and other financial documents required under s. 11(2) were filed — Stay of proceedings was granted to create stability and allow debtor companies to pursue their restructuring — Partnerships in application carried on operations that were integral and closely interrelated to business of debtor companies — It was just and convenient to grant relief requested with respect

to partnerships — Debtor-in-possession financing was approved — Administration charge was granted — Debtor companies' request for authorization to pay pre-filing amounts owed to critical suppliers was granted — Directors' and officers' charge was granted — Key employee retention plans were approved — Extension of time for calling of annual general meeting was granted.

#### Table of Authorities

##### Cases considered by *Pepall J.*:

*Cadillac Fairview Inc., Re* (1995), 1995 CarswellOnt 36, 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List]) — referred to

*Calpine Canada Energy Ltd., Re* (2006), 19 C.B.R. (5th) 187, 2006 ABQB 153, 2006 CarswellAlta 446 (Alta. Q.B.) — referred to

*General Publishing Co., Re* (2003), 39 C.B.R. (4th) 216, 2003 CarswellOnt 275 (Ont. S.C.J.) — referred to

*Global Light Telecommunications Inc., Re* (2004), 2004 BCSC 745, 2004 CarswellBC 1249, 2 C.B.R. (5th) 210, 33 B.C.L.R. (4th) 155 (B.C. S.C.) — referred to

*Grant Forest Products Inc., Re* (2009), 2009 CarswellOnt 4699, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) — followed

*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

*Sierra Club of Canada v. Canada (Minister of Finance)* (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed

*Smurfit-Stone Container Canada Inc., Re* (2009), 50 C.B.R. (5th) 71, 2009 CarswellOnt 391 (Ont. S.C.J. [Commercial List]) — referred to

*Stelco Inc., Re* (2004), 48 C.B.R. (4th) 299, 2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List]) — referred to

*Stelco Inc., Re* (2004), 2004 CarswellOnt 2936 (Ont. C.A.) — referred to

##### Statutes considered:

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3  
Generally — referred to

*Bankruptcy Code*, 11 U.S.C.  
Chapter 15 — referred to

*Canada Business Corporations Act*, R.S.C. 1985, c. C-44

Generally — referred to

s. 106(6) — referred to

s. 133(1) — referred to

s. 133(1)(b) — referred to

s. 133(3) — referred to

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

Generally — considered

s. 2 "debtor company" — referred to

s. 11 — considered

s. 11(2) — referred to

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.2(1) [en. 2005, c. 47, s. 128] — referred to

s. 11.2(4) [en. 2005, c. 47, s. 128] — considered

s. 11.4 [en. 1997, c. 12, s. 124] — considered

s. 11.4(1) [en. 1997, c. 12, s. 124] — referred to

s. 11.4(3) [en. 1997, c. 12, s. 124] — considered

s. 11.51 [en. 2005, c. 47, s. 128] — considered

s. 11.52 [en. 2005, c. 47, s. 128] — considered

s. 23 — considered

*Courts of Justice Act*, R.S.O. 1990, c. C.43

s. 137(2) — considered

**Rules considered:**

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

R. 38.09 — referred to

APPLICATION for relief pursuant to *Companies' Creditors Arrangement Act*.

***Pepall J.:***

1 Canwest Global Communications Corp. ("Canwest Global"), its principal operating subsidiary, Canwest Media Inc. ("CMI"), and the other applicants listed on Schedule "A" of the Notice of Application apply for relief pursuant to the *Companies' Creditors Arrangement Act*.<sup>1</sup> The applicants also seek to have the stay of proceedings and other provisions extend to the following partnerships: Canwest Television Limited Partnership ("CTLP"), Fox Sports World

Canada Partnership and The National Post Company/La Publication National Post ("The National Post Company"). The businesses operated by the applicants and the aforementioned partnerships include (i) Canwest's free-to-air television broadcast business (ie. the Global Television Network stations); (ii) certain subscription-based specialty television channels that are wholly owned and operated by CTLP; and (iii) the National Post.

2 The Canwest Global enterprise as a whole includes the applicants, the partnerships and Canwest Global's other subsidiaries that are not applicants. The term Canwest will be used to refer to the entire enterprise. The term CMI Entities will be used to refer to the applicants and the three aforementioned partnerships. The following entities are not applicants nor is a stay sought in respect of any of them: the entities in Canwest's newspaper publishing and digital media business in Canada (other than the National Post Company) namely the Canwest Limited Partnership, Canwest Publishing Inc./ Publications Canwest Inc., Canwest Books Inc., and Canwest (Canada) Inc.; the Canadian subscription based specialty television channels acquired from Alliance Atlantis Communications Inc. in August, 2007 which are held jointly with Goldman Sachs Capital Partners and operated by CW Investments Co. and its subsidiaries; and subscription-based specialty television channels which are not wholly owned by CTLP.

3 No one appearing opposed the relief requested.

#### Background Facts

4 Canwest is a leading Canadian media company with interests in twelve free-to-air television stations comprising the Global Television Network, subscription-based specialty television channels and newspaper publishing and digital media operations.

5 As of October 1, 2009, Canwest employed the full time equivalent of approximately 7,400 employees around the world. Of that number, the full time equivalent of approximately 1,700 are employed by the CMI Entities, the vast majority of whom work in Canada and 850 of whom work in Ontario.

6 Canwest Global owns 100% of CMI. CMI has direct or indirect ownership interests in all of the other CMI Entities. Ontario is the chief place of business of the CMI Entities.

7 Canwest Global is a public company continued under the *Canada Business Corporations Act*<sup>2</sup>. It has authorized capital consisting of an unlimited number of preference shares, multiple voting shares, subordinate voting shares, and non-voting shares. It is a "constrained-share company" which means that at least 66 2/3% of its voting shares must be beneficially owned by Canadians. The Asper family built the Canwest enterprise and family members hold various classes of shares. In April and May, 2009, corporate decision making was consolidated and streamlined.

8 The CMI Entities generate the majority of their revenue from the sale of advertising (approximately 77% on a consolidated basis). Fuelled by a deteriorating economic environment in Canada and elsewhere, in 2008 and 2009, they experienced a decline in their advertising revenues. This caused problems with cash flow and circumstances were exacerbated by their high fixed operating costs. In response to these conditions, the CMI Entities took steps to improve cash flow and to strengthen their balance sheets. They commenced workforce reductions and cost saving measures, sold certain interests and assets, and engaged in discussions with the CRTC and the Federal government on issues of concern.

9 Economic conditions did not improve nor did the financial circumstances of the CMI Entities. They experienced significant tightening of credit from critical suppliers and trade creditors, a further reduction of advertising commitments, demands for reduced credit terms by newsprint and printing suppliers, and restrictions on or cancellation of credit cards for certain employees.

10 In February, 2009, CMI breached certain of the financial covenants in its secured credit facility. It subsequently received waivers of the borrowing conditions on six occasions. On March 15, 2009, it failed to make an interest payment of US\$30.4 million due on 8% senior subordinated notes. CMI entered into negotiations with an ad hoc committee of the 8% senior subordinated noteholders holding approximately 72% of the notes (the "Ad Hoc Committee"). An agreement

was reached wherein CMI and its subsidiary CTLP agreed to issue US\$105 million in 12% secured notes to members of the Ad Hoc Committee. At the same time, CMI entered into an agreement with CIT Business Credit Canada Inc. ("CIT") in which CIT agreed to provide a senior secured revolving asset based loan facility of up to \$75 million. CMI used the funds generated for operations and to repay amounts owing on the senior credit facility with a syndicate of lenders of which the Bank of Nova Scotia was the administrative agent. These funds were also used to settle related swap obligations.

11 Canwest Global reports its financial results on a consolidated basis. As at May 31, 2009, it had total consolidated assets with a net book value of \$4.855 billion and total consolidated liabilities of \$5.846 billion. The subsidiaries of Canwest Global that are not applicants or partnerships in this proceeding had short and long term debt totalling \$2.742 billion as at May 31, 2009 and the CMI Entities had indebtedness of approximately \$954 million. For the 9 months ended May 31, 2009, Canwest Global's consolidated revenues decreased by \$272 million or 11% compared to the same period in 2008. In addition, operating income before amortization decreased by \$253 million or 47%. It reported a consolidated net loss of \$1.578 billion compared to \$22 million for the same period in 2008. CMI reported that revenues for the Canadian television operations decreased by \$8 million or 4% in the third quarter of 2009 and operating profit was \$21 million compared to \$39 million in the same period in 2008.

12 The board of directors of Canwest Global struck a special committee of the board ("the Special Committee") with a mandate to explore and consider strategic alternatives in order to maximize value. That committee appointed Thomas Strike, who is the President, Corporate Development and Strategy Implementation of Canwest Global, as Recapitalization Officer and retained Hap Stephen, who is the Chairman and CEO of Stonecrest Capital Inc., as a Restructuring Advisor ("CRA").

13 On September 15, 2009, CMI failed to pay US\$30.4 million in interest payments due on the 8% senior subordinated notes.

14 On September 22, 2009, the board of directors of Canwest Global authorized the sale of all of the shares of Ten Network Holdings Limited (Australia) ("Ten Holdings") held by its subsidiary, Canwest Mediaworks Ireland Holdings ("CMIH"). Prior to the sale, the CMI Entities had consolidated indebtedness totalling US\$939.9 million pursuant to three facilities. CMI had issued 8% unsecured notes in an aggregate principal amount of US\$761,054,211. They were guaranteed by all of the CMI Entities except Canwest Global, and 30109, LLC. CMI had also issued 12% secured notes in an aggregate principal amount of US\$94 million. They were guaranteed by the CMI Entities. Amongst others, Canwest's subsidiary, CMIH, was a guarantor of both of these facilities. The 12% notes were secured by first ranking charges against all of the property of CMI, CTLP and the guarantors. In addition, pursuant to a credit agreement dated May 22, 2009 and subsequently amended, CMI has a senior secured revolving asset-based loan facility in the maximum amount of \$75 million with CIT Business Credit Canada Inc. ("CIT"). Prior to the sale, the debt amounted to \$23.4 million not including certain letters of credit. The facility is guaranteed by CTLP, CMIH and others and secured by first ranking charges against all of the property of CMI, CTLP, CMIH and other guarantors. Significant terms of the credit agreement are described in paragraph 37 of the proposed Monitor's report. Upon a CCAA filing by CMI and commencement of proceedings under Chapter 15 of the Bankruptcy Code, the CIT facility converts into a DIP financing arrangement and increases to a maximum of \$100 million.

15 Consents from a majority of the 8% senior subordinated noteholders were necessary to allow the sale of the Ten Holdings shares. A Use of Cash Collateral and Consent Agreement was entered into by CMI, CMIH, certain consenting noteholders and others wherein CMIH was allowed to lend the proceeds of sale to CMI.

16 The sale of CMIH's interest in Ten Holdings was settled on October 1, 2009. Gross proceeds of approximately \$634 million were realized. The proceeds were applied to fund general liquidity and operating costs of CMI, pay all amounts owing under the 12% secured notes and all amounts outstanding under the CIT facility except for certain letters of credit in an aggregate face amount of \$10.7 million. In addition, a portion of the proceeds was used to reduce the



amount outstanding with respect to the 8% senior subordinated notes leaving an outstanding indebtedness thereunder of US\$393.25 million.

17 In consideration for the loan provided by CMIH to CMI, CMI issued a secured intercompany note in favour of CMIH in the principal amount of \$187.3 million and an unsecured promissory note in the principal amount of \$430.6 million. The secured note is subordinated to the CIT facility and is secured by a first ranking charge on the property of CMI and the guarantors. The payment of all amounts owing under the unsecured promissory note are subordinated and postponed in favour of amounts owing under the CIT facility. Canwest Global, CTLP and others have guaranteed the notes. It is contemplated that the debt that is the subject matter of the unsecured note will be compromised.

18 Without the funds advanced under the intercompany notes, the CMI Entities would be unable to meet their liabilities as they come due. The consent of the noteholders to the use of the Ten Holdings proceeds was predicated on the CMI Entities making this application for an Initial Order under the CCAA. Failure to do so and to take certain other steps constitute an event of default under the Use of Cash Collateral and Consent Agreement, the CIT facility and other agreements. The CMI Entities have insufficient funds to satisfy their obligations including those under the intercompany notes and the 8% senior subordinated notes.

19 The stay of proceedings under the CCAA is sought so as to allow the CMI Entities to proceed to develop a plan of arrangement or compromise to implement a consensual "pre-packaged" recapitalization transaction. The CMI Entities and the Ad Hoc Committee of noteholders have agreed on the terms of a going concern recapitalization transaction which is intended to form the basis of the plan. The terms are reflected in a support agreement and term sheet. The recapitalization transaction contemplates amongst other things, a significant reduction of debt and a debt for equity restructuring. The applicants anticipate that a substantial number of the businesses operated by the CMI Entities will continue as going concerns thereby preserving enterprise value for stakeholders and maintaining employment for as many as possible. As mentioned, certain steps designed to implement the recapitalization transaction have already been taken prior to the commencement of these proceedings.

20 CMI has agreed to maintain not more than \$2.5 million as cash collateral in a deposit account with the Bank of Nova Scotia to secure cash management obligations owed to BNS. BNS holds first ranking security against those funds and no court ordered charge attaches to the funds in the account.

21 The CMI Entities maintain eleven defined benefit pension plans and four defined contribution pension plans. There is an aggregate solvency deficiency of \$13.3 million as at the last valuation date and a wind up deficiency of \$32.8 million. There are twelve television collective agreements eleven of which are negotiated with the Communications, Energy and Paperworkers Union of Canada. The Canadian Union of Public Employees negotiated the twelfth television collective agreement. It expires on December 31, 2010. The other collective agreements are in expired status. None of the approximately 250 employees of the National Post Company are unionized. The CMI Entities propose to honour their payroll obligations to their employees, including all pre-filing wages and employee benefits outstanding as at the date of the commencement of the CCAA proceedings and payments in connection with their pension obligations.

**Proposed Monitor**

22 The applicants propose that FTI Consulting Canada Inc. serve as the Monitor in these proceedings. It is clearly qualified to act and has provided the Court with its consent to act. Neither FTI nor any of its representatives have served in any of the capacities prohibited by section of the amendments to the CCAA.

**Proposed Order**

23 I have reviewed in some detail the history that preceded this application. It culminated in the presentation of the within application and proposed order. Having reviewed the materials and heard submissions, I was satisfied that the relief requested should be granted.

24 This case involves a consideration of the amendments to the CCAA that were proclaimed in force on September 18, 2009. While these were long awaited, in many instances they reflect practices and principles that have been adopted by insolvency practitioners and developed in the jurisprudence and academic writings on the subject of the CCAA. In no way do the amendments change or detract from the underlying purpose of the CCAA, namely to provide debtor companies with the opportunity to extract themselves from financial difficulties notwithstanding insolvency and to reorganize their affairs for the benefit of stakeholders. In my view, the amendments should be interpreted and applied with that objective in mind.

**(a) Threshold Issues**

25 Firstly, the applicants qualify as debtor companies under the CCAA. Their chief place of business is in Ontario. The applicants are affiliated debtor companies with total claims against them exceeding \$5 million. The CMI Entities are in default of their obligations. CMI does not have the necessary liquidity to make an interest payment in the amount of US\$30.4 million that was due on September 15, 2009 and none of the other CMI Entities who are all guarantors are able to make such a payment either. The assets of the CMI Entities are insufficient to discharge all of the liabilities. The CMI Entities are unable to satisfy their debts as they come due and they are insolvent. They are insolvent both under the *Bankruptcy and Insolvency Act*<sup>3</sup> definition and under the more expansive definition of insolvency used in *Stelco Inc., Re*<sup>4</sup>. Absent these CCAA proceedings, the applicants would lack liquidity and would be unable to continue as going concerns. The CMI Entities have acknowledged their insolvency in the affidavit filed in support of the application.

26 Secondly, the required statement of projected cash-flow and other financial documents required under section 11(2) of the CCAA have been filed.

**(b) Stay of Proceedings**

27 Under section 11 of the CCAA, the Court has broad jurisdiction to grant a stay of proceedings and to give a debtor company a chance to develop a plan of compromise or arrangement. In my view, given the facts outlined, a stay is necessary to create stability and to allow the CMI Entities to pursue their restructuring.

**(b) Partnerships and Foreign Subsidiaries**

28 The applicants seek to extend the stay of proceedings and other relief to the aforementioned partnerships. The partnerships are intertwined with the applicants' ongoing operations. They own the National Post daily newspaper and Canadian free-to-air television assets and certain of its specialty television channels and some other television assets. These businesses constitute a significant portion of the overall enterprise value of the CMI Entities. The partnerships are also guarantors of the 8% senior subordinated notes.

29 While the CCAA definition of a company does not include a partnership or limited partnership, courts have repeatedly exercised their inherent jurisdiction to extend the scope of CCAA proceedings to encompass them. See for example *Lehndorff General Partner Ltd., Re*<sup>5</sup>; *Smurfit-Stone Container Canada Inc., Re*<sup>6</sup>; and *Calpine Canada Energy Ltd., Re*<sup>7</sup>. In this case, the partnerships carry on operations that are integral and closely interrelated to the business of the applicants. The operations and obligations of the partnerships are so intertwined with those of the applicants that irreparable harm would ensue if the requested stay were not granted. In my view, it is just and convenient to grant the relief requested with respect to the partnerships.

30 Certain applicants are foreign subsidiaries of CMI. Each is a guarantor under the 8% senior subordinated notes, the CIT credit agreement (and therefore the DIP facility), the intercompany notes and is party to the support agreement and the Use of Cash Collateral and Consent Agreement. If the stay of proceedings was not extended to these entities, creditors could seek to enforce their guarantees. I am persuaded that the foreign subsidiary applicants as that term is defined in the affidavit filed are debtor companies within the meaning of section 2 of the CCAA and that I have jurisdiction and ought

to grant the order requested as it relates to them. In this regard, I note that they are insolvent and each holds assets in Ontario in that they each maintain funds on deposit at the Bank of Nova Scotia in Toronto. See in this regard *Cadillac Fairview Inc., Re*<sup>8</sup> and *Global Light Telecommunications Inc., Re*<sup>9</sup>

**(C) DIP Financing**

31 Turning to the DIP financing, the premise underlying approval of DIP financing is that it is a benefit to all stakeholders as it allows the debtors to protect going-concern value while they attempt to devise a plan acceptable to creditors. While in the past, courts relied on inherent jurisdiction to approve the terms of a DIP financing charge, the September 18, 2009 amendments to the CCAA now expressly provide jurisdiction to grant a DIP financing charge. Section 11.2 of the Act states:

(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

(4) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

32 In light of the language of section 11.2(1), the first issue to consider is whether notice has been given to secured creditors who are likely to be affected by the security or charge. Paragraph 57 of the proposed order affords priority to the DIP charge, the administration charge, the Directors' and Officers' charge and the KERP charge with the following exception: "any validly perfected purchase money security interest in favour of a secured creditor or any statutory encumbrance existing on the date of this order in favour of any person which is a "secured creditor" as defined in the CCAA in respect of any of source deductions from wages, employer health tax, workers compensation, GST/QST, PST payables, vacation pay and banked overtime for employees, and amounts under the Wage Earners' Protection Program that are subject to a super priority claim under the BIA". This provision coupled with the notice that was provided satisfied me that secured creditors either were served or are unaffected by the DIP charge. This approach is both consistent with the legislation and practical.

33 Secondly, the Court must determine that the amount of the DIP is appropriate and required having regard to the debtors' cash-flow statement. The DIP charge is for up to \$100 million. Prior to entering into the CIT facility, the CMI Entities sought proposals from other third party lenders for a credit facility that would convert to a DIP facility should the CMI Entities be required to file for protection under the CCAA. The CIT facility was the best proposal submitted. In this case, it is contemplated that implementation of the plan will occur no later than April 15, 2010. The total amount of cash on hand is expected to be down to approximately \$10 million by late December, 2009 based on the cash flow forecast. The applicants state that this is an insufficient cushion for an enterprise of this magnitude. The cash-flow statements project the need for the liquidity provided by the DIP facility for the recapitalization transaction to be finalized. The facility is to accommodate additional liquidity requirements during the CCAA proceedings. It will enable the CMI Entities to operate as going concerns while pursuing the implementation and completion of a viable plan and will provide creditors with assurances of same. I also note that the proposed facility is simply a conversion of the pre-existing CIT facility and as such, it is expected that there would be no material prejudice to any of the creditors of the CMI Entities that arises from the granting of the DIP charge. I am persuaded that the amount is appropriate and required.

34 Thirdly, the DIP charge must not and does not secure an obligation that existed before the order was made. The only amount outstanding on the CIT facility is \$10.7 in outstanding letters of credit. These letters of credit are secured by existing security and it is proposed that that security rank ahead of the DIP charge.

35 Lastly, I must consider amongst others, the enumerated factors in paragraph 11.2(4) of the Act. I have already addressed some of them. The Management Directors of the applicants as that term is used in the materials filed will continue to manage the CMI Entities during the CCAA proceedings. It would appear that management has the confidence of its major creditors. The CMI Entities have appointed a CRA and a Restructuring Officer to negotiate and implement the recapitalization transaction and the aforementioned directors will continue to manage the CMI Entities during the CCAA proceedings. The DIP facility will enhance the prospects of a completed restructuring. CIT has stated that it will not convert the CIT facility into a DIP facility if the DIP charge is not approved. In its report, the proposed Monitor observes that the ability to borrow funds from a court approved DIP facility secured by the DIP charge is crucial to retain the confidence of the CMI Entities' creditors, employees and suppliers and would enhance the prospects of a viable compromise or arrangement being made. The proposed Monitor is supportive of the DIP facility and charge.

36 For all of these reasons, I was prepared to approve the DIP facility and charge.

*(d) Administration Charge*

37 While an administration charge was customarily granted by courts to secure the fees and disbursements of the professional advisors who guided a debtor company through the CCAA process, as a result of the amendments to the CCAA, there is now statutory authority to grant such a charge. Section 11.52 of the CCAA states:

(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

38 I must therefore be convinced that (1) notice has been given to the secured creditors likely to be affected by the charge; (2) the amount is appropriate; and (3) the charge should extend to all of the proposed beneficiaries.

39 As with the DIP charge, the issue relating to notice to affected secured creditors has been addressed appropriately by the applicants. The amount requested is up to \$15 million. The beneficiaries of the charge are: the Monitor and its counsel; counsel to the CMI Entities; the financial advisor to the Special Committee and its counsel; counsel to the Management Directors; the CRA; the financial advisor to the Ad Hoc Committee; and RBC Capital Markets and its counsel. The proposed Monitor supports the aforementioned charge and considers it to be required and reasonable in the circumstances in order to preserve the going concern operations of the CMI Entities. The applicants submit that the above-note professionals who have played a necessary and integral role in the restructuring activities to date are necessary to implement the recapitalization transaction.

40 Estimating quantum is an inexact exercise but I am prepared to accept the amount as being appropriate. There has obviously been extensive negotiation by stakeholders and the restructuring is of considerable magnitude and complexity. I was prepared to accept the submissions relating to the administration charge. I have not included any requirement that all of these professionals be required to have their accounts scrutinized and approved by the Court but they should not preclude this possibility.

*(e) Critical Suppliers*

41 The next issue to consider is the applicants' request for authorization to pay pre-filing amounts owed to critical suppliers. In recognition that one of the purposes of the CCAA is to permit an insolvent corporation to remain in business, typically courts exercised their inherent jurisdiction to grant such authorization and a charge with respect to the provision of essential goods and services. In the recent amendments, Parliament codified the practice of permitting the payment of pre-filing amounts to critical suppliers and the provision of a charge. Specifically, section 11.4 provides:

(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

(4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

42 Under these provisions, the Court must be satisfied that there has been notice to creditors likely to be affected by the charge, the person is a supplier of goods or services to the company, and that the goods or services that are supplied are critical to the company's continued operation. While one might interpret section 11.4 (3) as requiring a charge any time a person is declared to be a critical supplier, in my view, this provision only applies when a court is compelling a person to supply. The charge then provides protection to the unwilling supplier.

43 In this case, no charge is requested and no additional notice is therefore required. Indeed, there is an issue as to whether in the absence of a request for a charge, section 11.4 is even applicable and the Court is left to rely on inherent jurisdiction. The section seems to be primarily directed to the conditions surrounding the granting of a charge to secure critical suppliers. That said, even if it is applicable, I am satisfied that the applicants have met the requirements. The CMI Entities seek authorization to make certain payments to third parties that provide goods and services integral to their business. These include television programming suppliers given the need for continuous and undisturbed flow of programming, newsprint suppliers given the dependency of the National Post on a continuous and uninterrupted supply of newsprint to enable it to publish and on newspaper distributors, and the American Express Corporate Card Program and Central Billed Accounts that are required for CMI Entity employees to perform their job functions. No payment would be made without the consent of the Monitor. I accept that these suppliers are critical in nature. The CMI Entities also seek more general authorization allowing them to pay other suppliers if in the opinion of the CMI Entities, the supplier is critical. Again, no payment would be made without the consent of the Monitor. In addition, again no charge securing any payments is sought. This is not contrary to the language of section 11.4 (1) or to its purpose. The CMI Entities seek the ability to pay other suppliers if in their opinion the supplier is critical to their business and ongoing operations. The order requested is facilitative and practical in nature. The proposed Monitor supports the applicants' request and states that it will work to ensure that payments to suppliers in respect of pre-filing liabilities are minimized. The Monitor is of course an officer of the Court and is always able to seek direction from the Court if necessary. In addition, it will report on any such additional payments when it files its reports for Court approval. In the circumstances outlined, I am prepared to grant the relief requested in this regard.

*(f) Directors' and Officers' Charge*

44 The applicants also seek a directors' and officers' ("D &O") charge in the amount of \$20 million. The proposed charge would rank after the administration charge, the existing CIT security, and the DIP charge. It would rank *pari passu* with the KERP charge discussed subsequently in this endorsement but postponed in right of payment to the extent of the first \$85 million payable under the secured intercompany note.

45 Again, the recent amendments to the CCAA allow for such a charge. Section 11.51 provides that:

(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

46 I have already addressed the issue of notice to affected secured creditors. I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and no order should be granted if adequate insurance at a reasonable cost could be obtained.

47 The proposed Monitor reports that the amount of \$20 million was estimated taking into consideration the existing D&O insurance and the potential liabilities which may attach including certain employee related and tax related obligations. The amount was negotiated with the DIP lender and the Ad Hoc Committee. The order proposed speaks of indemnification relating to the failure of any of the CMI Entities, after the date of the order, to make certain payments. It also excludes gross negligence and wilful misconduct. The D&O insurance provides for \$30 million in coverage and \$10 million in excess coverage for a total of \$40 million. It will expire in a matter of weeks and Canwest Global has been unable to obtain additional or replacement coverage. I am advised that it also extends to others in the Canwest enterprise and not just to the CMI Entities. The directors and senior management are described as highly experienced, fully functional and qualified. The directors have indicated that they cannot continue in the restructuring effort unless the order includes the requested directors' charge.

48 The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protection against liabilities they could incur during the restructuring: *General Publishing Co., Re*<sup>10</sup> Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. The proposed Monitor believes that the charge is required and is reasonable in the circumstances and also observes that it will not cover all of the directors' and officers' liabilities in the worst case scenario. In all of these circumstances, I approved the request.

**(g) Key Employee Retention Plans**

49 Approval of a KERP and a KERP charge are matters of discretion. In this case, the CMI Entities have developed KERPs that are designed to facilitate and encourage the continued participation of certain of the CMI Entities' senior executives and other key employees who are required to guide the CMI Entities through a successful restructuring with a view to preserving enterprise value. There are 20 KERP participants all of whom are described by the applicants as being critical to the successful restructuring of the CMI Entities. Details of the KERPs are outlined in the materials and the proposed Monitor's report. A charge of \$5.9 million is requested. The three Management Directors are seasoned executives with extensive experience in the broadcasting and publishing industries. They have played critical roles in the restructuring initiatives taken to date. The applicants state that it is probable that they would consider other employment opportunities if the KERPs were not secured by a KERP charge. The other proposed participants are also described as being crucial to the restructuring and it would be extremely difficult to find replacements for them

50 Significantly in my view, the Monitor who has scrutinized the proposed KERPs and charge is supportive. Furthermore, they have been approved by the Board, the Special Committee, the Human Resources Committee of Canwest Global and the Ad Hoc Committee. The factors enumerated in *Grant Forest Products Inc., Re*<sup>11</sup> have all been met and I am persuaded that the relief in this regard should be granted.

51 The applicants ask that the Confidential Supplement containing unredacted copies of the KERPs that reveal individually identifiable information and compensation information be sealed. Generally speaking, judges are most reluctant to grant sealing orders. An open court and public access are fundamental to our system of justice. Section 137(2) of the *Courts of Justice Act* provides authority to grant a sealing order and the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)*<sup>12</sup> provides guidance on the appropriate legal principles to be applied. Firstly, the Court must be satisfied that the order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk. Secondly, the salutary effects of the order should outweigh its deleterious effects including the effects on the right to free expression which includes the public interest in open and accessible court proceedings.

52 In this case, the unredacted KERPs reveal individually identifiable information including compensation information. Protection of sensitive personal and compensation information the disclosure of which could cause harm



to the individuals and to the CMI Entities is an important commercial interest that should be protected. The KERP participants have a reasonable expectation that their personal information would be kept confidential. As to the second branch of the test, the aggregate amount of the KERPs has been disclosed and the individual personal information adds nothing. It seems to me that this second branch of the test has been met. The relief requested is granted.

#### **Annual Meeting**

53 The CMI Entities seek an order postponing the annual general meeting of shareholders of Canwest Global. Pursuant to section 133 (1)(b) of the CBCA, a corporation is required to call an annual meeting by no later than February 28, 2010, being six months after the end of its preceding financial year which ended on August 31, 2009. Pursuant to section 133 (3), despite subsection (1), the corporation may apply to the court for an order extending the time for calling an annual meeting.

54 CCAA courts have commonly granted extensions of time for the calling of an annual general meeting. In this case, the CMI Entities including Canwest Global are devoting their time to stabilizing business and implementing a plan. Time and resources would be diverted if the time was not extended as requested and the preparation for and the holding of the annual meeting would likely impede the timely and desirable restructuring of the CMI Entities. Under section 106(6) of the CBCA, if directors of a corporation are not elected, the incumbent directors continue. Financial and other information will be available on the proposed Monitor's website. An extension is properly granted.

#### **Other**

55 The applicants request authorization to commence Chapter 15 proceedings in the U.S. Continued timely supply of U.S. network and other programming is necessary to preserve going concern value. Commencement of Chapter 15 proceedings to have the CCAA proceedings recognized as "foreign main proceedings" is a prerequisite to the conversion of the CIT facility into the DIP facility. Authorization is granted.

56 Canwest's various corporate and other entities share certain business services. They are seeking to continue to provide and receive inter-company services in the ordinary course during the CCAA proceedings. This is supported by the proposed Monitor and FTI will monitor and report to the Court on matters pertaining to the provision of inter-company services.

57 Section 23 of the amended CCAA now addresses certain duties and functions of the Monitor including the provision of notice of an Initial Order although the Court may order otherwise. Here the financial threshold for notice to creditors has been increased from \$1000 to \$5000 so as to reduce the burden and cost of such a process. The proceedings will be widely published in the media and the Initial Order is to be posted on the Monitor's website. Other meritorious adjustments were also made to the notice provisions.

58 This is a "pre-packaged" restructuring and as such, stakeholders have negotiated and agreed on the terms of the requested order. That said, not every stakeholder was before me. For this reason, interested parties are reminded that the order includes the usual come back provision. The return date of any motion to vary, rescind or affect the provisions relating to the CIT credit agreement or the CMI DIP must be no later than November 5, 2009.

59 I have obviously not addressed every provision in the order but have attempted to address some key provisions. In support of the requested relief, the applicants filed a factum and the proposed Monitor filed a report. These were most helpful. A factum is required under Rule 38.09 of the Rules of Civil Procedure. Both a factum and a proposed Monitor's report should customarily be filed with a request for an Initial Order under the CCAA.

#### **Conclusion**



60 Weak economic conditions and a high debt load do not a happy couple make but clearly many of the stakeholders have been working hard to produce as desirable an outcome as possible in the circumstances. Hopefully the cooperation will persist.

*Application granted.*

Footnotes

- 1 R.S.C. 1985, c. C. 36, as amended
- 2 R.S.C. 1985, c.C.44.
- 3 R.S.C. 1985, c. B-3, as amended.
- 4 (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]); leave to appeal refused 2004 CarswellOnt 2936 (Ont. C.A.).
- 5 (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]).
- 6 [2009] O.J. No. 349 (Ont. S.C.J. [Commercial List]).
- 7 (2006), 19 C.B.R. (5th) 187 (Alta. Q.B.).
- 8 (1995), 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List]).
- 9 (2004), 33 B.C.L.R. (4th) 155 (B.C. S.C.).
- 10 (2003), 39 C.B.R. (4th) 216 (Ont. S.C.J.).
- 11 [2009] O.J. No. 3344 (Ont. S.C.J. [Commercial List]). That said, given the nature of the relationship between a board of directors and senior management, it may not always be appropriate to give undue consideration to the principle of business judgment.
- 12 [2002] 2 S.C.R. 522 (S.C.C.).

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**TAB 8**

2010 ONSC 222

Ontario Superior Court of Justice [Commercial List]

Canwest Publishing Inc./Publications Canwest Inc., Re

2010 CarswellOnt 212, 2010 ONSC 222, [2010] O.J. No. 188, 184 A.C.W.S. (3d) 684, 63 C.B.R. (5th) 115

**IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT  
ACT, R.S.C. 1985, C-36, AS AMENDED AND IN THE MATTER  
OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT  
OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST  
INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.**

Pepall J.

Judgment: January 18, 2010

Docket: CV-10-8533-00CL

Counsel: Lyndon Barnes, Alex Cobb, Duncan Ault for Applicant, LP Entities  
Mario Forte for Special Committee of the Board of Directors  
Andrew Kent, Hilary Clarke for Administrative Agent of the Senior Secured Lenders' Syndicate  
Peter Griffin for Management Directors  
Robin B. Schwill, Natalie Renner for Ad Hoc Committee of 9.25% Senior Subordinated Noteholders  
David Byers, Maria Konyukhova for Proposed Monitor, FTI Consulting Canada Inc.

Subject: Insolvency; Corporate and Commercial

**Related Abridgment Classifications**

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

**Bankruptcy and insolvency**

XIX Companies' Creditors Arrangement Act

XIX.3 Arrangements

XIX.3.a Approval by creditors

**Bankruptcy and insolvency**

XIX Companies' Creditors Arrangement Act

XIX.5 Miscellaneous

**Headnote**

**Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous**

CMI, entity of C Corp., obtained protection from creditors in Companies' Creditors Arrangement Act ("CCAA") proceedings in October 2009 — CPI, newspaper entities related to C, sought similar protection — CPI brought application for order pursuant to CCAA and for stay of proceedings and other benefits of order to be extended to CPI — Application granted — CPI was clearly insolvent — Community served by CPI was huge — Granting of order premised on anticipated going concern sale of newspaper business, which would serve interests of CPI and stakeholders and also community at large — Order requested would provide stability and enable CPI to pursue restructuring and preserve enterprise value for stakeholders — Without benefit of stay, CPI would have been required to pay approximately \$1.45 billion and would have been unable to continue operating business.

**Bankruptcy and insolvency --- Companies' Creditors Arrangement Act --- Arrangements --- Approval by creditors**

CMI, entity of C Corp., obtained protection from creditors in Companies' Creditors Arrangement Act ("CCAA") proceedings in October 2009 — CPI, newspaper entities related to C, sought similar protection — CPI brought application for order pursuant to CCAA and for stay of proceedings and other benefits of order to be extended to CPI — Application granted — CPI was clearly insolvent — Community served by CPI was huge — Granting of order premised on anticipated going concern sale of newspaper business, which would serve interests of CPI and stakeholders and also community at large — Order requested would provide stability and enable CPI to pursue restructuring and preserve enterprise value for stakeholders — Without benefit of stay, CPI would have been required to pay approximately \$1.45 billion and would have been unable to continue operating business — In circumstances, it was appropriate to allow CPI to file and present plan only to secured creditors.

**Table of Authorities**

**Cases considered by *Pepall J.*:**

*Anvil Range Mining Corp., Re* (2002), 2002 CarswellOnt 2254, 34 C.B.R. (4th) 157 (Ont. C.A.) — considered

*Anvil Range Mining Corp., Re* (2003), 310 N.R. 200 (note), 2003 CarswellOnt 730, 2003 CarswellOnt 731, 180 O.A.C. 399 (note) (S.C.C.) — referred to

*Canwest Global Communications Corp., Re* (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) — followed

*Grant Forest Products Inc., Re* (2009), 2009 CarswellOnt 4699, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) — considered

*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

*Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 54, 2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]) — followed

*Philip Services Corp., Re* (1999), 13 C.B.R. (4th) 159, 1999 CarswellOnt 4673 (Ont. S.C.J. [Commercial List]) — considered

*Sierra Club of Canada v. Canada (Minister of Finance)* (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed

**Statutes considered:**

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

Generally — referred to

s. 4 — considered

s. 5 — considered

- s. 11.2 [en. 1997, c. 12, s. 124] — considered
- s. 11.2(1) [en. 1997, c. 12, s. 124] — considered
- s. 11.2(4) [en. 1997, c. 12, s. 124] — considered
- s. 11.4 [en. 1997, c. 12, s. 124] — considered
- s. 11.4(1) [en. 1997, c. 12, s. 124] — considered
- s. 11.4(2) [en. 1997, c. 12, s. 124] — considered
- s. 11.7(2) [en. 1997, c. 12, s. 124] — referred to
- s. 11.51 [en. 2005, c. 47, s. 128] — considered
- s. 11.52 [en. 2005, c. 47, s. 128] — considered

*Courts of Justice Act*, R.S.O. 1990, c. C.43

- s. 137(2) — considered

APPLICATION by entity of company already protected under Companies' Creditors Arrangement Act for similar protection.

**Pepall J.:**

### **Reasons for Decision**

#### **Introduction**

1 Canwest Global Communications Corp. ("Canwest Global") is a leading Canadian media company with interests in (i) newspaper publishing and digital media; and (ii) free-to-air television stations and subscription based specialty television channels. Canwest Global, the entities in its Canadian television business (excluding CW Investments Co. and its subsidiaries) and the National Post Company (which prior to October 30, 2009 owned and published the National Post) (collectively, the "CMI Entities"), obtained protection from their creditors in a *Companies' Creditors Arrangement Act*<sup>1</sup> ("CCAA") proceeding on October 6, 2009.<sup>2</sup> Now, the Canwest Global Canadian newspaper entities with the exception of National Post Inc. seek similar protection. Specifically, Canwest Publishing Inc./Publications Canwest Inc. ("CPI"), Canwest Books Inc. ("CBI"), and Canwest (Canada) Inc. ("CCI") apply for an order pursuant to the CCAA. They also seek to have the stay of proceedings and the other benefits of the order extend to Canwest Limited Partnership/Canwest Société en Commandite (the "Limited Partnership"). The Applicants and the Limited Partnership are referred to as the "LP Entities" throughout these reasons. The term "Canwest" will be used to refer to the Canwest enterprise as a whole. It includes the LP Entities and Canwest Global's other subsidiaries which are not applicants in this proceeding.

2 All appearing on this application supported the relief requested with the exception of the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders. That Committee represents certain unsecured creditors whom I will discuss more fully later.

3 I granted the order requested with reasons to follow. These are my reasons.

4 I start with three observations. Firstly, Canwest Global, through its ownership interests in the LP Entities, is the largest publisher of daily English language newspapers in Canada. The LP Entities own and operate 12 daily newspapers across Canada. These newspapers are part of the Canadian heritage and landscape. The oldest, The Gazette, was

established in Montreal in 1778. The others are the Vancouver Sun, The Province, the Ottawa Citizen, the Edmonton Journal, the Calgary Herald, The Windsor Star, the Times Colonist, The Star Phoenix, the Leader-Post, the Nanaimo Daily News and the Alberni Valley Times. These newspapers have an estimated average weekly readership that exceeds 4 million. The LP Entities also publish 23 non-daily newspapers and own and operate a number of digital media and online operations. The community served by the LP Entities is huge. In addition, based on August 31, 2009 figures, the LP Entities employ approximately 5,300 employees in Canada with approximately 1,300 of those employees working in Ontario. The granting of the order requested is premised on an anticipated going concern sale of the newspaper business of the LP Entities. This serves not just the interests of the LP Entities and their stakeholders but the Canadian community at large.

5 Secondly, the order requested may contain some shortcomings; it may not be perfect. That said, insolvency proceedings typically involve what is feasible, not what is flawless.

6 Lastly, although the builders of this insolvent business are no doubt unhappy with its fate, gratitude is not misplaced by acknowledging their role in its construction.

### **Background Facts**

#### *(i) Financial Difficulties*

7 The LP Entities generate the majority of their revenues through the sale of advertising. In the fiscal year ended August 31, 2009, approximately 72% of the LP Entities' consolidated revenue derived from advertising. The LP Entities have been seriously affected by the economic downturn in Canada and their consolidated advertising revenues declined substantially in the latter half of 2008 and in 2009. In addition, they experienced increases in certain of their operating costs.

8 On May 29, 2009 the Limited Partnership failed, for the first time, to make certain interest and principal reduction payments and related interest and cross currency swap payments totaling approximately \$10 million in respect of its senior secured credit facilities. On the same day, the Limited Partnership announced that, as of May 31, 2009, it would be in breach of certain financial covenants set out in the credit agreement dated as of July 10, 2007 between its predecessor, Canwest Media Works Limited Partnership, The Bank of Nova Scotia as administrative agent, a syndicate of secured lenders ("the LP Secured Lenders"), and the predecessors of CCI, CPI and CBI as guarantors. The Limited Partnership also failed to make principal, interest and fee payments due pursuant to this credit agreement on June 21, June 22, July 21, July 22 and August 21, 2009.

9 The May 29, 2009, defaults under the senior secured credit facilities triggered defaults in respect of related foreign currency and interest rate swaps. The swap counterparties (the "Hedging Secured Creditors") demanded payment of \$68.9 million. These unpaid amounts rank *pari passu* with amounts owing under the LP Secured Lenders' credit facilities.

10 On or around August 31, 2009, the Limited Partnership and certain of the LP Secured Lenders entered into a forbearance agreement in order to allow the LP Entities and the LP Secured Lenders the opportunity to negotiate a pre-packaged restructuring or reorganization of the affairs of the LP Entities. On November 9, 2009, the forbearance agreement expired and since then, the LP Secured Lenders have been in a position to demand payment of approximately \$953.4 million, the amount outstanding as at August 31, 2009. Nonetheless, they continued negotiations with the LP Entities. The culmination of this process is that the LP Entities are now seeking a stay of proceedings under the CCAA in order to provide them with the necessary "breathing space" to restructure and reorganize their businesses and to preserve their enterprise value for the ultimate benefit of their broader stakeholder community.

11 The Limited Partnership released its annual consolidated financial statements for the twelve months ended August 31, 2009 and 2008 on November 26, 2009. As at August 31, 2009, the Limited Partnership had total consolidated assets with a net book value of approximately \$644.9 million. This included consolidated current assets of \$182.7 million and consolidated non-current assets of approximately \$462.2 million. As at that date, the Limited Partnership had total

consolidated liabilities of approximately \$1.719 billion (increased from \$1.656 billion as at August 31, 2008). These liabilities consisted of consolidated current liabilities of \$1.612 billion and consolidated non-current liabilities of \$107 million.

12 The Limited Partnership had been experiencing deteriorating financial results over the past year. For the year ended August 31, 2009, the Limited Partnership's consolidated revenues decreased by \$181.7 million or 15% to \$1.021 billion as compared to \$1.203 billion for the year ended August 31, 2008. For the year ended August 31, 2009, the Limited Partnership reported a consolidated net loss of \$66 million compared to consolidated net earnings of \$143.5 million for fiscal 2008.

*(ii) Indebtedness under the Credit Facilities*

13 The indebtedness under the credit facilities of the LP Entities consists of the following.

(a) The LP senior secured credit facilities are the subject matter of the July 10, 2007 credit agreement already mentioned. They are guaranteed by CCI, CPI and CBI. The security held by the LP Secured Lenders has been reviewed by the solicitors for the proposed Monitor, FTI Consulting Canada Inc. and considered to be valid and enforceable.<sup>3</sup> As at August 31, 2009, the amounts owing by the LP Entities totaled \$953.4 million exclusive of interest.<sup>4</sup>

(b) The Limited Partnership is a party to the aforementioned foreign currency and interest rate swaps with the Hedging Secured Creditors. Defaults under the LP senior secured credit facilities have triggered defaults in respect of these swap arrangements. Demand for repayment of amounts totaling \$68.9 million (exclusive of unpaid interest) has been made. These obligations are secured.

(c) Pursuant to a senior subordinated credit agreement dated as of July 10, 2007, between the Limited Partnership, The Bank of Nova Scotia as administrative agent for a syndicate of lenders, and others, certain subordinated lenders agreed to provide the Limited Partnership with access to a term credit facility of up to \$75 million. CCI, CPI, and CBI are guarantors. This facility is unsecured, guaranteed on an unsecured basis and currently fully drawn. On June 20, 2009, the Limited Partnership failed to make an interest payment resulting in an event of default under the credit agreement. In addition, the defaults under the senior secured credit facilities resulted in a default under this facility. The senior subordinated lenders are in a position to take steps to demand payment.

(d) Pursuant to a note indenture between the Limited Partnership, The Bank of New York Trust Company of Canada as trustee, and others, the Limited Partnership issued 9.5% per annum senior subordinated unsecured notes due 2015 in the aggregate principal amount of US \$400 million. CPI and CBI are guarantors. The notes are unsecured and guaranteed on an unsecured basis. The noteholders are in a position to take steps to demand immediate payment of all amounts outstanding under the notes as a result of events of default.

14 The LP Entities use a centralized cash management system at the Bank of Nova Scotia which they propose to continue. Obligations owed pursuant to the existing cash management arrangements are secured (the "Cash Management Creditor").

*(iii) LP Entities' Response to Financial Difficulties*

15 The LP Entities took a number of steps to address their circumstances with a view to improving cash flow and strengthening their balance sheet. Nonetheless, they began to experience significant tightening of credit from critical suppliers and other trade creditors. The LP Entities' debt totals approximately \$1.45 billion and they do not have the liquidity required to make payment in respect of this indebtedness. They are clearly insolvent.

16 The board of directors of Canwest Global struck a special committee of directors (the "Special Committee") with a mandate to explore and consider strategic alternatives. The Special Committee has appointed Thomas Strike, the President, Corporate Development & Strategy Implementation, as Recapitalization Officer and has retained Gary Colter of CRS Inc. as Restructuring Advisor for the LP Entities (the "CRA"). The President of CPI, Dennis Skulsky, will report directly to the Special Committee.

17 Given their problems, throughout the summer and fall of 2009, the LP Entities have participated in difficult and complex negotiations with their lenders and other stakeholders to obtain forbearance and to work towards a consensual restructuring or recapitalization.

18 An ad hoc committee of the holders of the senior subordinated unsecured notes (the "Ad Hoc Committee") was formed in July, 2009 and retained Davies Ward Phillips & Vineberg as counsel. Among other things, the Limited Partnership agreed to pay the Committee's legal fees up to a maximum of \$250,000. Representatives of the Limited Partnership and their advisors have had ongoing discussions with representatives of the Ad Hoc Committee and their counsel was granted access to certain confidential information following execution of a confidentiality agreement. The Ad Hoc Committee has also engaged a financial advisor who has been granted access to the LP Entities' virtual data room which contains confidential information regarding the business and affairs of the LP Entities. There is no evidence of any satisfactory proposal having been made by the noteholders. They have been in a position to demand payment since August, 2009, but they have not done so.

19 In the meantime and in order to permit the businesses of the LP Entities to continue to operate as going concerns and in an effort to preserve the greatest number of jobs and maximize value for the stakeholders of the LP Entities, the LP Entities have been engaged in negotiations with the LP Senior Lenders, the result of which is this CCAA application.

*(iv) The Support Agreement, the Secured Creditors' Plan and the Solicitation Process*

20 Since August 31, 2009, the LP Entities and the LP administrative agent for the LP Secured Lenders have worked together to negotiate terms for a consensual, prearranged restructuring, recapitalization or reorganization of the business and affairs of the LP Entities as a going concern. This is referred to by the parties as the Support Transaction.

21 As part of this Support Transaction, the LP Entities are seeking approval of a Support Agreement entered into by them and the administrative agent for the LP Secured Lenders. 48% of the LP Secured Lenders, the Hedging Secured Creditors, and the Cash Management Creditor (the "Secured Creditors") are party to the Support Agreement.

22 Three interrelated elements are contemplated by the Support Agreement and the Support Transaction: the credit acquisition, the Secured Creditors' plan (the "Plan"), and the sale and investor solicitation process which the parties refer to as SISP.

23 The Support Agreement contains various milestones with which the LP Entities are to comply and, subject to a successful bid arising from the solicitation process (an important caveat in my view), commits them to support a credit acquisition. The credit acquisition involves an acquisition by an entity capitalized by the Secured Creditors and described as AcquireCo. AcquireCo. would acquire substantially all of the assets of the LP Entities (including the shares in National Post Inc.) and assume certain of the liabilities of the LP Entities. It is contemplated that AcquireCo. would offer employment to all or substantially all of the employees of the LP Entities and would assume all of the LP Entities' existing pension plans and existing post-retirement and post-employment benefit plans subject to a right by AcquireCo., acting commercially reasonably and after consultation with the operational management of the LP Entities, to exclude certain specified liabilities. The credit acquisition would be the subject matter of a Plan to be voted on by the Secured Creditors on or before January 31, 2010. There would only be one class. The Plan would only compromise the LP Entities' secured claims and would not affect or compromise any other claims against any of the LP Entities ("unaffected claims"). No holders of the unaffected claims would be entitled to vote on or receive any distributions of their claims. The Secured Creditors would exchange their outstanding secured claims against the LP Entities under the LP credit agreement and



the swap obligations respectively for their *pro rata* shares of the debt and equity to be issued by AcquireCo. All of the LP Entities' obligations under the LP secured claims calculated as of the date of closing less \$25 million would be deemed to be satisfied following the closing of the Acquisition Agreement. LP secured claims in the amount of \$25 million would continue to be held by AcquireCo. and constitute an outstanding unsecured claim against the LP Entities.

24 The Support Agreement contemplates that the Financial Advisor, namely RBC Dominion Securities Inc., under the supervision of the Monitor, will conduct the solicitation process. Completion of the credit acquisition process is subject to a successful bid arising from the solicitation process. In general terms, the objective of the solicitation process is to obtain a better offer (with some limitations described below) than that reflected in the credit acquisition. If none is obtained in that process, the LP Entities intend for the credit acquisition to proceed assuming approval of the Plan. Court sanction would also be required.

25 In more detailed terms, Phase I of the solicitation process is expected to last approximately 7 weeks and qualified interested parties may submit non-binding proposals to the Financial Advisor on or before February 26, 2010. Thereafter, the Monitor will assess the proposals to determine whether there is a reasonable prospect of obtaining a Superior Offer. This is in essence a cash offer that is equal to or higher than that represented by the credit acquisition. If there is such a prospect, the Monitor will recommend that the process continue into Phase II. If there is no such prospect, the Monitor will then determine whether there is a Superior Alternative Offer, that is, an offer that is not a Superior Offer but which might nonetheless receive approval from the Secured Creditors. If so, to proceed into Phase II, the Superior Alternative Offer must be supported by Secured Creditors holding more than at least 33.3% of the secured claims. If it is not so supported, the process would be terminated and the LP Entities would then apply for court sanction of the Plan.

26 Phase II is expected to last approximately 7 weeks as well. This period allows for due diligence and the submission of final binding proposals. The Monitor will then conduct an assessment akin to the Phase 1 process with somewhat similar attendant outcomes if there are no Superior Offers and no acceptable Alternative Superior Offers. If there were a Superior Offer or an acceptable Alternative Superior Offer, an agreement would be negotiated and the requisite approvals sought.

27 The solicitation process is designed to allow the LP Entities to test the market. One concern is that a Superior Offer that benefits the secured lenders might operate to preclude a Superior Alternative Offer that could provide a better result for the unsecured creditors. That said, the LP Entities are of the view that the solicitation process and the support transaction present the best opportunity for the businesses of the LP Entities to continue as going concerns, thereby preserving jobs as well as the economic and social benefits of their continued operation. At this stage, the alternative is a bankruptcy or liquidation which would result in significant detriment not only to the creditors and employees of the LP Entities but to the broader community that benefits from the continued operation of the LP Entities' business. I also take some comfort from the position of the Monitor which is best captured in an excerpt from its preliminary Report:

The terms of the Support Agreement and SISF were the subject of lengthy and intense arm's length negotiations between the LP Entities and the LP Administrative Agent. The Proposed Monitor supports approval of the process contemplated therein and of the approval of those documents, but without in any way fettering the various powers and discretions of the Monitor.

28 It goes without saying that the Monitor, being a court appointed officer, may apply to the court for advice and directions and also owes reporting obligations to the court.

29 As to the objection of the Ad Hoc Committee, I make the following observations. Firstly, they represent unsecured subordinated debt. They have been in a position to take action since August, 2009. Furthermore, the LP Entities have provided up to \$250,000 for them to retain legal counsel. Meanwhile, the LP Secured Lenders have been in a position to enforce their rights through a non-consensual court proceeding and have advised the LP Entities of their abilities in that regard in the event that the LP Entities did not move forward as contemplated by the Support Agreement. With the Support Agreement and the solicitation process, there is an enhanced likelihood of the continuation of going concern operations, the preservation of jobs and the maximization of value for stakeholders of the LP Entities. It seemed to

me that in the face of these facts and given that the Support Agreement expired on January 8, 2010, adjourning the proceeding was not merited in the circumstances. The Committee did receive very short notice. Without being taken as encouraging or discouraging the use of the comeback clause in the order, I disagree with the submission of counsel to the Ad Hoc Committee to the effect that it is very difficult if not impossible to stop a process relying on that provision. That provision in the order is a meaningful one as is clear from the decision in *Muscletech Research & Development Inc., Re*<sup>5</sup>. On a come back motion, although the positions of parties who have relied bona fide on an Initial Order should not be prejudiced, the onus is on the applicants for an Initial Order to satisfy the court that the existing terms should be upheld.

***Proposed Monitor***

30 The Applicants propose that FTI Consulting Canada Inc. serve as the Monitor. It currently serves as the Monitor in the CMI Entities' CCAA proceeding. It is desirable for FTI to act; it is qualified to act; and it has consented to act. It has not served in any of the incompatible capacities described in section 11.7(2) of the CCAA. The proposed Monitor has an enhanced role that is reflected in the order and which is acceptable.

***Proposed Order***

31 As mentioned, I granted the order requested. It is clear that the LP Entities need protection under the CCAA. The order requested will provide stability and enable the LP Entities to pursue their restructuring and preserve enterprise value for their stakeholders. Without the benefit of a stay, the LP Entities would be required to pay approximately \$1.45 billion and would be unable to continue operating their businesses.

***(a) Threshold Issues***

32 The chief place of business of the Applicants is Ontario. They qualify as debtor companies under the CCAA. They are affiliated companies with total claims against them that far exceed \$5 million. Demand for payment of the swap indebtedness has been made and the Applicants are in default under all of the other facilities outlined in these reasons. They do not have sufficient liquidity to satisfy their obligations. They are clearly insolvent.

***(b) Limited Partnership***

33 The Applicants seek to extend the stay of proceedings and the other relief requested to the Limited Partnership. The CCAA definition of a company does not include a partnership or a limited partnership but courts have exercised their inherent jurisdiction to extend the protections of an Initial CCAA Order to partnerships when it was just and convenient to do so. The relief has been held to be appropriate where the operations of the partnership are so intertwined with those of the debtor companies that irreparable harm would ensue if the requested stay were not granted: *Canwest Global Communications Corp., Re*<sup>6</sup> and *Lehndorff General Partner Ltd., Re*<sup>7</sup>.

34 In this case, the Limited Partnership is the administrative backbone of the LP Entities and is integral to and intertwined with the Applicants' ongoing operations. It owns all shared information technology assets; it provides hosting services for all Canwest properties; it holds all software licences used by the LP Entities; it is party to many of the shared services agreements involving other Canwest entities; and employs approximately 390 full-time equivalent employees who work in Canwest's shared services area. The Applicants state that failure to extend the stay to the Limited Partnership would have a profoundly negative impact on the value of the Applicants, the Limited Partnership and the Canwest Global enterprise as a whole. In addition, exposing the assets of the Limited Partnership to the demands of creditors would make it impossible for the LP Entities to successfully restructure. I am persuaded that under these circumstances it is just and convenient to grant the request.

***(c) Filing of the Secured Creditors' Plan***

35 The LP Entities propose to present the Plan only to the Secured Creditors. Claims of unsecured creditors will not be addressed.

36 The CCAA seems to contemplate a single creditor-class plan. Sections 4 and 5 state:

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

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

37 Case law has interpreted these provisions as authorizing a single creditor-class plan. For instance, Blair J. (as he then was) stated in *Philip Services Corp., Re*<sup>8</sup>: "There is no doubt that a debtor is at liberty, under the terms of sections 4 and 5 of the CCAA, to make a proposal to secured creditors or to unsecured creditors or to both groups."<sup>9</sup> Similarly, in *Anvil Range Mining Corp., Re*<sup>10</sup>, the Court of Appeal stated: "It may also be noted that s. 5 of the CCAA contemplates a plan which is a compromise between a debtor company and its secured creditors and that by the terms of s. 6 of the Act, applied to the facts of this case, the plan is binding only on the secured creditors and the company and not on the unsecured creditors."<sup>11</sup>

38 Based on the foregoing, it is clear that a debtor has the statutory authority to present a plan to a single class of creditors. In *Anvil Range Mining Corp., Re*, the issue was raised in the context of the plan's sanction by the court and a consideration of whether the plan was fair and reasonable as it eliminated the opportunity for unsecured creditors to realize anything. The basis of the argument was that the motions judge had erred in not requiring a more complete and in depth valuation of the company's assets relative to the claims of the secured creditors.

39 In this case, I am not being asked to sanction the Plan at this stage. Furthermore, the Monitor will supervise a vigorous and lengthy solicitation process to thoroughly canvass the market for alternative transactions. The solicitation should provide a good indication of market value. In addition, as counsel for the LP Entities observed, the noteholders and the LP Entities never had any forbearance agreement. The noteholders have been in a position to take action since last summer but chose not to do so. One would expect some action on their part if they themselves believed that they "were in the money". While the process is not perfect, it is subject to the supervision of the court and the Monitor is obliged to report on its results to the court.

40 In my view it is appropriate in the circumstances to authorize the LP Entities to file and present a Plan only to the Secured Creditors.

(D) *DIP Financing*

41 The Applicants seek approval of a DIP facility in the amount of \$25 million which would be secured by a charge over all of the assets of the LP Entities and rank ahead of all other charges except the Administration Charge, and ahead of all other existing security interests except validly perfected purchase money security interests and certain specific statutory encumbrances.

42 Section 11.2 of the CCAA provides the statutory jurisdiction to grant a DIP charge. In *Camvest Global Communications Corp., Re*<sup>12</sup>, I addressed this provision. Firstly, an applicant should address the requirements contained in section 11.2 (1) and then address the enumerated factors found in section 11.2(4) of the CCAA. As that list is not exhaustive, it may be appropriate to consider other factors as well.

43 Applying these principles to this case and dealing firstly with section 11.2(1) of the CCAA, notice either has been given to secured creditors likely to be affected by the security or charge or alternatively they are not affected by the DIP charge. While funds are not anticipated to be immediately necessary, the cash flow statements project a good likelihood that the LP Entities will require the additional liquidity afforded by the \$25 million. The ability to borrow funds that are secured by a charge will help retain the confidence of the LP Entities' trade creditors, employees and suppliers. It is expected that the DIP facility will permit the LP Entities to conduct the solicitation process and consummate a recapitalization transaction of a sale of all or some of its assets. The charge does not secure any amounts that were owing prior to the filing. As such, there has been compliance with the provisions of section 11.2 (1).

44 Turning then to a consideration of the factors found in section 11.2(4) of the Act, the LP Entities are expected to be subject to these CCAA proceedings until July 31, 2010. Their business and financial affairs will be amply managed during the proceedings. This is a consensual filing which is reflective of the confidence of the major creditors in the current management configuration. All of these factors favour the granting of the charge. The DIP loan would enhance the prospects of a viable compromise or arrangement and would ensure the necessary stability during the CCAA process. I have already touched upon the issue of value. That said, in relative terms, the quantum of the DIP financing is not large and there is no readily apparent material prejudice to any creditor arising from the granting of the charge and approval of the financing. I also note that it is endorsed by the proposed Monitor in its report.

45 Other factors to consider in assessing whether to approve a DIP charge include the reasonableness of the financing terms and more particularly the associated fees. Ideally there should be some evidence on this issue. Prior to entering into the forbearance agreement, the LP Entities sought proposals from other third party lenders for a DIP facility. In this case, some but not all of the Secured Creditors are participating in the financing of the DIP loan. Therefore, only some would benefit from the DIP while others could bear the burden of it. While they may have opted not to participate in the DIP financing for various reasons, the concurrence of the non participating Secured Creditors is some market indicator of the appropriateness of the terms of the DIP financing.

46 Lastly, I note that the DIP lenders have indicated that they would not provide a DIP facility if the charge was not approved. In all of these circumstances, I was prepared to approve the DIP facility and grant the DIP charge.

*(e) Critical Suppliers*

47 The LP Entities ask that they be authorized but not required to pay pre-filing amounts owing in arrears to certain suppliers if the supplier is critical to the business and ongoing operations of the LP Entities or the potential future benefit of the payments is considerable and of value to the LP Entities as a whole. Such payments could only be made with the consent of the proposed Monitor. At present, it is contemplated that such suppliers would consist of certain newspaper suppliers, newspaper distributors, logistic suppliers and the Amex Bank of Canada. The LP Entities do not seek a charge to secure payments to any of its critical suppliers.

48 Section 11.4 of the CCAA addresses critical suppliers. It states:

11.4(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods and services to the company and that the goods or services that are supplied are critical to the company's continued operation.

(2) If the court declares the person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied upon the terms of the order.

(4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

49 Mr. Byers, who is counsel for the Monitor, submits that the court has always had discretion to authorize the payment of critical suppliers and that section 11.4 is not intended to address that issue. Rather, it is intended to respond to a post-filing situation where a debtor company wishes to compel a supplier to supply. In those circumstances, the court may declare a person to be a critical supplier and require the person to supply. If the court chooses to compel a person to supply, it must authorize a charge as security for the supplier. Mr. Barnes, who is counsel for the LP Entities, submits that section 11.4 is not so limited. Section 11.4 (1) gives the court general jurisdiction to declare a supplier to be a "critical supplier" where the supplier provides goods or services that are essential to the ongoing business of the debtor company. The permissive as opposed to mandatory language of section 11.4 (2) supports this interpretation.

50 Section 11.4 is not very clear. As a matter of principle, one would expect the purpose of section 11.4 to be twofold: (i) to codify the authority to permit suppliers who are critical to the continued operation of the company to be paid and (ii) to require the granting of a charge in circumstances where the court is compelling a person to supply. If no charge is proposed to be granted, there is no need to give notice to the secured creditors. I am not certain that the distinction between Mr. Byers and Mr. Barnes' interpretation is of any real significance for the purposes of this case. Either section 11.4(1) does not oust the court's inherent jurisdiction to make provision for the payment of critical suppliers where no charge is requested or it provides authority to the court to declare persons to be critical suppliers. Section 11.4(1) requires the person to be a supplier of goods and services that are critical to the companies' operation but does not impose any additional conditions or limitations.

51 The LP Entities do not seek a charge but ask that they be authorized but not required to make payments for the pre-filing provision of goods and services to certain third parties who are critical and integral to their businesses. This includes newsprint and ink suppliers. The LP Entities are dependent upon a continuous and uninterrupted supply of newsprint and ink and they have insufficient inventory on hand to meet their needs. It also includes newspaper distributors who are required to distribute the newspapers of the LP Entities; American Express whose corporate card programme and accounts are used by LP Entities employees for business related expenses; and royalty fees accrued and owing to content providers for the subscription-based online service provided by FPinfomart.ca, one of the businesses of the LP Entities. The LP Entities believe that it would be damaging to both their ongoing operations and their ability to restructure if they are unable to pay their critical suppliers. I am satisfied that the LP Entities may treat these parties and those described in Mr. Strike's affidavit as critical suppliers but none will be paid without the consent of the Monitor.

*(f) Administration Charge and Financial Advisor Charge*

52 The Applicants also seek a charge in the amount of \$3 million to secure the fees of the Monitor, its counsel, the LP Entities' counsel, the Special Committee's financial advisor and counsel to the Special Committee, the CRA and counsel to the CRA. These are professionals whose services are critical to the successful restructuring of the LP Entities' business. This charge is to rank in priority to all other security interests in the LP Entities' assets, with the exception of purchase money security interests and specific statutory encumbrances as provided for in the proposed order.<sup>13</sup> The LP Entities also request a \$10 million charge in favour of the Financial Advisor, RBC Dominion Securities Inc. The Financial Advisor is providing investment banking services to the LP Entities and is essential to the solicitation process. This charge would rank in third place, subsequent to the administration charge and the DIP charge.

53 In the past, an administration charge was granted pursuant to the inherent jurisdiction of the court. Section 11.52 of the amended CCAA now provides statutory jurisdiction to grant an administration charge. Section 11.52 states:

On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the debtor company is subject to a security or charge - in an amount that the court considers appropriate - in respect of the fees and expenses of

- (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
- (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
- (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

54 I am satisfied that the issue of notice has been appropriately addressed by the LP Entities. As to whether the amounts are appropriate and whether the charges should extend to the proposed beneficiaries, the section does not contain any specific criteria for a court to consider in its assessment. It seems to me that factors that might be considered would include:

- (a) the size and complexity of the businesses 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.

This is not an exhaustive list and no doubt other relevant factors will be developed in the jurisprudence.

55 There is no question that the restructuring of the LP Entities is large and highly complex and it is reasonable to expect extensive involvement by professional advisors. Each of the professionals whose fees are to be secured has played a critical role in the LP Entities restructuring activities to date and each will continue to be integral to the solicitation and restructuring process. Furthermore, there is no unwarranted duplication of roles. As to quantum of both proposed charges, I accept the Applicants' submissions that the business of the LP Entities and the tasks associated with their restructuring are of a magnitude and complexity that justify the amounts. I also take some comfort from the fact that the administrative agent for the LP Secured Lenders has agreed to them. In addition, the Monitor supports the charges requested. The quantum of the administration charge appears to be fair and reasonable. As to the quantum of the charge in favour of the Financial Advisor, it is more unusual as it involves an incentive payment but I note that the Monitor conducted its own due diligence and, as mentioned, is supportive of the request. The quantum reflects an appropriate incentive to secure a desirable alternative offer. Based on all of these factors, I concluded that the two charges should be approved.

*(g) Directors and Officers*

56 The Applicants also seek a directors and officers charge ("D & O charge") in the amount of \$35 million as security for their indemnification obligations for liabilities imposed upon the Applicants' directors and officers. The D & O charge will rank after the Financial Advisor charge and will rank *pari passu* with the MIP charge discussed subsequently. Section

11.51 of the CCAA addresses a D & O charge. I have already discussed section 11.51 in *Canwest Global Communications Corp.*, Re<sup>14</sup> as it related to the request by the CMI Entities for a D & O charge. Firstly, the charge is essential to the successful restructuring of the LP Entities. The continued participation of the experienced Boards of Directors, management and employees of the LP Entities is critical to the restructuring. Retaining the current officers and directors will also avoid destabilization. Furthermore, a CCAA restructuring creates new risks and potential liabilities for the directors and officers. The amount of the charge appears to be appropriate in light of the obligations and liabilities that may be incurred by the directors and officers. The charge will not cover all of the directors' and officers' liabilities in a worse case scenario. While Canwest Global maintains D & O liability insurance, it has only been extended to February 28, 2009 and further extensions are unavailable. As of the date of the Initial Order, Canwest Global had been unable to obtain additional or replacement insurance coverage.

57 Understandably in my view, the directors have indicated that due to the potential for significant personal liability, they cannot continue their service and involvement in the restructuring absent a D & O charge. The charge also provides assurances to the employees of the LP Entities that obligations for accrued wages and termination and severance pay will be satisfied. All secured creditors have either been given notice or are unaffected by the D & O charge. Lastly, the Monitor supports the charge and I was satisfied that the charge should be granted as requested.

*(h) Management Incentive Plan and Special Arrangements*

58 The LP Entities have made amendments to employment agreements with 2 key employees and have developed certain Management Incentive Plans for 24 participants (collectively the "MIPs"). They seek a charge in the amount of \$3 million to secure these obligations. It would be subsequent to the D & O charge.

59 The CCAA is silent on charges in support of Key Employee Retention Plans ("KERPs") but they have been approved in numerous CCAA proceedings. Most recently, in *Canwest Global Communications Corp.*, Re<sup>15</sup>, I approved the KERP requested on the basis of the factors enumerated in *Grant Forest Products Inc.*, Re<sup>16</sup> and given that the Monitor had carefully reviewed the charge and was supportive of the request as were the Board of Directors, the Special Committee of the Board of Directors, the Human Resources Committee of Canwest Global and the Adhoc Committee of Noteholders.

60 The MIPs in this case are designed to facilitate and encourage the continued participation of certain senior executives and other key employees who are required to guide the LP Entities through a successful restructuring. The participants are critical to the successful restructuring of the LP Entities. They are experienced executives and have played critical roles in the restructuring initiatives to date. They are integral to the continued operation of the business during the restructuring and the successful completion of a plan of restructuring, reorganization, compromise or arrangement.

61 In addition, it is probable that they would consider other employment opportunities in the absence of a charge securing their payments. The departure of senior management would distract from and undermine the restructuring process that is underway and it would be extremely difficult to find replacements for these employees. The MIPs provide appropriate incentives for the participants to remain in their current positions and ensures that they are properly compensated for their assistance in the reorganization process.

62 In this case, the MIPs and the MIP charge have been approved in form and substance by the Board of Directors and the Special Committee of Canwest Global. The proposed Monitor has also expressed its support for the MIPs and the MIP charge in its pre-filing report. In my view, the charge should be granted as requested.

*(i) Confidential Information*

63 The LP Entities request that the court seal the confidential supplement which contains individually identifiable information and compensation information including sensitive salary information about the individuals who are covered by the MIPs. It also contains an unredacted copy of the Financial Advisor's agreement. I have discretion pursuant



to Section 137(2) of the *Courts of Justice Act*<sup>17</sup> to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record. That said, public access in an important tenet of our system of justice.

64 The threshold test for sealing orders is found in the Supreme Court of Canada decision of *Sierra Club of Canada v. Canada (Minister of Finance)*<sup>18</sup>. In that case, Iacobucci J. stated that an order should only be granted when: (i) it is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and (ii) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

65 In *Canwest Global Communications Corp., Re*<sup>19</sup> I applied the *Sierra Club* test and approved a similar request by the Applicants for the sealing of a confidential supplement containing unredacted copies of KERPs for the employees of the CMI Entities. Here, with respect to the first branch of the *Sierra Club* test, the confidential supplement contains unredacted copies of the MIPs. Protecting the disclosure of sensitive personal and compensation information of this nature, the disclosure of which would cause harm to both the LP Entities and the MIP participants, is an important commercial interest that should be protected. The information would be of obvious strategic advantage to competitors. Moreover, there are legitimate personal privacy concerns in issue. The MIP participants have a reasonable expectation that their names and their salary information will be kept confidential. With respect to the second branch of the *Sierra Club* test, keeping the information confidential will not have any deleterious effects. As in the *Canwest Global Communications Corp., Re* case, the aggregate amount of the MIP charge has been disclosed and the individual personal information adds nothing. The salutary effects of sealing the confidential supplement outweigh any conceivable deleterious effects. In the normal course, outside of the context of a CCAA proceeding, confidential personal and salary information would be kept confidential by an employer and would not find its way into the public domain. With respect to the unredacted Financial Advisor agreement, it contains commercially sensitive information the disclosure of which could be harmful to the solicitation process and the salutary effects of sealing it outweigh any deleterious effects. The confidential supplements should be sealed and not form part of the public record at least at this stage of the proceedings.

### **Conclusion**

66 For all of these reasons, I was prepared to grant the order requested.

*Application granted.*

### Footnotes

1 R.S.C. 1985, c. C. 36, as amended.

2 On October 30, 2009, substantially all of the assets and business of the National Post Company were transferred to the company now known as National Post Inc.

3 Subject to certain assumptions and qualifications.

4 Although not formally in evidence before the court, counsel for the LP Secured Lenders advised the court that currently \$382,889,000 in principal in Canadian dollars is outstanding along with \$458,042,000 in principal in American dollars.

5 2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]).

6 2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List]) at para. 29.

7 (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]).



- 8 1999 CarswellOnt 4673 (Ont. S.C.J. [Commercial List]).
- 9 Ibid at para. 16.
- 10 (2002), 34 C.B.R. (4th) 157 (Ont. C.A.), leave to appeal to S.C.C. refused (March 6,2003) [2003 CarswellOnt 730 (S.C.C.)].
- 11 Ibid at para. 34.
- 12 Supra, note 7 at paras. 31-35.
- 13 This exception also applies to the other charges granted.
- 14 Supra note 7 at paras. 44-48.
- 15 Supra note 7.
- 16 [2009] O.J. No. 3344 (Ont. S.C.J. [Commercial List]).
- 17 R.S.O. 1990, c. C.43, as amended.
- 18 [2002] 2 S.C.R. 522 (S.C.C.).
- 19 Supra, note 7 at para. 52.

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End of Document

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**TAB 9**

**\*\* Preliminary Version \*\***

*Case Name:*

**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] S.C.J. No. 60

[2010] A.C.S. no 60

2010 SCC 60

[2010] 3 S.C.R. 379

[2010] 3 R.C.S. 379

2011 D.T.C. 5006

409 N.R. 201

296 B.C.A.C. 1

12 B.C.L.R. (5th) 1

2010 CarswellBC 3419

326 D.L.R. (4th) 577

EYB 2010-183759

2011EXP-9

J.E. 2011-5

2011 G.T.C. 2006

[2011] 2 W.W.R. 383

72 C.B.R. (5th) 170

[2010] G.S.T.C. 186

196 A.C.W.S. (3d) 27

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

*Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Application of Act -- Compromises and arrangements -- Where Crown affected -- Effect of related legislation -- Bankruptcy and Insolvency Act -- Appeal by Century Services Inc. from judgment of British Columbia Court of Appeal reversing a judgment dismissing a Crown application for payment of unremitted GST monies allowed -- Section 222(3) of the Excise Tax Act evinced no explicit intention of Parliament to repeal s. 18.3 of CCAA -- Parliament's intent with respect to GST deemed trusts was to be found in the CCAA -- Judge 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 debtor company to make an assignment in bankruptcy.*

Appeal by Century Services Inc. from a judgment of the British Columbia Court of Appeal reversing a judgment dismissing a Crown application for payment of unremitted GST monies. The debtor company commenced proceedings under the Companies' Creditors Arrangement Act (CCAA), obtaining a stay of proceedings with a view to reorganizing its financial affairs. Among the debts owed by the debtor company at the commencement of the reorganization was an amount of GST collected but unremitted to the Crown. The Excise Tax Act (ETA) created a deemed trust in favour of the Crown for amounts collected in respect of GST. The ETA provided that the deemed

trust operated despite any other enactment of Canada except the Bankruptcy and Insolvency Act (BIA). However, the CCAA also provided that subject to certain exceptions, none of which mentioned GST, deemed trusts in favour of the Crown did not operate under the CCAA. In the context of the CCAA proceedings, a chambers judge approved a payment not exceeding \$5 million to the debtor company's major secured creditor, Century Services. The judge agreed to the debtor company's proposal 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. After concluding that reorganization was not possible, the debtor company sought leave to partially lift the stay of proceedings so it could make an assignment in bankruptcy under the Bankruptcy and Insolvency Act (BIA). The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. The judge denied the Crown's motion, and allowed the assignment in bankruptcy. The Court of Appeal found two independent bases for allowing the Crown's appeal. 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 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. Second, the Court of Appeal concluded that by ordering the GST funds segregated in the Monitor's trust account, 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.

HELD: Appeal allowed. Section 222(3) of the ETA evinced no explicit intention of Parliament to repeal CCAA s. 18.3. Had Parliament sought to give the Crown a priority for GST claims, it could have done so explicitly, as it did for source deductions. There was no express statutory basis for concluding that GST claims enjoyed a preferred treatment under the CCAA or the BIA. Parliament's intent with respect to GST deemed trusts was to be found in the CCAA. With respect to the scope of a court's discretion when supervising reorganization, the broad discretionary jurisdiction conferred on the supervising judge had to be interpreted having regard to the remedial nature of the CCAA and insolvency legislation generally. The question was whether the order advanced the underlying purpose of the CCAA. The judge'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. The order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that was common to both statutes. The breadth of the court's discretion under the CCAA was sufficient to lift the stay to allow entry into liquidation. No express trust was created by the judge's order because there was no certainty of object inferable from his order. Further, no deemed trust was created.

**Statutes, Regulations and Rules Cited:**

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, s. 69, s. 128, s. 131

Bank Act, S.C. 1991, c. 46,

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-, s. 67, s. 86

Canada Pension Plan, R.S.C. 1985, c. C-8, s. 23

Cities and Towns Act, R.S.Q., c. C-19,

Civil Code of QuÉbec, S.Q. 1991, c. 64, art. 2930

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11, s. 11.4, s. 18.3, s. 18.4, s. 20, s. 21

Companies' Creditors Arrangement Act, 1933, S.C. 1932-33, c. 36,

Employment Insurance Act, S.C. 1996, c. 23, s. 86(2), s. 86(2.1)

Excise Tax Act, R.S.C. 1985, c. E-15, s. 222

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), s. 227(4), s. 227(4.1)

Interpretation Act, R.S.C. 1985, c. I-21, s. 2, s. 44(f)

Personal Property Security Act, S.A. 1988, c. P-4.05,

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11,

**Subsequent History:**

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

**Court 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.*

### **Court 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., 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 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, 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.

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 Act* 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 unmistakable 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.

*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) 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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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; *Metcalf & 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.

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*Bank Act*, S.C. 1991, c. 46.

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, ss. 67, 86 [am. 2005, c. 47, s. 69].

*Canada Pension Plan*, R.S.C. 1985, c. C-8, s. 23.

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*Civil Code of Québec*, S.Q. 1991, c. 64.

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ss. 11, 11.4, 18.3, 18.4, 20 [am. 2005, c. 47, ss. 128, 131], 21 [am. 1997, c. 12, s. 126].

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**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.

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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 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.

**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 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?

### 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 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 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 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 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, October 3, 1991, at pp. 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 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, 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, ss. 25 and 29; 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* (1986)).

**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.

### 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 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 am. 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. Bank. 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 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").

**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, 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.

**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 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, 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 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.

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*.

**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 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 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.

### 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 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.

**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 *Metcalf & 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 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.), 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 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 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*.

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 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 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 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.

**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 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*"). 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.

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 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 being 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.

**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) the *CCAA* and in s. 67(3) 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 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 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 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 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 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<sup>1</sup> 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:

(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 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 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, at pp. 37-38). 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]

**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*).

**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:

[T]he 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 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,<sup>2</sup> 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 "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 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 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.

*Appeal allowed with costs, ABELLA J. dissenting.*

\* \* \* \* \*

## 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,

(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,
  - (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, 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 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 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.

**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 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);

(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 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 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 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.

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 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

(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

(a) 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

(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
- (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.

**Solicitors:**

*Solicitors for the appellant: Fraser Milner Casgrain, Vancouver.*

*Solicitor for the respondent: Department of Justice, 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.

**TAB 10**

**Most Negative Treatment:** Distinguished

**Most Recent Distinguished:** 1078385 Ontario Ltd., Re | 2004 CarswellOnt 8041, 16 C.B.R. (5th) 144 | (Ont. S.C.J., Nov 22, 2004)

1999 CarswellOnt 2213

Ontario Superior Court of Justice [Commercial List]

Enterprise Capital Management Inc. v. Semi-Tech Corp.

1999 CarswellOnt 2213, [1999] O.J. No. 5865, 10 C.B.R. (4th) 133

**Enterprise Capital Management Inc., Applicant  
and Semi-Tech Corporation, Respondent**

Ground J.

Heard: March 26, 29 and 30, 1999

Judgment: May 5, 1999

Docket: 99-CL-3251

Counsel: *Sean F. Dunphy* and *Adrian C. Lang*, for Applicant.

*Kevin P. McElcheran* and *Lisa S. Corne*, for Respondent.

Subject: Insolvency; Corporate and Commercial

**Headnote**

**Corporations — Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Approval by Court — Miscellaneous issues**

Corporation issued notes which were secured under trust indenture — Noteholders brought application for declaration that Companies' Creditors Arrangement Act applied to corporation, order authorizing noteholders to file plan or plans of compromise or arrangement in respect of corporation, and order appointing monitor — Application dismissed — Corporation was not insolvent within meaning of s. 2(1) of Bankruptcy and Insolvency Act — Not all debts payable at some future date are to be included in "accruing due" for purposes of insolvency tests — Obligations to be measured against fair valuation of company's property as being obligations due and accruing due, must be limited to obligations currently payable or properly chargeable to accounting period during which test is being applied — Principal amounts of notes was neither due nor accruing due — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 2(1).

**Corporations — Borrowing — Rights and obligations of security holders — Remedies on default — Miscellaneous issues**

Corporation issued notes which were secured under trust indenture — Noteholders brought application for relief under oppression remedies of Business Corporations Act — Application dismissed — Not sufficient to establish that noteholders' interests had been negatively impacted — None of corporations' transactions constituted affairs of corporation being carried on in manner which was oppressive or unfairly prejudicial to, or unfairly disregarded interests of, noteholders — Business Corporations Act, R.S.O. 1990, c. B.16.

The corporation is a holding company with common shares trading on the Toronto Stock Exchange. The primary holdings of the corporation are control blocks of two public companies, which in turn hold controlling interests in other public companies. The acquisition of shares in one of the public companies was raised by the corporation by

the issuance of notes. The notes were secured by a pledge of shares of the public company, under a trust indenture. The corporation breached certain of the covenants contained in the trust indenture, but as no notices of covenant defaults had been delivered, there was no "event of default" under the trust indenture. The total market price of the shares of the public companies held by the corporation was \$120,000,000. The total principal amount of the notes was \$531,000,000, and was increasing by \$5,000,000 per month. The noteholders brought an application for an order declaring that the *Companies' Creditors Arrangement Act* and the *Business Corporations Act* applied to the corporation, an order authorizing the noteholders to file a plan or plans of compromise or arrangement in respect of the corporation, and an order appointing a monitor. The noteholders also sought an order restricting the management and control of the corporation and its operations

**Held:** The application was dismissed.

There was no evidence before the court of the corporation being unable to meet its obligations as they generally became due. The position of the noteholders was that the corporation was insolvent, as it did not have sufficient assets to enable payment of the corporation's obligations due and accruing due. A determination of the fair valuation of the corporation's assets required more than a simple multiplication of the number of shares held in the public companies by their current market prices. The court was required to recognize that a disposition of control blocks, as held by the corporation, would attract control block premiums. However, it was unlikely that a control block premium would increase the fair valuation of the shares to the extent that it would exceed the value of the notes. A finding of insolvency based on a comparison of fair valuation of assets to the amount of obligations due and accruing due, could not be rebutted by the indication of a shareholders equity in the financial statements of the corporation. The financial statements of a company did not necessarily reflect what would result if a company sold all of its assets at a fair valuation and was required to pay all of its obligations due and accruing due.

Not all debts payable at some future date are to be included in "accruing due" for the purposes of insolvency tests. The obligations to be measured against the fair valuation of a company's property as being obligations due and accruing due, must be limited to obligations currently payable or properly chargeable to the accounting period during which the test is being applied. The principal amounts of the notes was neither due nor accruing due. The notes did not mature until 2003, and there had been no "event of default" allowing acceleration of the maturity of the notes. The corporation was not insolvent within the meaning of s. 2(1) of the *Bankruptcy and Insolvency Act*.

Even if the corporation had been found to be insolvent, the court would have exercised its discretion not to make an order under the *Companies' Creditors Arrangement Act*. The noteholders failed to submit an outline of the type of plan or compromise and arrangement being proposed. Sufficient information was easily accessible by the noteholders to prepare a general outline. It would be inappropriate for the court to make any order pursuant to the *Companies' Creditors Arrangement Act* in the absence of an outline.

In order to establish oppression, it was not sufficient to establish that the noteholders' interests had been negatively impacted. Some evidence of conduct which was oppressive or unfairly prejudicial to, or unfairly disregarded the interests of, the noteholders, was required. Conflicting evidence as to the motivation for, the business efficacy of, and the financial results of, certain transactions challenged by the noteholders as oppressive conduct, existed. None of the transactions constituted the affairs of the corporation being carried on in a manner which was oppressive or unfairly prejudicial to, or unfairly disregarded the interests of, the noteholders.

#### Table of Authorities

##### Cases considered by *Ground J.*:

*Centennial Textiles Inc., Re* (1998), 220 B.R. 165 (U.S. N.Y.D.C.) — not followed

*Lin v. Lee* (June 27, 1996), Doc. Vancouver C944487 (B.C. S.C.) — applied

*Mail Printing Co. v. Clarkson* (1898), 25 O.A.R. 1 (Ont. C.A.) — not followed

*P. Lyall & Sons Construction Co. v. Baker*, 14 C.B.R. 339, [1933] O.R. 286, [1933] 2 D.L.R. 264 (Ont. C.A.) — considered

*Skydome Corp., Re* (November 27, 1998), Blair J. (Ont. Gen. Div.) — applied

**Statutes considered:**

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

s. 2(1) "insolvent person" (c) [renumbered 1997, c. 12, s. 1] — considered

*Business Corporations Act*, R.S.O. 1990, c. B.16

Generally — referred to

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

Generally — referred to

s. 2 "debtor company" — considered

*Winding Up Act*, R.S.C. 1927, c. 213

Generally — referred to

**Words and phrases considered**

**ACCRUING DUE**

To include every debt payable at some future date in "accruing due" for the purposes of insolvency tests would render numerous corporations, with long term debt due over a period of years in the future and anticipated to be paid out of future income, "insolvent" for purposes of the BIA [*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3] and therefore the CCAA [*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36]. For the same reason, I do not accept the statement . . . from the decision of the Bankruptcy Court for the Southern District of New York in *Centennial Textiles Inc., Re*, 220 B.R. 165 that "if the present saleable value of assets are less than the amount required to pay existing debt as they mature, the debtor is insolvent". In my view the obligations, which are to be measured against the fair valuation of a company's property as being obligations due and accruing due, must be limited to obligations currently payable or properly chargeable to the accounting period during which the test is being applied as, for example, a sinking fund payment due within the current year.

APPLICATION by noteholders for declaration that *Companies' Creditors Arrangement Act* and *Business Corporations Act* applied to corporation, order authorizing noteholders to file plan or plans of compromise or arrangement in respect of corporation, and order appointing monitor.

**Ground J.:**

**Endorsement**

1 This application is brought by Enterprise Capital Management Inc. ("Enterprise"), on its own behalf and on behalf of funds managed by it, and with the support of other holders of Senior Secured Discount Notes (the "Notes") of Semi-Tech Corporation ("Semi-Tech") for, inter alia, an order declaring that Semi-Tech is a corporation to which the *Companies' Creditors Arrangement Act*, R.S.C. 1985, Chapter C-36 (the "CCAA") and the *Business Corporations Act*, R.S.O. 1990, Chapter B.16 (the "OBCA") apply, for an order authorizing the applicant to file a plan or plans of compromise or arrangement in respect of Semi-Tech under the CCAA and the OBCA, an order appointing KPMG Inc. ("KPMG") as monitor of Semi-Tech to assist Enterprise in developing the plan and to monitor the property of Semi-Tech and conduct the business and affairs of Semi-Tech until discharged by this Court. The application also seeks orders restricting the management and control of Semi-Tech and its operations by prohibiting Semi-Tech from making any payments to certain senior officers and directors, from voting any of the shares of Semi-Tech (Global) Company Limited ("Global") or the Singer Company N.V. ("Singer"), altering any material contracts between controlling parties and corporations in which Semi-Tech has a substantial equity interest, prohibiting Semi-Tech and its officers and directors from dealing with its assets or making payments to creditors except in the ordinary course of business and removing the current directors of Semi-Tech and appointing directors to be specified in the plan.

### **Background**

2 Semi-Tech is a holding company. Its common shares trade on the Toronto Stock Exchange. Its primary direct holdings are control blocks of two public companies, Singer and Global. Singer trades on the New York Stock Exchange and Global trades on the Hong Kong Stock Exchange.

Both Singer and Global hold controlling interests in other public companies. For example, Singer holds approximately 80% of the common shares of G.M. Pfaff AG ("Pfaff") which shares are traded on the Frankfurt Stock Exchange. Global holds direct and indirect controlling interests in Akai Electric Co. Ltd. ("Akai") and Sansui Electric Co. Limited ("Sansui") whose shares are traded on the Tokyo, Osaka and Nagoya Stock Exchanges as well as Tomei International Holding Limited ("Tomei"), whose shares are traded on the Hong Kong Stock Exchange.

3 As the financial statements of the companies are based on United States dollars, the dollar references herein are to United States dollars.

4 Semi-Tech acquired its interest in Singer from Global in 1993. The acquisition price of \$848 million was funded by a public issue of common shares raising \$548 million and the issuance of the Notes, raising \$300 million. In the 1993 Prospectus filed in connection with the issuance of its common shares and Notes, Semi-Tech described the purpose of its acquisition of Singer and described Global's plans for continued investment in turnaround opportunities in the developing world, particularly Asia. The terms of the Notes were negotiated with the original holders. The Notes provide that no payments of principal are due until 2003 and no interest is payable until 2001.

5 The Notes are secured by a pledge of 25,300,000 shares of Singer, representing approximately 50% of the outstanding shares of Singer. The trust indenture dated August 18, 1993 (the "Trust Indenture"), under which the Notes are secured, provides that, if an Event of Default were to occur, the Noteholders, acting through their trustee and in accordance with the terms set out in the Trust Indenture, could accelerate the maturity date of the Notes and enforce their security in the Singer shares.

6 I am satisfied that the Applicant would be able to establish that Semi-Tech has breached certain of the covenants contained in the Trust Indenture. However, in that the appropriate notices of covenant defaults have not been given and the time periods allowed to remedy defaults following such notices have not elapsed, it is conceded that at this date there is no "Event of Default" as defined in the Trust Indenture.

7 The most recent audited and unaudited financial statements for Semi-Tech, Singer and Global indicate substantial shareholders' equity in each company although the audited financial statements for the companies as at the end of their January, 1999 fiscal years are not yet issued and are not before this Court. The market prices of the shares of Singer



and Global are depressed and the total market value of the shares of Singer and Global held by Semi-Tech as of the date of the application was approximately \$120,000,000. The total principal amount of the Notes outstanding as of September 30, 1998 was approximately \$531,000,000 and it is alleged by Enterprise that this amount has been increasing by approximately \$5,000,000 per month since September, 1998 as the redemption price of the Notes gradually increases toward their ultimate maturity date. There are no other significant liabilities of Semi-Tech.

### *Submissions*

8 It is conceded that there is no evidence before this Court of Semi-Tech being unable to meet its obligations as they generally became due. It appears to be the position of Enterprise that Semi-Tech is insolvent under the test set out in clause (c) of the definition of "insolvent person" in subsection 2(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended (the "BIA"), which definition is applicable to defining a "debtor company" as being "insolvent" under section 2 of the CCAA. It is the position of Enterprise that, having regard to the market value of the shares of Singer and Global, which are effectively the only assets of Semi-Tech, they are not, in the aggregate, at a fair valuation or if disposed of at a fairly conducted sale under legal process, sufficient to enable payment of Semi-Tech's obligations due and accruing due.

9 Enterprise submits that in determining obligations "due and accruing due" for purposes of the insolvency test in clause (c) of the definition of "insolvent person" in subsection 2(1) of the BIA, the Court should not limit its consideration to debts which have matured and that accordingly a debtor is insolvent if its present assets are insufficient to meet its liabilities at maturity. Enterprise relies on certain American authorities to support this proposition.

10 Enterprise further takes the position that the principal amount of Notes outstanding are obligations due and accruing due because of the occurrence of defaults under certain covenants in the Trust Indenture which defaults have not been waived. Enterprise relies on an Abstract of issues discussed by the Emerging Issues Committee of the Canadian Institute of Chartered Accountants as contained in the C.I.A.C. Handbook which recommends that, if there has been a default under certain types of covenants in an instrument under which debt securities are outstanding and such default has not been waived or arrangements in place to cure the default, the principal amount of such debt securities should be included in current liabilities in a financial statement.

11 Semi-Tech submits that the determination of whether the value of its property is sufficient to enable payment of its obligations due and accruing due is a "present exercise" and that the Court should not speculate as to whether the company will eventually be unable to meet its liabilities as they fall due. Semi-Tech states that its audited financial statements are appropriate evidence of solvency sufficient to rebut any allegations of insolvency, that such financial statements indicate substantial shareholders equity in Semi-Tech, that no reduction has been made by its auditors in the market value of the securities it holds and that the Notes have not been recorded as current liabilities as would be recommended by the CICA Handbook provision referred to above.

12 It is the further submission of Semi-Tech that the market value of the shares of Singer and Global is not determinative of the value of the assets of Semi-Tech which are controlling interests in Singer and Global and which would attract a control block premium and that, to determine the value of such assets, would require expert evidence from underwriters or others at a trial. In addition, Semi-Tech submits that, to value such assets, one must have regard to the financial statements of Singer and Global. The financial statements of Singer and Global before this Court indicate a substantial shareholders' equity in each of Singer and Global which would indicate the value of the controlling interests in each of those companies. Semi-Tech also submits that the CICA Handbook is not definitive of the question of whether the Notes are obligations "due or accruing due" for purposes of the insolvency test and that the Notes are not now due or accruing due in that no payments of interest or principal are due until the years 2001 and 2003 respectively and no Event of Default has occurred under the Trust Indenture accelerating the maturity date of the Notes.

### *Reasons*

13 I accept the submission of Semi-Tech that to determine the fair valuation of Semi-Tech's assets, being principally the control blocks of shares of Singer and Global, one cannot simply multiply the number of shares by their current market prices. The Court must recognize that the control blocks, if disposed of by Semi-Tech, would attract control block premiums and that accordingly a determination of fair valuation would require expert evidence from underwriters or others as to the market value of such control blocks. It does seem to me however that, if the Notes represent obligations "due and accruing due" in an amount in excess of \$531,000,000, it is highly unlikely that control block premiums would increase the fair valuation of such control blocks from the value of \$120,000,000 based on current share prices to anything approaching \$531,000,000.

14 I am not satisfied that one can rely upon the fact that the financial statements of Semi-Tech indicate a shareholders equity to rebut a finding of insolvency based on a comparison of fair valuation of assets to the amount of obligations due and accruing due. Financial statements are based upon historic figures and on a going concern assumption and do not necessarily reflect what would result if the company as of this date sold all its assets at a fair valuation and was required to pay all of its obligations due and accruing due. In *Lin v. Lee* (June 27, 1996), Doc. Vancouver C944487 (B.C. S.C.), Coultas J. referred to this assumption as stated in the CICA Handbook.

An assumption underlying the preparation of financial statements in accordance with generally accepted accounting principles is that the enterprise will be able to realize assets and discharge liabilities in the normal course of business for the foreseeable future. This is commonly referred to as the going concern assumption.

15 It therefore becomes necessary to determine whether the principal amount of the Notes constitutes an obligation "due or accruing due" as of date of this application.

16 There is a paucity of helpful authority on the meaning of "accruing due" for purposes of a definition of insolvency. Historically in 1933, in *P. Lyall & Sons Construction Co. v. Baker*, [1933] O.R. 286 (Ont. C.A.), the Ontario Court of Appeal, in determining a question of set-off under the Dominion Winding Up Act had to determine whether the amount claimed as a set-off was a debt due or accruing due to the company in liquidation for purposes of that Act. Marsten J.A. at pages 292-293 quoted from Moss J.A. in *Mail Printing Co. v. Clarkson* (1898), 25 O.A.R. 1 (Ont. C.A.) at page 8:

A debt is defined to be a sum of money which is certainly, and at all event, payable without regard to the fact whether it be payable now or at a future time. And an accruing debt is a debt not yet actually payable, but a debt which is represented by an existing obligation; per Lindley, L.J. in *Webb v. Stenton* (1883) 11 Q.B.D. at p. 529.

17 Whatever relevance such definition may have had for purposes of dealing with claims by and against companies in liquidation under the old winding up legislation, it is apparent to me that it should not be applied to definitions of insolvency. To include every debt payable at some future date in "accruing due" for the purposes of insolvency tests would render numerous corporations, with long term debt due over a period of years in the future and anticipated to be paid out of future income, "insolvent" for purposes of the BIA and therefore the CCAA. For the same reason, I do not accept the statement quoted in the Enterprise factum from the decision of the Bankruptcy Court for the Southern District of New York in *Centennial Textiles Inc., Re*, 220 B.R. 165 (U.S. N.Y.D.C. 1998) that "if the present saleable value of assets are less than the amount required to pay existing debt as they mature, the debtor is insolvent". In my view the obligations, which are to be measured against the fair valuation of a company's property as being obligations due and accruing due, must be limited to obligations currently payable or properly chargeable to the accounting period during which the test is being applied as, for example, a sinking fund payment due within the current year. Black's Law Dictionary defines "accrued liability" as "an obligation or debt which is properly chargeable in a given accounting period but which is not yet paid or payable". The principal amount of the Notes is neither due nor accruing due in this sense.

18 In addition, even if the reference in the CICA Handbook is applicable to the covenant defaults alleged by Enterprise, this simply means that it is recommended that, in applicable situations for purposes of preparing a financial statement, the accountants should show long term debt as a current liability. As stated above, I do not think reference should be

made to financial statements for the purpose of determining whether a company is "insolvent" as that term is defined in the BIA and applicable to the CCAA. In the case at bar, where the Notes do not mature until 2003, there has been no Event of Default and no acceleration of the maturity of the Notes, the fact that accountants may, in certain circumstances of a covenant default, determine to show long term debt as a current liability in the financial statements, presumably with some explanatory note, is not in my view determinative of such debt being an obligation "accruing due" for purposes of the insolvency test.

19 Accordingly, on the basis of the evidence now before this Court, I am unable to conclude that Semi-Tech is insolvent within the meaning of clause (c) of the definition of "insolvent person" in subsection 2(1) of the BIA which definition is applicable to the CCAA.

20 Although it is moot in view of my finding that Semi-Tech is not insolvent within the meaning of clause (c) of subsection 2(1) of the BIA, I wish to comment on certain other aspects of this application. Even where the Court has found a company to be insolvent, the Court must in exercising its discretion under the CCAA, determine whether in all the circumstances it is appropriate that an order be made pursuant to the CCAA. In making such determination, the Court must have regard to the interests of all the stakeholders, not only those represented before the Court on the application, and must take into account any public interest involved.

21 I adopt the statement of Blair J. in his November 27, 1998 endorsement in the application of *Skydome Corp., Re* [(November 27, 1998), Blair J. (Ont. Gen. Div.)] under the CCAA:

Thus there is a broader public dimension which must be considered and weighed in the balance on this Application as well as the interests of those most directly affected: see *Anvil Range Mining Corporation*, unreported decision of the Ontario Court of Justice, General Division, August 20, 1998. As was stated in that case:

The court in its supervisory capacity has a broader mandate. In a receivership such as this one which works well into the social and economic fabric of a territory, that mandate must encompass having an eye for the social consequences of the receivership too. These interests cannot override the lawful interests of secured creditors ultimately but they can and must be weighed in the balance as the process works its way through.

The *Anvil Range* case concerned a CCAA proceeding which had been turned into a receivership but the same principles apply in my view to a case such as this.

22 In addition the Court must be conscious of the purpose and intent of the CCAA. The statute was originally enacted in 1933 to provide for an alternative to bankruptcy or liquidation of companies in financial difficulties during the depression years and for court sanction of plans of compromise and arrangement between companies and their creditors which would permit a restructuring and the continued operation of the companies' businesses and continued production and employment by the companies. In the Houlden and Morawetz annotated Bankruptcy and Insolvency Act at page 10A-2, the authors describe the purpose and intent of the CCAA as follows:

The CCAA has a broad remedial purpose giving a debtor an opportunity to find a way out of financial difficulties short of bankruptcy, foreclosure or the seizure of assets through receivership proceedings. It allows the debtor to find a plan that will enable him to meet the demands of his creditors through refinancing with new lending, equity financing or the sale of the business as a going concern. This alternative may well give the creditors of all classes a larger return and protect the jobs of the company's employees: *Diemaster Tool Inc. v. Skvortsoff* (Trustee of) (1991), 3 C.B.R. (3d) 133 (Ont. Gen. Div.).

23 It is usual on initial applications under the CCAA for the applicant to submit to the Court at least a general outline of the type of plan of compromise and arrangement between the company and its creditors proposed by the applicant. The application now before this Court is somewhat of a rarity in that the application is brought by an applicant representing a group of creditors and not by the company itself as is the usual case. Enterprise has submitted that it is not in a position to submit an outline of a plan to the Court in that it lacks sufficient information and has been unable to obtain such

information from Semi-Tech. Enterprise points out that, in the usual case, the application is brought by the company, the company has all the necessary information at hand and has usually had the assistance of a firm which is the proposed monitor and which has worked with the company in preparing an outline of a plan.

24 I have some difficulty with the submission of Enterprise that it does not have sufficient information available to submit an outline of a plan. Semi-Tech is a public company, as are Singer and Global and a number of the subsidiaries of Singer and Global, and I would have thought that sufficient information is easily accessible by Enterprise to prepare a general outline of what compromises or arrangements are proposed as between Semi-Tech and its creditors and in particular what is proposed as to either a disposition of the shares of Singer and/or Global or a restructuring of either of those companies. There is no such information before the Court and no indication that Semi-Tech will be involved in the preparation of a draft plan to be put before the Court other than as a source of information.

25 In the absence of any indication that Enterprise proposes a plan which would consist of some compromise or arrangement between Semi-Tech and its creditors and permit the continued operation of Semi-Tech and its subsidiaries in some restructured form, it appears to me that it would be inappropriate to make any order pursuant to the CCAA. If the Noteholders intend simply to liquidate the assets of Semi-Tech and distribute the proceeds, it would appear that they could do so by proceeding under the Trust Indenture on the basis of the alleged covenant defaults, accelerating the maturity date of the Notes, realizing on their security in the shares of Singer and recovering any balance due on the Notes by the appointment of a receiver or otherwise.

26 If any such steps were taken by the Noteholders, Semi-Tech could at that time bring its own application pursuant to the CCAA outlining a restructuring plan which would permit the continued operation of the company and its subsidiaries and be in conformity with the purpose and intent of the legislation. I am conscious however that, although the evidence before this Court on this point was somewhat inconclusive, the application is alleged to be brought with the consent of an informal committee of Noteholders representing 52.3% in principal amount of the outstanding Notes and that the holder of a further 20% in principal amount of outstanding Notes is alleged to support the application. In view of this, it would appear unlikely that any plan brought forward by Semi-Tech would receive the approval of creditors required by the CCAA.

27 With respect to the application pursuant to the oppression provisions of the OBCA, the OBCA is relied upon by the applicant primarily to provide a jurisdictional basis for the ancillary relief sought in the application. The principal complaint of Enterprise is that the market value of the assets of Semi-Tech has deteriorated to the point where the control block of shares of Singer pledged as security for the Notes is no longer adequate security and Semi-Tech is in a position where the fair valuation of its assets is insufficient to meet its obligations due and accruing due, in particular the payment of the Notes.

28 In order to establish oppression it is not sufficient for the complainant to establish that its position or its security or its interests have been negatively impacted. There must be some evidence before the Court to establish that the affairs of the corporation have been conducted in a manner which is oppressive or unfairly prejudicial to, or unfairly disregards the interests of, the complainant. There is conflicting evidence before this Court as to the motivation for, the business efficacy of, and the financial results of, certain transactions challenged by Enterprise as oppressive conduct. I am unable to conclude, on the evidence before this Court on this application, that any of such transactions constitute the affairs of Semi-Tech being carried on in a manner which is oppressive or unfairly prejudicial to, or unfairly disregards the interests of, Enterprise. Certainly the decline in the market value of the shares of Singer and Global and the resulting alleged insolvency of Semi-Tech does not constitute activities on the part of Semi-Tech which are oppressive or unfairly prejudicial to, or unfairly disregard the interests of, Enterprise.

29 The application is dismissed.

30 Counsel may make brief written submissions to me as to the costs of this application on or before May 31, 1999.  
*Application dismissed.*

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**TAB 11**

2012 ONSC 1299

Ontario Superior Court of Justice [Commercial List]

First Leaside Wealth Management Inc., Re

2012 CarswellOnt 2559, 2012 ONSC 1299, 213 A.C.W.S. (3d) 266

**In the Matter of a Plan of Compromise or Arrangement of First Leaside Wealth Management Inc., First Leaside Finance Inc., First Leaside Securities Inc., FL Securities Inc., First Leaside Management Inc., First Leaside Accounting and Tax Services Inc., First Leaside Holdings Inc., 2086056 Ontario Inc., First Leaside Realty Inc., First Leaside Capital Inc., First Leaside Realty II Inc., First Leaside Investments Inc., 965010 Ontario Inc., 1045517 Ontario Inc., 1024919 Ontario Inc., 1031628 Ontario Inc., 1056971 Ontario Inc., 1376095 Ontario Inc., 1437290 Ontario Ltd., 1244428 Ontario Ltd., PrestonOne Development (Canada) Inc., PrestonTwo Development (Canada) Inc., PrestonThree Development (Canada) Inc., PrestonFour Development (Canada) Inc., 2088543 Ontario Inc., 2088544 Ontario Inc., 2088545 Ontario Inc., 1331607 Ontario Inc., Queenston Manor General Partner Inc., 1408927 Ontario Ltd., 2107738 Ontario Inc., 1418361 Ontario Ltd., 2128054 Ontario Inc., 2069212 Ontario Inc., 1132413 Ontario Inc., 2067171 Ontario Inc., 2085306 Ontario Inc., 2059035 Ontario Inc., 2086218 Ontario Inc., 2085438 Ontario Inc., First Leaside Visions Management Inc., 1049015 Ontario Inc., 1049016 Ontario Inc., 2007804 Ontario Inc., 2019418 Ontario Inc., FL Research Management Inc., 970877 Ontario Inc., 1031628 Ontario Inc., 1045516 Ontario Inc., 2004516 Ontario Inc., 2192341 Ontario Inc., and First Leaside Fund Management Inc., Applicants**

D.M. Brown J.

Heard: February 23, 2012

Judgment: February 26, 2012

Docket: CV-12-9617-00CL

Counsel: J. Birch, D. Ward, for Applicants  
P. Huff, C. Burr, for Proposed Monitor, Grant Thornton Limited  
D. Bish, for Independent Directors  
B. Empey, for Investment Industry Regulatory Organization of Canada  
J. Grout, for Ontario Securities Commission  
R. Oliver, for Kenaidan Contracting Limited  
J. Dietrich — Proposed Representative Counsel, for the investors  
E. Garbe, for Structform International Limited  
N. Richter, for Gilbert Steel Limited  
M. Sanford, for Janick Electrick Limited  
M. Konyukhova, for Midland Loan Services Inc.  
C. Prophet, for Canadian Imperial Bank of Commerce

Subject: Insolvency; Corporate and Commercial

**Related Abridgment Classifications**

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

**Bankruptcy and insolvency**

X Priorities of claims

X.2 Preferred claims

X.2.c Costs and expenses of administrators

X.2.c.ii Priority over other claims

**Bankruptcy and insolvency**

XIX Companies' Creditors Arrangement Act

XIX.1 General principles

XIX.1.b Qualifying company

**Bankruptcy and insolvency**

XIX Companies' Creditors Arrangement Act

XIX.1 General principles

XIX.1.c Application of Act

XIX.1.c.iv Miscellaneous

**Bankruptcy and insolvency**

XIX Companies' Creditors Arrangement Act

XIX.1 General principles

XIX.1.d Constitutional issues

**Headnote**

**Bankruptcy and insolvency --- Companies' Creditors Arrangement Act --- General principles --- Qualifying company**

FLG was syndicate that purchased real estate through limited partnerships (LPs) — Applicants were general partners in LPs — FLG experienced financial difficulties and retained CRO to develop workout plan — CRO recommended that FLG undertake orderly wind-down under Companies' Creditors Arrangement Act (CCAA) — Applicants brought application for initial order under CCAA — Application granted — Applicants qualified for CCAA protection — Applicants were "companies" within meaning of CCAA — Total claims against applicants, as affiliated group of companies, was greater than \$5 million — Some applicants were "debtor companies" in sense that they were insolvent — It was necessary and appropriate to extend CCAA protection to other applicants, as well as to LPs — Presence of those entities within ambit of initial order was necessary to effect orderly winding-up of FLG — This conclusion was supported by insolvency of overall FLG and high degree of inter-connectedness amongst members of FLG — Consequently, whether particular applicant fell under initial order as debtor company, or as necessary party as part of intertwined whole, was distinction without practical difference.

**Bankruptcy and insolvency --- Companies' Creditors Arrangement Act --- General principles --- Application of Act --- Miscellaneous**

Liquidation under Act — FLG was syndicate that purchased real estate through limited partnerships (LPs) — Applicants were general partners in LPs — FLG experienced financial difficulties and retained CRO to develop workout plan — CRO recommended that FLG undertake orderly wind-down under Companies' Creditors Arrangement Act (CCAA) — Applicants brought application for initial order under CCAA — Application granted — CCAA was available to applicants in circumstances — Both CRO and proposed monitor possessed extensive knowledge about workings of applicants and supported process conducted under CCAA — No party contested availability of CCAA to conduct orderly winding-up, although some parties questioned whether certain entities



should be included within scope of initial order — Given that state of affairs, there was no reason not to accept professional judgment of CRO and proposed monitor that liquidation under CCAA was most appropriate route to take — There was no prejudice to claimant creditors by permitting winding-up under CCAA instead of under Bankruptcy and Insolvency Act in view of convergence between these two Acts on issue of priorities.

**Bankruptcy and insolvency — Companies' Creditors Arrangement Act — General principles — Constitutional issues**

FLG was syndicate that purchased real estate through limited partnerships (LPs) — Applicants were general partners in LPs — FLG experienced financial difficulties and retained CRO to develop workout plan — CRO recommended that FLG undertake orderly wind-down under Companies' Creditors Arrangement Act (CCAA) — Applicants brought application for initial order under CCAA — Application granted — Initial order included super-priority for administration charges and director and officer's charges (charges sought) — It was necessary to grant charges sought in order to secure services of estate professionals and to ensure continuation of directors in their offices — Amounts of charges sought were reasonable in circumstances — Adjournment requested by mortgagee and construction lien claimants (opposed creditors) was not granted — Opposed creditors had been given notice required by ss. 11.51(1) and 11.52(1) of CCAA — To ensure integrity of CCAA process, issue of priority of charges sought, including possible issue of paramountcy, should be raised on initial order application — Case relied on by opposed creditors was quite different, as it involved fiduciary duty owed by debtor company to pensioners — Caution had to be exercised before extending holding of that case to ordinary secured creditors — It was difficult to see how constitutional issues of paramountcy arose as between secured creditors and persons granted super-priority charge under ss. 11.51 and 11.52 of CCAA — Applicants were eligible for protection of federal CCAA, which expressly brings mortgagees and construction lien claimants within its regime.

**Bankruptcy and insolvency — Priorities of claims — Preferred claims — Costs and expenses of administrators — Priority over other claims**

FLG was syndicate that purchased real estate through limited partnerships (LPs) — Applicants were general partners in LPs — FLG experienced financial difficulties and retained CRO to develop workout plan — CRO recommended that FLG undertake orderly wind-down under Companies' Creditors Arrangement Act (CCAA) — Applicants brought application for initial order under CCAA — Application granted — Initial order included super-priority for administration charges and director and officer's charges (charges sought) — It was necessary to grant charges sought in order to secure services of estate professionals and to ensure continuation of directors in their offices — Amounts of charges sought were reasonable in circumstances — Adjournment requested by mortgagee and construction lien claimants (opposed creditors) was not granted — Opposed creditors had been given notice required by ss. 11.51(1) and 11.52(1) of CCAA — To ensure integrity of CCAA process, issue of priority of charges sought, including possible issue of paramountcy, should be raised on initial order application — Case relied on by opposed creditors was quite different, as it involved fiduciary duty owed by debtor company to pensioners — Caution had to be exercised before extending holding of that case to ordinary secured creditors — It was difficult to see how constitutional issues of paramountcy arose as between secured creditors and persons granted super-priority charge under ss. 11.51 and 11.52 of CCAA — Applicants were eligible for protection of federal CCAA, which expressly brings mortgagees and construction lien claimants within its regime.

**Table of Authorities**

**Cases considered by D.M. Brown J.:**

*Associated Investors of Canada Ltd., Re* (1987), 1987 CarswellAlta 330, 56 Alta. L.R. (2d) 259, [1988] 2 W.W.R. 211, 38 B.L.R. 148, 67 C.B.R. (N.S.) 237, (sub nom. *First Investors Corp., Re*) 46 D.L.R. (4th) 669 (Alta. Q.B.) — considered

*Brake Pro Ltd., Re* (2008), 2008 CarswellOnt 3195 (Ont. S.C.J.) — considered

*Canadian Western Bank v. Alberta* (2007), [2007] I.L.R. I-4622, 281 D.L.R. (4th) 125, [2007] 2 S.C.R. 3, 409 A.R. 207, 402 W.A.C. 207, 49 C.C.L.I. (4th) 1, 2007 SCC 22, 2007 CarswellAlta 702, 2007 CarswellAlta 703, 362 N.R. 111, 75 Alta. L.R. (4th) 1, [2007] 8 W.W.R. 1 (S.C.C.) — considered

*Caterpillar Financial Services Ltd. v. 360networks Corp.* (2007), 2007 BCCA 14, 2007 CarswellBC 29, 61 B.C.L.R. (4th) 334, 28 E.T.R. (3d) 186, 27 C.B.R. (5th) 115, 10 P.P.S.A.C. (3d) 311, 235 B.C.A.C. 95, 388 W.A.C. 95, 279 D.L.R. (4th) 701 (B.C. C.A.) — considered

*Indalex Ltd., Re* (2011), 2011 CarswellOnt 2458, 2011 ONCA 265, 2011 C.E.B. & P.G.R. 8433, 104 O.R. (3d) 641, 75 C.B.R. (5th) 19, 17 P.P.S.A.C. (3d) 194, 331 D.L.R. (4th) 352, 276 O.A.C. 347, 89 C.C.P.B. 39 (Ont. C.A.) — considered

*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — considered

*Nortel Networks Corp., Re* (2009), 256 O.A.C. 131, 2009 CarswellOnt 7383, 2009 ONCA 833, 59 C.B.R. (5th) 23, 77 C.C.P.B. 161, (sub nom. *Sproule v. Nortel Networks Corp.*) 2010 C.L.L.C. 210-005, (sub nom. *Sproule v. Nortel Networks Corp., Re*) 99 O.R. (3d) 708 (Ont. C.A.) — referred to

*Prizm Income Fund, Re* (2011), 2011 ONSC 2061, 2011 CarswellOnt 2258, 75 C.B.R. (5th) 213 (Ont. S.C.J.) — considered

*Rothmans, Benson & Hedges Inc. v. Saskatchewan* (2005), [2005] 1 S.C.R. 188, 2005 SCC 13, 2005 CarswellSask 162, 2005 CarswellSask 163, 250 D.L.R. (4th) 411, [2005] 9 W.W.R. 403 (S.C.C.) — considered

*Stelco Inc., Re* (2004), 48 C.B.R. (4th) 299, 2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List]) — considered

*Ted Leroy Trucking Ltd., Re* (2010), (sub nom. *Century Services Inc. v. Canada (A.G.)*) [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 G.T.C. 2006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 D.T.C. 5006 (Eng.), (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 503 W.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 296 B.C.A.C. 1, 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re*) 326 D.L.R. (4th) 577, 72 C.B.R. (5th) 170, [2011] 2 W.W.R. 383 (S.C.C.) — considered

*Timminco Ltd., Re* (2012), 2012 ONSC 506, 95 C.C.P.B. 48, 2012 CarswellOnt 1263, 85 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]) — followed

**Statutes considered:**

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

Generally — referred to

s. 2 "insolvent person" — considered

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

Generally — referred to

s. 2 — considered

s. 2 "secured creditor" — considered

s. 3(1) — considered

s. 11.51 [en. 2005, c. 47, s. 128] — considered

s. 11.51(1) [en. 2005, c. 47, s. 128] — considered

s. 11.52 [en. 2005, c. 47, s. 128] — considered

s. 11.52(1) [en. 2007, c. 36, s. 66] — considered

*Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

Generally — referred to

s. 91 ¶ 21 — considered

s. 92 ¶ 13 — considered

APPLICATION by members of insolvent group of companies for initial order under *Companies' Creditors Arrangement Act*.

**D.M. Brown J.:**

### **I. Overview: CCAA Initial Order**

1 On Thursday, February 23, 2012, I granted an Initial Order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, in respect of the Applicants. These are my Reasons for that decision.

### **II. The applicant corporations**

2 The Applicants are members of the First Leaside group of companies. They are described in detail in the affidavit of Gregory MacLeod, the Chief Restructuring Officer of First Leaside Wealth Management ("FLWM"), so I intend only refer in these Reasons to the key entities in the group. The parent corporation, FLWM, owns several subsidiaries, including the applicant, First Leaside Securities Inc. ("FLSI"). According to Mr. MacLeod, the Group's operations centre on FLWM and FLSI.

3 FLSI is an Ontario investment dealer that manages clients' investment portfolios which, broadly speaking, consist of non-proprietary Marketable Securities as well as proprietary equity and debt securities issued by First Leaside (the so-called "FL Products"). All segregated Marketable Securities are held in segregated client accounts with Penson Financial Services Canada Inc.

4 First Leaside designed its FL Products to provide investors with consistent monthly distributions. First Leaside acts as a real estate syndicate, purchasing real estate through limited partnerships with a view to rehabilitating the properties for lease at higher rates or eventual resale. First Leaside incorporated special-purpose corporations to act as general partners in the various LPs it set up. The general partners of First Leaside's Canadian LPs — i.e. those which own property in Canada — are applicants in this proceeding. First Leaside also seeks to extend the benefits of the Initial Order to the corresponding LPs.

5 First Leaside has two types of LPs: individual LPs that acquire and operate a single property or development, and aggregator LPs that hold units of multiple LPs. Investors have invested in both kinds of LPs. In paragraph 49 of his affidavit Mr. MacLeod detailed the LPs within First Leaside. While most First Leaside LPs hold interests in identifiable properties, for a few, called "Blind Pool LPs", clients invest funds without knowing where the funds likely were to be invested. Those LPs are described in paragraph 51 of Mr. MacLeod's affidavit.

6 The applicant, First Leaside Finance Inc. ("FL Finance"), acted as a "central bank" for the First Leaside group of entities.

### III. The material events leading to this application

7 In the fall of 2009 the Ontario Securities Commission began investigating First Leaside. In March, 2011, First Leaside retained the proposed Monitor, Grant Thornton Limited, to review and make recommendations about First Leaside's businesses. Around the same time First Leaside arranged for appraisals to be performed of various properties.

8 Grant Thornton released its report on August 19, 2011. For purposes of this application Grant Thornton made several material findings:

- (i) There exist significant interrelationships between the entities in the FL Group which result in a complex corporate structure;
- (ii) Certain LPs have been a drain on the resources of the Group as a result of recurring operating losses and property rehabilitation costs; and,
- (iii) The future viability of the FL Group was contingent on its ability to raise new capital:

If the FL Group was restricted from raising new capital, it would likely be unable to continue its operations in the ordinary course, as it would have insufficient revenue to support its infrastructure, staffing costs, distributions, and to meet their funding requirements for existing projects.

9 As a result of the report First Leaside hired additional staff to improve accounting resources and financial planning. Last November the Board appointed an Independent Committee to assume all decision-making authority in respect of First Leaside; the Group's founder, David Phillips, was no longer in charge of its management.

10 FLSI is regulated by both the OSC and the Investment Industry Regulatory Organization of Canada ("IIROC"). In October, 2011, IIROC issued FLSI a discretionary early warning level 2 letter prohibiting the company from reducing capital and placing other restrictions on its activities. At the same time the OSC told First Leaside that unless satisfactory arrangements were made to deal with its situation, the OSC almost certainly would take regulatory action, including seeking a cease trade order.

11 First Leaside agreed to a voluntary cease trade, retained Grant Thornton to act as an independent monitor, informed investors about those developments, and made available the August Grant Thornton report.

12 Because the cease trade restricted First Leaside's ability to raise capital, the Independent Committee decided in late November to cease distributions to clients, including distributions to LP unit holders, interest payments on client notes/debts, and dividends on common or preferred shares.

13 In December the Independent Committee decided to retain Mr. MacLeod as CRO for First Leaside and asked him to develop a workout plan, which he finalized in late January, 2012. Mr. MacLeod deposed that the downturn in the economy has resulted in First Leaside realizing lower operating income while incurring higher operational costs. In his affidavit Mr. MacLeod set out his conclusion about a workout plan:

After carefully analyzing the situation, my ultimate conclusion was that it was too risky and uncertain for First Leaside to pursue a resumption of previous operations, including the raising of capital. My recommendation to the Independent Committee was that First Leaside instead undertake an orderly wind-down of operations, involving:

- (a) Completing any ongoing property development activity which would create value for investors;
- (b) Realizing upon assets when it is feasible to do so (even where optimal realization might occur over the next 12 to 36 months);
- (c) Dealing with the significant inter-company debts; and,
- (d) Distributing proceeds to investors.

Mr. MacLeod further deposed:

[T]he best way to promote this wind-down is through a filing under the *CCAA* so that all issues — especially the numerous investor and creditor claims and inter-company claims — can be dealt with in one forum under the supervision of the court.

The Independent Committee approved Mr. MacLeod's recommendations. This application resulted.

#### IV. Availability of CCAA

##### *A. The financial condition of the applicants*

14 According to Mr. MacLeod, First Leaside has over \$370 million in assets under management. Some of those, however, are Marketable Securities. First Leaside is proposing that clients holding Marketable Securities (which are held in segregated accounts) be free to transfer them to another investment dealer during the *CCAA* process. As to the value of FL Products, Mr. MacLeod deposed that "it remains to be determined specifically how much value will be realized for investors on the LP units, debt instruments, and shares issued by the various First Leaside entities."

15 First Leaside's debt totals approximately \$308 million: \$176 million to secured creditors (mostly mortgagees) and \$132 million to unsecured creditors, including investors holding notes or other debt instruments.

16 Mr. MacLeod summarized his assessment of the financial status of the First Leaside Group as follows:

[S]ince GTL reported that the aggregate value of properties in the First Leaside exceeded the value of the properties, there will be net proceeds remaining to provide at least some return to subordinate creditors or equity holders (i.e., LP unit holders and corporation shareholders) in many of the First Leaside entities. The recovery will, of course, vary depending on the entity. At this stage, however, it is fair to conclude that there is a material equity deficit both in individual First Leaside entities and in the overall First Leaside group.

17 In his affidavit Mr. MacLeod also deposed, with respect to the financial situation of First Leaside, that:

- (i) The cease trade placed severe financial constraints on First Leaside as almost every business unit depended on the ability of FLWM and its subsidiaries to raise capital from investors;
- (ii) There are immediate cash flow crises at FLWM and most LPs;
- (iii) FLWM's cash reserves had fallen from \$2.8 million in November, 2011 to \$1.6 million at the end of this January;
- (iv) Absent new cash from asset disposals, current cash reserves would be exhausted in April;

(v) At the end of December, 2011 Ventures defaulted by failing to make a principal mortgage payment of \$4.25 million owing to KingSett;

(vi) Absent cash flow from FLWM a default is imminent for Investor's Harmony property;

(vii) First Leaside lacks the liquidity or refinancing options to rehabilitate a number of the properties and execute on its business plan; and,

(viii) First Leaside generally has been able to make mortgage payments to its creditors, but in the future it will be difficult to do so given the need to expend monies on property development and upgrading activities

18 In his description of the status of the employees of the Applicants, Mr. MacLeod did not identify any issue concerning a pension funding deficiency.<sup>1</sup> The internally-prepared 2010 FLWM financial statements did not record any such liability. Grant Thornton did not identify any such issue in its Pre-filing Report.

19 First Leaside is not proposing to place all of its operations under court-supervised insolvency proceedings. It does not plan to seek Chapter 11 protection for its Texas properties since it believes they may be able to continue operations over the anticipated wind-up period using cash flows they generate and pay their liabilities as they become due. Nor does First Leaside seek to include in this *CCAA* proceeding the First Leaside Venture LP ("Ventures") which owns and operates several properties in Ontario and British Columbia. On February 15, 2012 Ventures and Bridge Gap Konsult Inc. signed a non-binding term sheet to provide some bridge financing for Ventures. First Leaside decided not to include certain Ventures-related limited partnerships in the *CCAA* application at this stage,<sup>2</sup> while reserving the right to later bring a motion to extend the Initial Order and stay to these Excluded LPs. The Initial Order which I signed reflected that reservation.

20 As noted above, over the better part of the past year the proposed Monitor, Grant Thornton, has become familiar with the affairs of the First Leaside Group as a result of the review it conducted for its August, 2011 report. Last November First Leaside retained Grant Thornton as an independent monitor of its business.

21 In its Pre-filing Report Grant Thornton noted that the last available financial statements for FLWM were internally prepared ones for the year ended December 31, 2010. They showed a net loss of about \$2.863 million. The Pre-filing Report contained a 10-week cash flow projection (ending April 27, 2012) prepared by the First Leaside Group. The Cash Flow Projection does not contemplate servicing interest and principal payments during the projection period. On that basis the Cash Flow Projection showed the Group's combined closing bank balance declining from \$6.97 million to \$4.144 million by the end of the projection period. Grant Thornton reviewed the Cash Flow Projection and stated that it reflected the probable and hypothetical assumptions on which it was prepared and that the assumptions were suitably supported and consistent with the plans of the First Leaside Group and provided a reasonable basis for the Cash Flow Projection.

22 Grant Thornton reported that certain creditors, specifically construction lien claimants, had commenced enforcement proceedings and it concluded:

Given creditors' actions to date and due to the complicated nature of the FL Group's business, the complex corporate structure and the number of competing stakeholders, it is unlikely that the FL Group will be able to conduct an orderly wind-up or continue to rehabilitate properties without the stability provided by a formal Court supervised restructuring process.

...

As the various stakeholder interests are in many cases intertwined, including intercompany claims, the granting of the relief requested would provide a single forum for the numerous stakeholders of the FL Group to be heard and

to deal with such parties' claims in an orderly manner, under the supervision of the Court, a CRO and a Court-appointed Monitor. In particular, a simple or forced divestiture of the properties of the FL Group would not only erode potential investor value, but would not provide the structure necessary to reconcile investor interests on an equitable and ratable basis.

A stay of proceedings for both the Applicants and the LPs is necessary if it is deemed appropriate by this Honourable Court to allow the FL Group to maintain its business and to allow the FL Group the opportunity to develop, refine and implement their restructuring/wind-up plan(s) in a stabilized environment.

**B. Findings**

23 I am satisfied that the Applicants are "companies" within the meaning of the *CCAA* and that the total claims against the Applicants, as an affiliated group of companies, is greater than \$5 million.

24 Are the Applicant companies "debtor companies" in the sense that they are insolvent? For the purposes of the *CCAA* a company may be insolvent if it falls within the definition of an insolvent person in section 2 of the *Bankruptcy and Insolvency Act* or if its financial circumstances fall within the meaning of insolvent as described in *Stelco Inc., Re* which include a financially troubled corporation that is "reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring".<sup>3</sup>

25 When looked at as a group the Applicants fall within the extended meaning of "insolvent": as a result of the cease trade their ability to raise capital has been severely restricted; cash reserves fell significantly from November until the time of filing, and the Cash Flow Projection indicates that cash reserves will continue to decline even with the cessation of payments on mortgages and other debt; Mr. MacLeod estimated that cash reserves would run out in April; distributions to unit holders were suspended last November; and, some formal mortgage defaults have occurred.

26 However, a secured creditor mortgagee, Midland Loan Services Inc., submitted that to qualify for *CCAA* protection each individual applicant must be a "debtor company" and that in the case of one applicant, Queenston Manor General Partner Inc., that company was not insolvent. In his affidavit Mr. MacLeod deposed that the Queenston Manor LP is owned by the First Leaside Expansion Limited Partnership ("FLEX"). Queenston owns and operates a 77-unit retirement complex in St. Catherines, has been profitable since 2008 and is expected to remain profitable through 2013. Queenston has been listed for sale, and management currently is considering an offer to purchase the property. Midland Loan submitted that in light of that financial situation, no finding could be made that the applicant, Queenston Manor General Partner Inc., was a "debtor company".

27 Following that submission I asked Applicants' counsel where in the record one could find evidence about the insolvency of each individual Applicant. That prompted a break in the hearing, at the end of which the Applicants filed a supplementary affidavit from Mr. MacLeod. Indicating that one of the biggest problems facing the Applicants was the lack of complete and up-to-date records, in consultation with the Applicants' CFO Mr. MacLeod submitted a chart providing, to the extent possible, further information about the financial status of each Applicant. That chart broke down the financial status of each of the 52 Applicants as follows:

|  |    |
|--|----|
| Insolvent  | 28 |
| Dormant  | 15 |
| Little or no realizable assets   | 5  |
| More information to be made available to the court   | 3  |
| Other: management revenue stopped in 2010; \$70,000 cash; \$270,000 in related-company receivables | 1  |

Queenston Manor General Partner Inc. was one of the applicants for which "more information would be made available to the court".

28 As I have found, when looked at as a group, the Applicants fall within the extended meaning of "insolvent". When one descends a few levels and looks at the financial situation of some of the aggregator LPs, such as FLEX, Mr. MacLeod deposed that FLEX is one of the largest net debtors — i.e. it is unable to repay inter-company balances from operating cash flows and lacks sufficient net asset value to settle the intercompany balances through the immediate liquidation of assets. The evidence therefore supports a finding that the corporate general partner of FLEX is insolvent. Queenston Manor is one of several assets owned by FLEX, albeit an asset which uses the form of a limited partnership.

29 If an insolvent company owns a healthy asset in the form of a limited partnership does the health of that asset preclude it from being joined as an applicant in a *CCAA* proceeding? In the circumstances of this case it does not. The jurisprudence under the *CCAA* provides that the protection of the Act may be extended not only to a "debtor company", but also to entities who, in a very practical sense, are "necessary parties" to ensure that that stay order works. Morawetz J. put the matter the following way in *Prizm Income Fund, Re*:

The *CCAA* definition of an eligible company does not expressly include partnerships. However, *CCAA* courts have exercised jurisdiction to stay proceedings with respect to partnerships and limited partnerships where it is just and convenient to do so. See *Lehdorff, supra*, and *Re Canwest Global Communications Corp.*, 2009 CarswellOnt 6184 (S.C.J.).

The courts have held that this relief is appropriate where the operations of the debtor companies are so intertwined with those of the partnerships or limited partnerships in question, that not extending the stay would significantly impair the effectiveness of a stay in respect of the debtor companies.<sup>4</sup>

30 Although section 3(1) of the *CCAA* requires a court on an initial application to inquire into the solvency of any applicant, the jurisprudence also requires a court to take into account the relationship between any particular company and the larger group of which it is a member, as well as the need to place that company within the protection of the Initial Order so that the order will work effectively. On the evidence filed I had no hesitation in concluding that given the insolvency of the overall First Leaside Group and the high degree of inter-connectedness amongst the members of that group, the protection of the *CCAA* needed to extend both to the Applicants and the limited partnerships listed in Schedule "A" to the Initial Order. The presence of all those entities within the ambit of the Initial Order is necessary to effect an orderly winding-up of the insolvent group as a whole. Consequently, whether Queenston Manor General Partner Inc. falls under the Initial Order by virtue of being a "debtor company", or by virtue of being a necessary party as part of an intertwined whole, is, in the circumstances of this case, a distinction without a practical difference.

31 In sum, I am satisfied that those Applicants identified as "insolvent" on the chart attached to Mr. MacLeod's supplementary affidavit are "debtor companies" within the meaning of the *CCAA* and that the other Applicants, as well as the limited partnerships listed on Schedule "A" of the Initial Order, are entities to which it is necessary and appropriate to extend *CCAA* protection.

### C. "Liquidation" *CCAA*

32 While in most circumstances resort is made to the *CCAA* to "permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets" and to create "conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all", the reality is that "reorganizations of differing complexity require different legal mechanisms."<sup>5</sup> That reality has led courts to recognize that the *CCAA* may be used to sell substantially all of the assets of a debtor company to preserve it as a going concern under new ownership,<sup>6</sup> or to wind-up or liquidate it. In *Lehdorff General Partner Ltd., Re*<sup>7</sup> Farley J. observed:

It appears to me that the purpose of the *CCAA* is also to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company or simply a



substantial downsizing of its business operations, provided the same is proposed in the best interests of the creditors generally. See *Assoc. Investors, supra*, at p. 318; *Re Amirault Co.* (1951), 32 C.B.R. 1986, (1951) 5 D.L.R. 203 (N.S.S.C.) at pp. 187-8 (C.B.R.).

33 In the decision of *Associated Investors of Canada Ltd., Re* referred to by Farley J., the Alberta Court of Queen's Bench stated:

The realities of the modern marketplace dictate that courts of law respond to commercial problems in innovative ways without sacrificing legal principle. In my opinion, the Companies' Creditors Arrangement Act is not restricted in its application to companies which are to be kept in business. Moreover, the Court is not without the ability to address within its jurisdiction the concerns expressed in the Ontario cases. The Act may be invoked as a means of liquidating a company and winding-up its affairs but only if certain conditions precedent are met:

1. It must be demonstrated that benefits would likely flow to Creditors that would not otherwise be available if liquidation were effected pursuant to the Bankruptcy Act or the Winding-Up Act.
2. The Court must concurrently provide directions pursuant to compatible legislation that ensures judicial control over the liquidation process and an effective means whereby the affairs of the company may be investigated and the results of that investigation made available to the Court.
3. A Plan of Arrangement should not receive judicial sanction until the Court has in its possession, all of the evidence necessary to allow the Court to properly exercise its discretion according to standards of fairness and reasonableness, absent any findings of illegality.<sup>8</sup>

The editors of *The 2012 Annotated Bankruptcy and Insolvency Act* take some issue with the extent of those conditions:

With respect, these conditions may be too rigorous. If the court finds that the plan is fair and reasonable and in the best interests of creditors, and there are cogent reasons for using the statute rather than the *BIA* or *WURA*, there seems no reason why an orderly liquidation could not be carried out under the *CCAA*.<sup>9</sup>

34 Mr. MacLeod, the CRO, deposed that no viable plan exists to continue First Leaside as a going concern and that the most appropriate course of action is to effect an orderly wind-down of First Leaside's operations over a period of time and in a manner which will create the opportunity to realize improved net asset value. In his professional judgment the *CCAA* offered the most appropriate mechanism by which to conduct such an orderly liquidation:

[T]he best way to promote this wind-down is through a filing under the *CCAA* so that all issues — especially the numerous investor and creditor claims and the inter-company claims — can be dealt with in one forum under the supervision of the court.

In its Pre-filing Report the Monitor also supported using the *CCAA* to implement the "restructuring/wind-up plan(s) in a stabilized environment".

35 Both the CRO and the proposed Monitor possess extensive knowledge about the workings of the Applicants. Both support a process conducted under the *CCAA* as the most practical and effective way in which to deal with the affairs of this insolvent group of companies. No party contested the availability of the *CCAA* to conduct an orderly winding-up of the affairs of the Applicants (although, as noted, some parties questioned whether certain entities should be included within the scope of the Initial Order). Given that state of affairs, I saw no reason not to accept the professional judgment of the CRO and the proposed Monitor that a liquidation under the *CCAA* was the most appropriate route to take.

36 Moreover, I saw no prejudice to claimant creditors by permitting the winding-up of the First Leaside Group to proceed under the *CCAA* instead of under the *BIA* in view of the convergence which exists between the *CCAA* and *BIA* on the issue of priorities. As the Supreme Court of Canada pointed out in *Century Services*:

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.<sup>10</sup>

As the British Columbia Court of Appeal observed in *Caterpillar Financial Services Ltd. v. 360networks Corp.* interested parties also use that priorities backdrop to negotiate successful *CCAA* reorganizations:

While it might be suggested that *CCAA* proceedings may require those with a financial stake in the company, including shareholders and creditors, to compromise some of their rights in order to sustain the business, it cannot be said that the priorities between those with a financial stake are meaningless. The right of creditors to realize on any security may be suspended pending the final approval of the court, but this does not render their potential priority nugatory. Priorities are always in the background and influence the decisions of those who vote on the plan.<sup>11</sup>

37 I therefore concluded that the *CCAA* was available to the Applicants in the circumstances, and I so ordered.

#### V. Representative Counsel, CRO and Monitor

38 The Applicants sought the appointment of Fraser Milner Casgrain ("FMC") as Representative Counsel to represent the interests of the some 1,200 clients of FLSI in this proceeding, subject to the right of any client to opt-out of such representation. The proposed Monitor expressed the view that it would be in the best interests of the FL Group and its investors to appoint Representative Counsel. No party objected to such an appointment. I reviewed the qualifications and experience of proposed Representative Counsel and its proposed fees, and I was satisfied that it would be appropriate to appoint FMC as Representative Counsel on the terms set out in the Initial Order.

39 The Applicants sought the appointment of G.S. MacLeod & Associates Inc. as CRO of First Leaside. No party objected to that appointment. The Applicants included a copy of the CRO's December 21, 2011 Retention Agreement in their materials. The proposed Monitor stated that the appointment of a CRO was important to ensure an adequate level of senior corporate governance leadership. I agree, especially in light of the withdrawal of Mr. Phillips last November from the management of the Group. The proposed Monitor reported that the terms and conditions of the Retention Agreement were consistent with similar arrangements approved by other courts in *CCAA* proceedings and the remuneration payable was reasonable in the circumstances. As a result, I confirmed the appointment of G.S. MacLeod & Associates Inc. as CRO of First Leaside.

40 Finally, I appointed Grant Thornton as Monitor. No party objected, and Grant Thornton has extensive knowledge of the affairs of the First Leaside Group.

#### VI. Administration and D&O Charges and their priorities

##### A. Charges sought

41 The Applicants sought approval, pursuant to section 11.52 of the *CCAA*, of an Administration Charge in the amount of \$1 million to secure amounts owed to the Estate Professionals — First Leaside's legal advisors, the CRO, the Monitor, and the Monitor's counsel.

42 They also sought an order indemnifying the Applicants' directors and officers against any post-filing liabilities, together with approval, pursuant to section 11.51 of the *CCAA*, of a Director and Officer's Charge in the amount of \$250,000 as security for such an indemnity. Historically the First Leaside Group did not maintain D&O insurance, and the Independent Committee was not able to secure such insurance at reasonable rates and terms when it tried to do so in 2011.

43 The Monitor stated that the amount of the Administration Charge was established based on the Estate Professionals' previous history and experience with restructurings of similar magnitude and complexity. The Monitor regarded the amount of the D&O Charge as reasonable under the circumstances. The Monitor commented that the combined amount of both charges (\$1.25 million) was reasonable in comparison with the amount owing to mortgagees (\$176 million).

44 In its Pre-filing Report the Monitor did note that shortly before commencing this application the Applicants paid \$250,000 to counsel for the Independent Committee of the Board. The Monitor stated that the payment might "be subject to review by the Monitor, if/when it is appointed, in accordance with s. 36.1(1) of the *CCAA*". No party requested an adjudication of this issue, so I refer to the matter simply to record the Monitor's expression of concern.

45 Based on the evidence filed, I concluded that it was necessary to grant the charges sought in order to secure the services of the Estate Professionals and to ensure the continuation of the directors in their offices and that the amounts of the charges were reasonable in the circumstances.

#### ***B. Priority of charges***

46 The Applicants sought super-priority for the Administration and D&O Charges, with the Administration Charge enjoying first priority and the D&O Charge second, with some modification with respect to the property of FLSI which the Applicants had negotiated with IIROC.

47 In its Pre-filing Report the proposed Monitor stated that the mortgages appeared to be well collateralized, and the mortgagees would not be materially prejudiced by the granting of the proposed priority charges. The proposed Monitor reported that it planned to work with the Applicants to develop a methodology which would allocate the priority charges fairly amongst the Applicants and the included LPs, and the allocation methodology developed would be submitted to the Court for review and approval.

48 In *Indalex Ltd., Re*<sup>12</sup> the Court of Appeal reversed the super-priority initially given to a DIP Charge by the motions judge in an initial order and, instead, following the sale of the debtor company's assets, granted priority to deemed trusts for pension deficiencies. In reaching that decision Court of Appeal observed that affected persons — the pensioners — had not been provided at the beginning of the *CCAA* proceeding with an appropriate opportunity to participate in the issue of the priority of the DIP Charge.<sup>13</sup> Specifically, the Court of Appeal held:

In this case, there is nothing in the record to suggest that the issue of paramountcy was invoked on April 8, 2009, when Morawetz J. amended the Initial Order to include the super-priority charge. The documents before the court at that time did not alert the court to the issue or suggest that the *PBA* deemed trust would have to be overridden in order for Indalex to proceed with its DIP financing efforts while under *CCAA* protection. To the contrary, the affidavit of Timothy Stubbs, the then CEO of Indalex, sworn April 3, 2009, was the primary source of information before the court. In para. 74 of his affidavit, Mr. Stubbs deposes that Indalex intended to comply with all applicable laws including "regulatory deemed trust requirements".

While the super-priority charge provides that it ranks in priority over trusts, "statutory or otherwise", I do not read it as taking priority over the deemed trust in this case because the deemed trust was not identified by the court at the time the charge was granted and the affidavit evidence suggested such a priority was unnecessary. As no finding of paramountcy was made, valid provincial laws continue to operate: the super-priority charge does not override the *PBA* deemed trust. The two operate sequentially, with the deemed trust being satisfied first from the Reserve Fund.<sup>14</sup>

49 In his recent decision in *Timminco Ltd., Re*<sup>15</sup> ("Timminco I") Morawetz J. described the commercial reality underpinning requests for Administration and D&O Charges in *CCAA* proceedings:

In my view, in the absence of the court granting the requested super priority and protection, the objectives of the CCAA would be frustrated. It is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position should the Timminco Entities continue CCAA proceedings without the requested protection. The outcome of the failure to provide these respective groups with the requested protection would, in my view, result in the overwhelming likelihood that the CCAA proceedings would come to an abrupt halt, followed, in all likelihood, by bankruptcy proceedings.<sup>16</sup>

50 In its Pre-filing Report the proposed Monitor expressed the view that if the priority charges were not granted, the First Leaside Group likely would not be able to proceed under the CCAA.

51 In my view, absent an express order to the contrary by the initial order applications judge, the issue of the priorities enjoyed by administration, D&O and DIP lending charges should be finalized at the commencement of a CCAA proceeding. Professional services are provided, and DIP funding is advanced, in reliance on super-priorities contained in initial orders. To ensure the integrity, predictability and fairness of the CCAA process, certainty must accompany the granting of such super-priority charges. When those important objectives of the CCAA process are coupled with the Court of Appeal's holding that parties affected by such priority orders be given an opportunity to raise any paramouncy issue, it strikes me that a judge hearing an initial order application should directly raise with the parties the issue of the priority of the charges sought, including any possible issue of paramouncy in respect of competing claims on the debtor's property based on provincial legislation.

52 Accordingly I raised that issue at the commencement of the hearing last Thursday and requested submissions on the issues of priority and paramouncy from any interested party. Several parties made submissions on those points: (i) the Applicants, proposed Monitor and proposed Representative Counsel submitted that the Court should address any priority or paramouncy issues raised; (ii) IIROC advised that it did not see any paramouncy issue in respect of its interests; (iii) counsel for Midland Loan submitted that a paramouncy issue existed with respect to its client, a secured mortgagee, because it enjoyed certain property rights under provincial mortgage law; she also argued that the less than full day's notice of the hearing given by the Applicants was inadequate to permit the mortgagee to consider its position, and her client should be given seven days to do so; and, (iv) counsel for a construction lien claimant, Structform International, who spoke on behalf of a number of such lien claimants, made a similar submission, contending that the construction lien claimants required 10 days to determine whether they should make submissions on the relationship between their lien claims and any super-priority charge granted under the CCAA.

53 I did not grant the adjournment requested by the mortgagee and construction lien claimants for the following reasons. First, the facts in *Indalex* were quite different from those in the present case, involving as they did considerations of what fiduciary duty a debtor company owed to pensioners in respect of underfunded pension liabilities. I think caution must be exercised before extending the holding of *Indalex* concerning CCAA-authorized priority charges to other situations, such as the one before me, which do not involve claims involving pension deficiencies, but claims by more "ordinary" secured creditors, such as mortgagees and construction lien claimants.

54 Second, I have some difficulty seeing how constitutional issues of paramouncy arise in a CCAA proceeding as between claims to the debtor's property by secured creditors, such as mortgagees and construction lien claimants, and persons granted a super-priority charge by court order under sections 11.51 and 11.52 of the CCAA. At the risk of gross over-simplification, Canadian constitutional law places the issue of priorities of secured creditors in different legislative balliwicks depending on the health of the debtor company. When a company is healthy, secured creditor priorities usually are determined under provincial laws, such as personal property security legislation and related statutes, which result from provincial legislatures exercising their powers with respect to "property and civil rights in the province".<sup>17</sup> However, when a company gets sick — becomes insolvent — our *Constitution* vests in Parliament the power to craft the legislative regimes which will govern in those circumstances. Exercising its power in respect of "bankruptcy and insolvency",<sup>18</sup> Parliament has established legal frameworks under the *BIA* and *CCAA* to administer sick companies.

Priority determinations under the *CCAA* draw on those set out in the *BIA*, as well as the provisions of the *CCAA* dealing with specific claims such as Crown trusts and other claims.

55 As it has evolved over the years the constitutional doctrine of paramountcy polices the overlapping effects of valid federal and provincial legislation: "The doctrine applies not only to cases in which the provincial legislature has legislated pursuant to its ancillary power to trench on an area of federal jurisdiction, but also to situations in which the provincial legislature acts within its primary powers, and Parliament pursuant to its ancillary powers."<sup>19</sup> Since 1960 the Supreme Court of Canada has travelled a "path of judicial restraint in questions of paramountcy".<sup>20</sup> That Court has not been prepared to presume that, by legislating in respect of a matter, Parliament intended to rule out any possible provincial action in respect of that subject,<sup>21</sup> unless (and it is a big "unless"), Parliament used very clear statutory language to that effect.<sup>22</sup>

56 I have found that the Applicants have entered the world of the sick, or the insolvent, and are eligible for the protection of the federal *CCAA*. The federal legislation *expressly* brings mortgagees and construction lien claimants within its regime — the definition of "secured creditor" contained in section 2 of the *CCAA* specifically includes "a holder of a mortgage" and "a holder of a ...lien...on or against...all or any of the property of a debtor company as security for indebtedness of the debtor company". The federal legislation also *expressly* authorizes a court to grant priority to administration and D&O charges over the claims of such secured creditors of the debtor.<sup>23</sup> In light of those express provisions in sections 2, 11.51 and 11.52 of the *CCAA*, and my finding that the Applicants are eligible for the protection offered by the *CCAA*, I had great difficulty understanding what argument could be advanced by the mortgagees and construction lien claimants about the concurrent operation of provincial and federal law which would relieve them from the priority charge provisions of the *CCAA*. I therefore did not see any practical need for an adjournment.

57 Finally, sections 11.51(1) and 11.52(1) of the *CCAA* both require that notice be given to secured creditors who are likely to be affected by an administration or D&O charge before a court grants such charges. In the present case I was satisfied that such notice had been given. Was the notice adequate in the circumstances? I concluded that it was. To repeat, making due allowance for the unlimited creativity of lawyers, I have difficulty seeing what concurrent operation argument could be advanced by mortgagee and construction lien claims against court-ordered super-priority charges under sections 11.51 and 11.52 of the *CCAA*. Second, as reported by the proposed Monitor, the quantum of the priority charges (\$1.25 million) is reasonable in comparison with the amount owing to mortgagees (\$176 million) and the mortgages appeared to be well collateralized based on available information. Third, the Applicant and Monitor will develop an allocation methodology for the priority charges for later consideration by this Court. The proposed Monitor reported:

It is the Proposed Monitor's view that the allocation of the proposed Priority Charges should be carried out on an equitable and proportionate basis which recognizes the separate interests of the stakeholders of each of the entities.

The secured creditors will be able to make submissions on any proposed allocation of the priority charges. Finally, while I understand why the secured creditors are focusing on their specific interests, it must be recalled that the work secured by the priority charges will be performed for the benefit of all creditors of the Applicants, including the mortgagees and construction lien claimants. All creditors will benefit from an orderly winding-up of the affairs of the Applicants.

58 In the event that I am incorrect that no paramountcy issue arises in this case in respect of the priority charges, I echo the statements made by Morawetz J. in *Timminco* which I reproduced in paragraph 49 above. In *Indalex* the Court of Appeal accepted that "the *CCAA* judge can make an order granting a super-priority charge that has the effect of overriding provincial legislation".<sup>24</sup> I find that it is both necessary and appropriate to grant super priority to both the Administration and D&O Charges in order to ensure that the objectives of the *CCAA* are not frustrated.

59 For those reasons I did not grant the adjournment requested by Midland Loan and the construction lien claimants, concluding that they had been given adequate notice in the circumstances, and I granted the requested Administration and D&O Charges.

## VII. Other matters

60 At the hearing counsel for one of the construction lien claimants sought confirmation that by granting the Initial Order a construction lien claimant who had issued, but not served, a statement of claim prior to the granting of the order would not be prevented from serving the statement of claim on the Applicants. Counsel for the Applicants confirmed that such statements of claim could be served on it.

61 At the hearing the Applicants submitted a modified form of the model Initial Order. Certain amendments were proposed during the hearing; the parties had an opportunity to make submissions on the proposed amendments.

## VIII. Summary

62 For the foregoing reasons I was satisfied that it was appropriate to grant the CCAA Initial Order in the form requested. I signed the Initial Order at 4:08 p.m. EST on Thursday, February 23, 2012.

*Application granted.*

## Footnotes

1 MacLeod Affidavit, paras. 104 to 106.

2 The Excluded LPs were identified in paragraph 134 of Mr. MacLeod's affidavit.

3 (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]).

4 2011 ONSC 2061 (Ont. S.C.J.), paras. 26-27.

5 *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.), paras. 15, 77 and 78.

6 *Nortel Networks Corp., Re*, 2009 ONCA 833 (Ont. C.A.), para. 46; see Kevin P. McElcheran, *Commercial Insolvency in Canada, Second Edition* (Toronto: LexisNexis, 2011), pp. 284 et seq.

7 [1993] O.J. No. 14 (Ont. Gen. Div. [Commercial List]). In *Brake Pro Ltd., Re*, [2008] O.J. No. 2180 (Ont. S.C.J.), Wilton-Siegel J. stated, at paragraph 10: "While reservations are expressed from time to time regarding the appropriateness of a "liquidating" CCAA proceeding, such proceedings are permissible under the CCAA."

8 *Associated Investors of Canada Ltd., Re* (1987), 46 D.L.R. (4th) 669 (Alta. Q.B.), para. 36.

9 Houlden, Morawetz & Sarra, *The 2012 Annotated Bankruptcy and Insolvency Act*, N§1, p. 1099.

10 *Century Services, supra.*, para. 23.

11 (2007), 279 D.L.R. (4th) 701 (B.C. C.A.), para. 42.

12 2011 ONCA 265 (Ont. C.A.).

13 *Ibid.*, para. 155.

14 *Ibid.*, paras. 178 and 179.

15 2012 ONSC 506 (Ont. S.C.J. [Commercial List]).

16 *Ibid.*, para. 66.

17 *Constitution Act, 1867*, s. 92 ¶13.

18 *Ibid.*, s. 91 ¶21.

19 *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3 (S.C.C.), para. 69.

20 *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188 (S.C.C.), para. 21

21 *Canadian Western Bank*, *supra.*, para. 74.

22 *Rothmans*, *supra.*, para. 21.

23 CCAA ss. 11.51(2) and 11.52(2).

24 *Indalex*, *supra.*, para. 176.

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**TAB 12**



2009 CarswellOnt 4699  
Ontario Superior Court of Justice [Commercial List]

Grant Forest Products Inc., Re

2009 CarswellOnt 4699, [2009] O.J. No. 3344, 179 A.C.W.S. (3d) 517, 57 C.B.R. (5th) 128

**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 GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC., GRANT  
FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS GP (Applicants)

Newbould J.

Heard: August 6, 2009

Judgment: August 11, 2009

Docket: CV-09-8247-00CL

Counsel: A. Duncan Grace for GE Canada Leasing Services Company  
Daniel R. Dowdall, Jane O. Dietrich for Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales  
Inc., Grant U.S. Holdings GP  
Sean Dunphy, Katherine Mah for Monitor, Ernst & Young Inc.  
Kevin McElcheran for Toronto-Dominion Bank  
Stuart Brotman for Independent Directors

Subject: Insolvency

**Related Abridgment Classifications**

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

**Bankruptcy and insolvency**

XIX Companies' Creditors Arrangement Act

XIX.3 Arrangements

XIX.3.b Approval by court

XIX.3.b.iv Miscellaneous

**Headnote**

**Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court —  
Miscellaneous**

Applicant companies were leading manufacturer of oriented strand board — Parent company was G Inc — L was executive vice-president of G Inc — He owned no shares in G Inc — Employee retention plan ("ERP") agreement between G Inc. and L provided that if at any time before L turned 65 years of age, termination event occurred, and he was to be paid three times his then base salary — Agreement provided that obligation was to be secured by letter of credit and that if company made application under Companies' Creditors Arrangement Act, it would seek order creating charge on assets of company with priority satisfactory to L — In initial order, ERP agreement was approved and ERP charge on all of property of applicants as security for amounts that could be owing to L under ERP agreement was granted to L, ranking after administrative charge and investment offering advisory charge — Initial order was made without prejudice to G Co. to move to oppose ERP provisions — G Co. brought motion for order

to delete ERP provisions in initial order on basis that provisions had effect of preferring interest of L over interest of other creditors, including G Co. — Motion dismissed — ERP agreement and charge contained in initial order were appropriate and were to be maintained — To require key employee to have already received offer of employment from someone else before ERP agreement could be justified would not be something that is necessary or desirable — ERP agreement and charge were approved by board of directors of G Inc., including approval by independent directors — Once could not assume without more that these people did not have experience in these matters or know what was reasonable — Three-year severance payment was not so large on face of it to be unreasonable or unfair to other stakeholders — Though ERP agreement did not provide that payment should not be made before restructuring was complete, that was clearly its present intent, which was sufficient.

#### Table of Authorities

##### Cases considered by *Newbould J.*:

*MEI Computer Technology Group Inc., Re* (2005), 19 C.B.R. (5th) 257, 2005 CarswellQue 3675, [2005] R.J.Q. 1558 (C.S. Que.) — distinguished

*Nortel Networks Corp., Re* (2009), 2009 CarswellOnt 1519 (Ont. S.C.J. [Commercial List]) — considered

*Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

*Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd.* (2007), 2007 CarswellOnt 5799, 36 C.B.R. (5th) 296 (Ont. S.C.J.) — considered

*Warehouse Drug Store Ltd., Re* (2006), 24 C.B.R. (5th) 275, 2006 CarswellOnt 5128 (Ont. S.C.J.) — considered

##### Statutes considered:

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36  
Generally — referred to

MOTION by creditor for order to delete employee retention plan provisions in initial order.

##### *Newbould J.*:

1 KERP is an acronym for key employee retention plan. In the Initial Order of June 25, 2009, a KERP agreement between Grant Forest Products Inc. and Mr. Peter Lynch was approved and a KERP charge on all of the property of the applicants as security for the amounts that could be owing to Mr. Lynch under the KERP agreement was granted to Mr. Lynch ranking after the Administration Charge and the Investment Offering Advisory Charge. The Initial Order was made without prejudice to the right of GE Canada Leasing Services Company ("GE Canada") to move to oppose the KERP provisions.

2 GE Canada has now moved for an order to delete the KERP provisions in the Initial Order. GE Canada takes the position that these KERP provisions have the effect of preferring the interest of Mr. Lynch over the interest of the other creditors, including GE Canada.

##### **KERP Agreement and Charge**

3 The applicant companies have been a leading manufacturer of oriented strand board and have interests in three mills in Canada and two mills in the United States. The parent company is Grant Forest Products Inc. Grant Forest was founded by Peter Grant Sr. in 1980 and is privately owned by the Grant family. Peter Grant Sr. is the CEO, his son, Peter Grant Jr., is the president, having worked in the business for approximately fourteen years. Peter Lynch is 58 years old. He practised corporate commercial law from 1976 to 1993 during which time he acted on occasion for members of the Grant family. In 1993 he joined the business and became executive vice-president of Grant Forest. Mr. Lynch owns no shares in the business.

4 The only KERP agreement made was between Grant Forest and Mr. Lynch. It provides that if at any time before Mr. Lynch turns 65 years of age a termination event occurs, he shall be paid three times his then base salary. A termination event is defined as the termination of his employment for any reason other than just cause or resignation, constructive dismissal, the sale of the business or a material part of the assets, or a change of control of the company. The agreement provided that the obligation was to be secured by a letter of credit and that if the company made an application under the CCAA it would seek an order creating a charge on the assets of the company with priority satisfactory to Mr. Lynch. That provision led to the KERP charge in the Initial Order.

#### Creditors of the Applicants

5 Grant Forest has total funded debt obligations of approximately \$550 million in two levels of primary secured debt. The first lien lenders, for whom TD Bank is the agent, are owed approximately \$400 million. The second lien lenders are owed approximately \$150 million.

6 Grant Forest has unsecured trade creditors of over \$4 million as well as other unsecured debt obligations. GE Canada is an unsecured creditor of Grant Forest pursuant to a master aircraft leasing agreement with respect to three aircraft which have now been returned to GE Canada. GE Canada expects that after the aircraft have been sold, it will have a deficiency claim of approximately U.S. \$6.5 million.

7 The largest unsecured creditor is a numbered company owned by the Grant family interests which is owed approximately \$50 million for debt financing provided to the business.

#### Analysis

8 Whether KERP provisions such as the ones in this case should be ordered in a CCAA proceeding is a matter of discretion. While there are a small number of cases under the CCAA dealing with this issue, it certainly cannot be said that there is any established body of case law settling the principles to be considered. In *Houlden & Morawetz Bankruptcy and Insolvency Analysis*, West Law, 2009, it is stated:

In some instances, the court supervising the CCAA proceeding will authorize a key employee retention plan or key employee incentive plan. Such plans are aimed at retaining employees that are important to the management or operations of the debtor company in order to keep their skills within the company at a time when they are likely to look for other employment because of the company's financial distress. (Underlining added)

9 In *Canadian Insolvency in Canada* by Kevin P. McElcheran (LexisNexis - Butterworths) at p. 231, it is stated:

KERPs and special director compensation arrangements are heavily negotiated and controversial arrangements. ... Because of the controversial nature of KERP arrangements, it is important that any proposed KERP be scrutinized carefully by the monitor with a view to insisting that only true key employees are covered by the plan and that the KERP will not do more harm than good by failing to include the truly key employees and failing to treat them fairly. (Underlining added)

10 I accept these statements as generally applicable. In my view it is quite clear on the basis of the record before me that the KERP agreement and charge contained in the Initial Order are appropriate and should be maintained. There are a number of reasons for this.

11 The Monitor supports the KERP agreement and charge. Mr. Morrison has stated in the third report of the Monitor that as Mr. Lynch is a very seasoned executive, the Monitor would expect that he would consider other employment options if the KERP agreement were not secured by the KERP charge, and that his doing so could only distract from the marketing process that is underway with respect to the assets of the applicants. The Monitor has expressed the view that Mr. Lynch continuing role as a senior executive is important for the stability of the business and to enhance the effectiveness of the marketing process.

12 Mr. Hap Stephen, the Chairman and CEO of Stonecrest Capital Inc., appointed as the Chief Restructuring Advisor of the applicants in the Initial Order, pointed out in his affidavit that Mr. Lynch is the only senior officer of the applicants who is not a member of the Grant family and who works from Grant Forest's executive office in Toronto. He has sworn that the history, knowledge and stability that Mr. Lynch provides the applicants is crucial not only in dealing with potential investors during the restructuring to provide them with information regarding the applicants' operations, but also in making decisions regarding operations and management on a day-to-day basis during this period. He states that it would be extremely difficult at this stage of the restructuring to find a replacement to fulfill Mr. Lynch's current responsibilities and he has concern that if the KERP provisions in the Initial Order are removed, Mr. Lynch may begin to search for other professional opportunities given the uncertainty of his present position with the applicants. Mr. Stephen strongly supports the inclusion of the KERP provisions in the Initial Order.

13 It is contended on behalf of GE Canada that there is little evidence that Mr. Lynch has or will be foregoing other employment opportunities. Reliance is placed upon a statement of Leitch R.S.J. in *Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd.* (2007), 36 C.B.R. (5th) 296 (Ont. S.C.J.). In that case Leitch J. refused to approve a KERP arrangement for a number of reasons, including the fact that there was no contract for the proposed payment and it had not been reviewed by the court appointed receiver who was applying to the court for directions. Leitch J. stated in distinguishing the case before her from *Warehouse Drug Store Ltd., Re*, [2006] O.J. No. 3416 (Ont. S.C.J.), that there was no suggestion that any of the key employees in the case before her had alternative employment opportunities that they chose to forego.

14 I do not read the decision of Leitch J. in *Textron* to state that there must be an alternative job that an employee chose to forego in order for a KERP arrangement to be approved. It was only a distinguishing fact in the case before her from the *Warehouse Drug Store* case. Moreover, I do not think that a court should be hamstrung by any such rule in a matter that is one of discretion depending upon the circumstances of each case. The statement in *Houlden Morawetz* to which I have earlier referred that a KERP plan is aimed at retaining important employees when they are likely to look for other employment indicates a much broader intent, i.e. for a key employee who is likely to look for other employment rather than a key employee who has been offered another job but turned it down. In *Nortel Networks Corp., Re*, [2009] O.J. No. 1188 (Ont. S.C.J. [Commercial List]), Morawetz J. approved a KERP agreement in circumstances in which there was a "potential" loss of management at the time who were sought after by competitors. To require a key employee to have already received an offer of employment from someone else before a KERP agreement could be justified would not in my view be something that is necessary or desirable.

15 In this case, the concern of the Monitor and of Mr. Stephen that Mr. Lynch may consider other employment opportunities if the KERP provisions are not kept in place is not an idle concern. On his cross-examination on July 28, 2009, Mr. Lynch disclosed that recently he was approached on an unsolicited basis to submit to an interview for a position of CEO of another company in a different sector. He declined to be interviewed for the position. He stated that the KERP provisions played a role in his decision which might well have been different if the KERP provisions did not exist. This evidence is not surprising and quite understandable for a person of Mr. Lynch's age in the uncertain circumstances that exist with the applicants' business.

16 It is also contended by GE Canada that Mr. Lynch shares responsibilities with Mr. Grant Jr., the implication being that Mr. Lynch is not indispensable. This contention is contrary to the views of the Monitor and Mr. Stephen and is not supported by any cogent evidence. It also does not take into account the different status of Mr. Lynch and Mr. Grant Jr. Mr. Lynch is not a shareholder. One can readily understand that a prospective bidder in the marketing process that is now underway might want to hear from an experienced executive of the company who is not a shareholder and thus not conflicted. Mr. Dunphy on behalf of the Monitor submitted that Mr. Lynch is the only senior executive independent of the shareholders and that it is the Monitor's view that an unconflicted non-family executive is critical to the marketing process. The KERP agreement providing Mr. Lynch with a substantial termination payment in the event that the business is sold can be viewed as adding to his independence insofar as his dealing with respective bidders are concerned.

17 It is also contended on behalf of GE Canada that there is no material before the court to establish that the quantum of the termination payment, three times Mr. Lynch's salary at the time he is terminated, is reasonable. I do not accept that. The KERP agreement and charge were approved by the board of directors of Grant Forest, including approval by the independent directors. These independent directors included Mr. William Stinson, the former CEO of Canadian Pacific Limited and the lead director of Sun Life, Mr. Michael Harris, a former premier of Ontario, and Mr. Wallace, the president of a construction company and a director of Inco. The independent directors were advised by Mr. Levin, a very senior corporate counsel. One cannot assume without more that these people did not have experience in these matters or know what was reasonable.

18 A three year severance payment is not so large on the face of it to be unreasonable, or in this case, unfair to the other stakeholders. The business acumen of the board of directors of Grant Forest, including the independent directors, is one that a court should not ignore unless there is good reason on the record to ignore it. This is particularly so in light of the support of the Monitor and Mr. Stephens for the KERP provisions. Their business judgment cannot be ignored.

19 The Monitor is, of course, an officer of the court. The Chief Restructuring Advisor is not but has been appointed in the Initial Order. Their views deserve great weight and I would be reluctant to second guess them. The following statement of Gallagan J.A., in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.), while made in the context of the approval by a court appointed receiver of the sale of a business, is instructive in my view in considering the views of a Monitor, including the Monitor in this case and the views of the Chief Restructuring Advisor:

When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver.

20 The first lien security holders owed approximately \$400 million also support the KERP agreement and charge for Mr. Lynch. They too take the position that it is important to have Mr. Lynch involved in the restructuring process. Not only did they support the KERP provisions in the Initial Order, they negotiated section 10(1) of the Initial Order that provides that the applicants could not without the prior written approval of their agent, TD Bank, and the Monitor, make any changes to the officers or senior management. That is, without the consent of the TD Bank as agent for the first lien creditors, Mr. Lynch could not be terminated unless the Initial Order were later amended by court order to permit that to occur.

21 With respect to the fairness of the KERP provisions for Mr. Lynch and whether they unduly interfere with the rights of the creditors of the applicants, it appears that the potential cost of the KERP agreement, if it in fact occurs, will be borne by the secured creditors who either consent to the provisions or do not oppose them. The first lien lenders owed approximately \$400 million are consenting and the second lien lenders owed approximately \$150 million have not taken any steps to oppose the KERP provisions. It appears from marketing information provided by the Monitor and

Mr. Stephen to the Court on a confidential basis that the secured creditors will likely incur substantial shortfalls and that there likely will be no recovery for the unsecured creditors. Mr. Grace fairly acknowledged in argument that it is highly unlikely that there will be any recovery for the unsecured creditors. Even if that were not the case, and there was a reasonable prospect for some recovery by the unsecured creditors, the largest unsecured creditor, being the numbered company owned by the Grant family that is owed approximately \$50 million, supports the KERP provisions for Mr. Lynch.

22 In his work, *Canadian Insolvency in Canada, supra*, Mr. McElcheran states that because a KERP arrangement is intended to keep key personnel for the duration of the restructuring process, the compensation covered by the agreement should be deferred until after the restructuring or sale of the business has been completed, although he acknowledges that there may be stated "staged bonuses". While I agree that the logic of a KERP agreement leads to it reflecting these principles, I would be reluctant to hold that they are necessarily a code limiting the discretion of a CCAA court in making an order that is just and fair in the circumstances of the particular case.

23 In this case, the KERP agreement does not expressly provide that the payments are to await the completion of the restructuring. It proves that they are to be made within five days of termination of Mr. Lynch. There would be nothing on the face of the agreement to prevent Mr. Lynch being terminated before the restructuring was completed. However, it is clear that the company wants Mr. Lynch to stay through the restructuring. The intent is not to dismiss him before then. Mr. Dunphy submitted, which I accept, that the provision to pay the termination pay upon termination is to protect Mr. Lynch. Thus while the agreement does not provide that the payment should not be made before the restructuring is complete, that is clearly its present intent, which in my view is sufficient.

24 I have been referred to the case of *MEI Computer Technology Group Inc., Re* (2005), 19 C.B.R. (5th) 257 (C.S. Que.), a decision of Gascon J. in the Quebec Superior Court. In that case, Gascon J. refused to approve a charge for an employee retention plan in a CCAA proceeding. In doing so, Justice Gascon concluded there were guidelines to be followed, which included statements that the remedy was extraordinary that should be used sparingly, that the debtor should normally establish that there was an urgent need for the creation of the charge and that there must be a reasonable prospect of a successful restructuring. I do not agree that such guidelines are necessarily appropriate for a KERP agreement. Why, for example, refuse a KERP agreement if there was no reasonable prospect of a successful restructuring if the agreement provided for a payment on the restructuring? Justice Gascon accepted the submission of the debtor's counsel that the charge was the same as a charge for DIP financing, and took guidelines from DIP financing cases and commentary. I do not think that helpful. DIP financing and a KERP agreement are two different things. I decline to follow the case.

25 The motion by GE Canada to strike the KERP provisions from the Initial Order is denied. The applicants are entitled to their costs from GE Canada. If the quantum cannot be agreed, brief written submissions may be made.

*Motion dismissed.*

**TAB 13**

*Case Name:*

**Grant Forest Products Inc. v. GE Canada Leasing Services Co.**

**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 of Arrangement of  
Grant Forest Products Inc., Grant Alberta Inc., Grant Forest  
Products Sales Inc. and Grant U.S. Holdings GP, Applicants,  
and  
GE Canada Leasing Services Company, et al, Defendants**

[2013] O.J. No. 4599

2013 ONSC 5933

233 A.C.W.S. (3d) 373

6 C.B.R. (6th) 1

7 C.C.P.B. (2d) 239

93 E.T.R. (3d) 15

2013 CarswellOnt 14057

File No. CV-09-8247-00CL

Ontario Superior Court of Justice  
Commercial List

**C.L. Campbell J.**

Heard: July 23, 2013.

Judgment: September 20, 2013.

(133 paras.)

*Bankruptcy and insolvency law -- Assignments and petition into bankruptcy -- Petition and receiving orders -- Contestation -- Motion by West Face Capital, a second lien creditor of Grant*



*Forest, for order lifting stay of proceedings under Companies Creditors Arrangement Act to facilitate issuance of Bankruptcy Order allowed -- Monitor had held back funds from sale of assets in amount of estimated windup deficit in two pension plans -- West Face wanted to commence bankruptcy proceedings to preserve its priority to funds -- West Face's interests should prevail -- Otherwise deemed trust not existing at time of Initial Order and not recognized under bankruptcy regime would have priority.*

*Pensions and benefits law -- Private pension plans -- Administration of pensions -- Winding-up of plan -- Bankruptcy, effect of -- Motion by West Face Capital, a second lien creditor of Grant Forest, for order lifting stay of proceedings under Companies Creditors Arrangement Act to facilitate issuance of Bankruptcy Order allowed -- Monitor had held back funds from sale of assets in amount of estimated windup deficit in two pension plans -- West Face wanted to commence bankruptcy proceedings to preserve its priority to funds -- West Face's interests should prevail -- Otherwise deemed trust not existing at time of Initial Order and not recognized under bankruptcy regime would have priority.*

Motion by West Face Capital, a second lien creditor of Grant Forest, for an order lifting the stay of proceedings under the Companies Creditors Arrangement Act for the purpose of facilitating the issuance of a Bankruptcy Order in respect of Grant Forest. West Face wanted to commence bankruptcy proceedings in order to preserve its priority secured interests. The priority issue was between the Administrator on behalf of the pension plans of Forest Grant and West Face Capital. The Monitor had held funds in escrow from the sale of assets. The two defined benefit pension plans were now in the process of being wound up. An Initial Order under the Companies Creditors Arrangement Act was made in 2009. Pursuant to a 2011 order, Grant Forest was to wind up the pension plans and the Monitor was to hold back from any distribution to creditors the amount estimated at that time to be the windup deficit in the plans. Neither of the pension plans was in windup process at the time of the Initial Order or for some time after.

HELD: Motion allowed. The priority of proceeds was to the secured creditors in respect of those amounts that otherwise would be payable in respect of windup deficiencies in the pension plans. In the absence of provisions in a Plan under the Companies Creditors Arrangement Act or a specific court order, any creditor was at liberty to request that the CAAA proceedings be terminated if that creditor's position might be better advanced under the Bankruptcy and Insolvency Act. West Face's interests should prevail because otherwise a deemed trust which did not exist at the time of the Initial Order would de facto be given priority by the requirement that Grant Forest make wind up deficiency payments to pay priorities that would not be recognized under the bankruptcy regime.

**Statutes, Regulations and Rules Cited:**

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3,

Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36,

Pension Benefit Act, s. 57(3), s. 57(4)

**Counsel:**

Craig J. Hill, Roger Jaipargas for West Face Capital.

Alex Cobb, for PWC, Pension Administrator.

Mark Bailey, for Superintendent of Financial Services.

Richard Swan, Jonathan Bell, for Peter Grant Sr.

David Byers, Daniel Murdoch, for Ernst & Young.

Jane Dietrich, for the remaining applicants.

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**REASONS FOR DECISION**

**1 C.L. CAMPBELL J.:**-- This decision deals with issues in respect of two defined benefit pension plans of Grant Forest Products Inc. (GFPI) both now in the process of being wound up.

**Procedural Issues**

**2** The motion seeking relief was originally made returnable June 25, 2012 and adjourned on several occasions, the latest being to enable counsel to make submissions following the release in February of this year of the decision of the Supreme Court of Canada in *Sun Indalex Finance, LLC v. United Steelworkers [2013] S.C.J. No. 6. (Indalex)*.

**3** The several specific issues arise based on certain of the facts of this case which give rise to a priority claim by pension beneficiaries in respect of the remaining funds in the hands of the Monitor following the sale of the assets of GFPI. The priority issue is between the Administrator on behalf of the pension plans of GFPI and a Second Lien creditor of GFPI, namely, West Face Capital.

**4** The Initial Order under the CCAA was made June 25, 2009 and provided for a Stay of proceedings to enable a restructuring (liquidation) of the assets of the various entities which for the purposes of this decision can be referred to as the remaining applicant or GFPI.

**5** As at June 25, 2009 there was an outstanding Petition in Bankruptcy issued March 19, 2009 in respect of GFPI initiated by various senior secured creditors which has not to date been proceeded with.

6 The Initial Order contained a term (standard model order language) that "entitled but not required" GFPI to make pension contributions among other ongoing expenses.

**The Pension Plans**

7 As at the date of the Initial Order there were 4 pension plans of GFPI, two of which were defined benefit plans and are the ones at issue here.

8 The relevant dates with respect to the windup of the two defined benefit plans are as follows:

Salaried Plan:

The initiation of windup was as a result of an Order dated February 27, 2012.  
The effective date of windup was made as of March 31, 2011.

Executive Plan:

The initiation of Plan windup was undertaken by the Superintendent of Financial Services as a result of the Order dated February 27, 2012 with the effective date of wind up being June 30, 2010.

9 The "effective date" as the term appears in the *Pension Benefit Act (PBA)* Ontario is chosen for actuarial purposes as the last date of contributions to the Plans.

10 None of the above dates preceded the Initial Order of June 2009. The major sale of assets to Georgia Pacific was by Order dated May 26, 2010 with the last significant sale of assets February 20, 2011.

11 There were no deemed trusts in existence either at the date of the Initial Order of June 2009 or the last significant sale of assets in February 2011.

12 The Court granted Orders that were unopposed on the 26th day of August and the 21st day of September 2011 which authorized the following:

- i) GFPI to take steps to initiate windup of the Timmins Salaried Plan, the appointment of a replacement administrator of such plan;
- ii) GFPI to take steps to initiate a windup of both the Salaried and Executive Plans.

13 The orders directed the Monitor to hold back from any distribution to creditors of GFPI the amount estimated at that time to be the windup deficit in the plans. The Monitor began holding in

escrow an amount of \$191,245 with respect to the Salaried Plan and \$2,185,000 with respect to the Executive Plan.

14 The issue of deemed trust arising as a result of the Windup Orders was not sought to be determined by any party at the time of the August and September 2011 Orders.

15 When motions now before the Court first came on for hearing on August 27, 2012 the Court was advised that the Supreme Court of Canada had under reserve its decision in *Indalex* which among other things was to deal with the existence and priority of deemed trust amounts under the *PBA* in the context of *CCAA* proceeding.

16 The motion returnable on August 27, 2012 by the applicant was for direction with respect to the payment of amounts held in escrow by the Monitor in respect of pensions.

17 The position of both the Monitor and GFPI at that time was that there should be no further payments made on behalf of the pension plans or distribution of any further amounts to the Second Lien Lenders until following release of the decision of the Supreme Court of Canada in *Indalex*.

18 The Monitor reported for the motion of August 2012 that the expectation of a windup deficit of both plans would be in excess of \$2.3 million. The position of PWC as Administrator of the Plans was that amounts available by way of windup deficit under both plans should be made pursuant to the provisions of the *PBA*.

19 The position of the Monitor and GFPI prevailed, and the motion for direction adjourned to November 2012 when both that motion and the companion motion of West Face on behalf of Second Lien Lenders for a lifting of the stay under the *CCAA* to permit the petition in bankruptcy to proceed were heard.

20 Following submissions in November 2012, decision was reserved and following the decision of the Supreme Court of Canada in *Indalex* in February 2013 the parties to this proceeding were invited to provide further submissions based on that decision together with updated figures on amounts held and sums claimed due under the windup of the Pension Plans.

21 In addition Counsel and their clients did attempt to see if the issues could be resolved without the necessity of further decision. Not surprisingly, given the complexity of issues that still remain following *Indalex* and despite diligent efforts a determination on the motions is required.

### **Legal Analysis**

22 In the *Indalex* decision -- the members of Supreme Court of Canada were divided and in particular on the issue of deemed trust arising on windup in the context of a *CCAA* proceeding.

23 Justice Cromwell in the introduction to his reasons in *Indalex* at paragraph 85 of the decision describes the general problem associated with pensions and insolvent corporations.

[85] When a business becomes insolvent, many interests are at risk. Creditors may not be able to recover their debts, investors may lose their investments and employees may lose their jobs. If the business is the sponsor of an employee pension plan, the benefits promised by the plan are not immune from that risk. The circumstances leading to these appeals show how that risk can materialize. Pension plans and creditors find themselves in a zero-sum game with not enough money to go around. At a very general level, this case raises the issue of how the law balances the interests of pension plan beneficiaries with those of other creditors.

[86] Indalex Limited, the sponsor and administrator of employee pension plans, became insolvent and sought protection from its creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). Although all current contributions were up to date, the company's pension plans did not have sufficient assets to fulfill the pension promises made to their members. In a series of sanctioned steps, which were judged to be in the best interests of all stakeholders, the company borrowed a great deal of money to allow it to continue to operate. The parties injecting the operating money were given a super priority over the claims by other creditors. When the business was sold, thereby preserving hundreds of jobs, there was a shortfall between the sale proceeds and the debt. The pension plan beneficiaries thus found themselves in a dispute about the priority of their claims. The appellant, Sun Indalex Finance LLC, claimed it had priority by virtue of the super priority granted in the CCAA proceedings. The trustee in bankruptcy of the U.S. Debtors (George Miller) and the Monitor (FTI Consulting) joined in the appeal. The plan beneficiaries claimed that they had priority by virtue of a statutory deemed trust under the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("PBA"), and a constructive trust arising from the company's alleged breaches of fiduciary duty.

**24** Justice Deschamps described in paragraph 44 the importance of the deemed trust under the *PBA*:

The deemed trust provision is a remedial one. Its purpose is to protect the interests of plan members. This purpose militates against the adopting the limited scope proposed by Indalex and some of the interveners. In the case of competing priorities between creditors, the remedial purpose favors an approach that includes all wind up payments in the value of the deemed trust in order to achieve a broad protection.

**25** The majority position as set out above in the reasons of Justice Deschamps prevailed over the reasons of Justice Cromwell (for himself Chief Justice McLachlan and Rothstein J.) which held in

essence the deficiency amounts could only "accrue" as that word is used in s. 57(4) of the *PBA* when the amount is ascertainable. All of the justices agreed that the deemed trust provision contained in s. 57(4) of the *PBA* does not apply to the windup deficit of a pension plan that has not been wound up (the Indalex Executive Plan) at the time of *CCAA* proceedings.

**26** The legal analysis in *Indalex* commenced with the 2010 decision of the Supreme Court of Canada in *Century Services Inc. v. Canada (Attorney General)* 2010 SCC 60.

**27** In addition to providing definitive guidance on the purpose of the *CCAA* and the relationship between the *CCAA* and the *BIA*, more specifically on the facts of *Century Services* the Court held the deemed trust provisions of the *Federal Excise Tax Act* did not give rise to a priority over other creditors in a *CCAA* proceeding.

**28** It was held in *Century Services* that the *CCAA* and the *BIA* are to be read harmoniously and further that in the absence of express language carving out an exception for GST claims the provisions in both statutes nullify statutory deemed trusts in favour of the Crown.

**29** In summary, the more limited and general provisions of the *CCAA* permit insolvent corporations to restructure or indeed liquidate in a flexible and less formal fashion than would otherwise prevail with respect to priorities under the *BIA*.

**30** Prior to the arrival of *Indalex* in this Court in 2009<sup>1</sup>, the governing decision dealing with pension claims of a deemed trust under the *PBA* seeking priority for unpaid pension contributions over secured creditors in a *CCAA* proceeding where the companies were unable to restructure and secured creditors sought to put the company into bankruptcy is *Ivaco (Re)* [2006] O.J. No. 4152 (C.A.).

**31** Laskin JA for the Court of Appeal dealt with the argument that the provincial deemed trust takes priority based on a gap that exists between the *CCAA* and the *BIA* in the following passage:

[61] The Superintendent's submission that the motions judge was required to order payment of the outstanding contributions rests on the proposition that a gap exists between the *CCAA* and the *BIA* in which the Provincial deemed trusts can be executed. This proposition runs contrary to the federal bankruptcy and insolvency regime and to the principle that the province cannot reorder priorities in bankruptcy.

[62] The federal insolvency regime includes the *CCAA* and the *BIA*. The two statutes are related. A debtor company under the *CCAA* is defined in s. 2 by the company's bankruptcy or insolvency. Section 11(3) authorizes a thirty-day stay of any current or prospective proceedings under the *BIA*, and s. 11(4) authorizes an extension of the initial thirty-day period. During the stay period, creditor

claims and bankruptcy proceedings are suspended. Once the stay is lifted by court order or terminates by its own terms, simultaneously the creditor claims and bankruptcy proceedings are revived and may go forward.

[63] For the Superintendent's position to be correct, there would have to be a gap between the end of the *CCAA* period and bankruptcy proceedings, in which the pension beneficiaries' rights under the deemed trusts crystallize before the rights of all other creditors, including their right to bring a bankruptcy petition. That position is illogical. All rights must crystallize simultaneously at the end of the *CCAA* period. There is simply no gap in the federal insolvency regime in which the provincial deemed trusts alone can operate. That is obviously so on the facts in this case because the Bank of Nova Scotia had already commenced a petition for bankruptcy, which was stayed by the initial order under the *CCAA*. Once the motions judge lifted the stay, the petition was revived. In my view, however, the situation would be the same even if no bankruptcy petition was pending.

[64] Where a creditor seeks to petition a debtor company into bankruptcy at the end of *CCAA* proceedings, any claim under a provincial deemed trust must be dealt with in bankruptcy proceedings. The *CCAA* and the *BIA* create a complementary and interrelated scheme for dealing with the property of insolvent companies, a scheme that occupies the field and ousts the application of provincial legislation. Were it otherwise, creditors might be tempted to forgo efforts to restructure a debtor company and instead put the company immediately into bankruptcy. That would not be a desirable result.

[65] Also, giving effect to the Superintendent's position, in substance, would allow a province to do indirectly what it is precluded from doing directly. Just as a province cannot directly create its own priorities or alter the scheme of distribution of property under the *BIA*, neither can it do so indirectly. See *Husky Oil, supra*, at paras, 32 and 39. At bottom the Superintendent seeks to alter the scheme for distributing an insolvent company's assets under the *BIA*. It cannot do so.

[66] The Superintendent relies on one authority in support of its position: the decision of the motions judge in *Usarco*, [1991] O.J. No. 1314. In that case, although a bankruptcy petition had been brought, Farley J. nonetheless ordered the receiver to pay to the pension plan administrator the amount of the deemed trusts under the *PBA*. However, the facts in *Usarco* differed materially from the

facts in this case.

[67] In *Usarco*, CCAA proceedings did not precede the bankruptcy petition. Moreover, in *Usarco* the petitioning creditor was not proceeding with its bankruptcy petition because its principal had died, and no other creditor took steps to advance the petition. Thus, unlike in this case, in *Usarco* it was unclear whether bankruptcy proceedings would ever take place.

[68] Recently in *Re General Chemical Canada Ltd.*, [2005] O.J. No. 5436, Campbell J. relied on this distinction, followed the motions judge's decision in the present case and refused to order payment of the amount of the deemed trusts under the PBA. He wrote at para. 35:

To conclude otherwise (absent improper motive on the part of Company or a major creditor) would be to negate both CCAA proceedings and bankruptcy proceedings by preventing creditors from pursuing a process of equitable distribution of the debtor's property as they believe it to be when making their decisions.

I agree. The factual differences between *General Chemical* and this case on the one hand, and *Usarco* on the other, render *Usarco* of no assistance to the Superintendent on this appeal.

[69] Because the federal legislative regime under the CCAA and the BIA determines the claims of creditors of an insolvent company, if the rights of pension claimants are to be given greater priority, Parliament, not the courts, must do so. And Parliament has at least signalled its intention to do so.

**32** The further argument of unfairness in permitting a petition into bankruptcy to proceed if the companies was rejected (see paragraph 77 in *Ivaco*):

The motions judge took into account the likely result of the Superintendent's claims if the Companies are put into bankruptcy. He recognized that bankruptcy would potentially reverse the priority accorded to the pension claims outside bankruptcy. Nonetheless, having weighed all the competing considerations, he exercised his discretion to lift the stay and permit the bankruptcy petitions to proceed. In my view, he exercised his discretion properly. I would not give effect to this ground of appeal.



33 The issues in *Indalex* involved, as those in this instance do, pension plans, but with a difference. While both the plans faced funding deficiencies when *Indalex* filed for an Initial Order under the CCAA and requested a stay, the financial distress threatened the interests of all plan members. Following the Initial Order the Company was authorized to borrow US\$24.4 million from DIP (Debtor in Possession) lenders who were granted priority over all other creditors.

34 The plan members in *Indalex* sought, at the time of the Sanction and Approval Order a declaration that a deemed trust equal in amount to the unfunded pension liability was enforceable by way of priority over secured creditors with respect to the proceeds of assets sold. The parties reached agreement on an amount to be held by the Monitor subject to the Courts' determination as to whether or not the funds held were being held subject to a deemed trust.

35 This Court's decision in *Indalex*<sup>2</sup> held that the deemed trust did not prevail over the priority of DIP financiers was appealed. On appeal to the Court of Appeal of Ontario the claims of deemed trust, of breach of fiduciary duty against the company and the requested remedy of constructive trust were successful.

36 At the time of the Initial Order in *Indalex* the *Indalex* salary plan was in windup with a windup deficiency order. As at the date of the *Indalex* Initial Order the executive plan had not been wound up.

37 The Supreme Court of Canada in *Indalex* was divided on the issues before it. Four of the judges being Deschamps, Moldaver JJ joined by Lebel J. and Abella J. on the issue held that the deemed trust provision of s. 57(4) of the *PBA* did provide a statutory scheme to provide a deemed trust in respect of the plan which had been wound up, which trust extended to the windup deficiency payments required by s. 75(1)(b) of the Act which had "accrued" but were not yet due at the time of the sale of assets.<sup>3</sup>

38 The three judges of the minority on the issue, being Chief Justice McLachlin, Justices Rothstein and Cromwell JJ., concluded that given the legislative history and evolution of the provisions the legislature never intended to include windup deficiency in a statutory deemed trust -- rather the legislative intent is to exclude from the deemed trust liabilities that arise only on the date of wind up.

39 Five of the judges, which excluded Lebel and Abella JJ., concluded that given the doctrine of federal paramountcy the DIP charges superseded the provincial statutory deemed trust which Abella J., Lebel J., Deschamps J. and Moldaver J. had found.

40 Those same five judges concluded that the circumstances for the application of a constructive trust were not met notwithstanding a breach of duty by the applicant to give all plan members notice prior to the return of the motion seeking an Initial Order.

41 The context of *Indalex's* distress was set out in the following paragraph from the reasons of

Deschamps J.:

8. Indalex's financial distress threatened the interests of all the Plan members. If the reorganization failed and Indalex were liquidated under the *Bankruptcy and Insolvency Act*, R.S.C, 1985, c.B-3 ("*BIA*"), they would not have recovered any of their claims against Indalex for the underfunded pension liabilities, because the priority created by the provincial statute would not be recognized under the federal legislation: *Husky Oil Operations Ltd v. Minister of National Revenue*, [1995] 3 S.C.R. 453. Although the priority was not rendered ineffective by the *CCAA* the Plan Members' position was uncertain.

42 As was noted by the Supreme Court of Canada in *Century Services*<sup>4</sup> the *CCAA* and the *BIA* are two statutory regimes for re-organization and or liquidation. Of the two federal statutes the *CCAA* provides the opportunity for orderly restructuring and or liquidation with supervision by the Court.

43 The *BIA* deals with priority distribution when there is no further purpose for the application of the *CCAA*. In the ordinary case under the *CCAA* an applicant company, following the Initial Order, seeks out agreement with its creditors and the formulation of a proposed Plan to be voted on by the creditors which when approved by the Court in effect creates a contract between the company and its creditors. (see *Red Cross* (2002), 35 C.B.R. (4th) 43 (SCJ).

44 What has become more prominent in recent times has been the occurrence of what has become to be known as the liquidating *CCAA* of which both *Indalex* and GFPI are leading examples.

#### **The Factual Distinction between *Indalex* and GFPI**

45 In this case the 29th Report of the Monitor dated February 21, 2013 describes the nature of the business of GFPI and its subsidiaries which manufactured Strand Board from facilities located in Canada and the United States.

46 The Report goes on at paragraphs 29 to 32 to detail the deficiencies in the special payments required to be paid under the PBA to fund the windup deficiencies in the plans. Unlike the situation in *Indalex* neither of the pension plans of GFPI were in windup process at the time of the Initial Order or for some time after. Unlike *Indalex* there was no request made for DIP prior to a sale of assets following the Initial Order.

47 Unlike *Indalex*, the Initial Order re GFPI contemplated in this case that the business of the company would continue for the purpose of the orderly disposition of various assets being various types of mills in Canada and the United States. The most significant of which were sold to Georgia Pacific, which has continued the operation of some of the mills.

48 The summary of the position of the Plans as of the date of July 2013 is as follows:

The Salaried Plan Wind Up Report disclosed an estimated windup deficit of \$726,481. The Required Salaried Plan Payment as of August 24, 2012 was \$328,298 plus interest from March 31, 2012, which amount was due to be paid by GFPI into the Salaried Plan.

The required Salaried Plan Payment as at November 27, 2012 was \$339,923. This amount includes interest in the amount of \$11,625 (determined using the same rate used in determining the amount of the annual special payments needed to liquidate the windup deficiency). It is contested that interest should be included.

The Required Salaried Plan Payment as at March 31, 2013 was \$485,715, including interest in the amount of \$15,883. It is contested that interest should be included.

The Executive Plan Wind-Up Report disclosed an estimated wind-up deficit of \$2,384,688.

The required Executive Plan Payment as of August 24, 2012 was \$1,263,186 plus interest from February 29, 2012, which amount was due to be paid by GFPI into the Executive Plan.

The required Executive Plan Payment as at November 27, 2012 was \$1,281,639, including interest in the amount of \$18,453. It is contested that interest should be included.

The required Executive Plan Payment as at March 31, 2013 was \$1,764,275, including interest in the amount of \$20,803. GFPI does not accept that interest should be included.

**49** Submissions with respect to the Pension Motion were heard on November 27, 2012. During the same hearing, submissions were also heard on a motion by West Face Capital Inc. for an order lifting the stay of proceedings herein to facilitate a bankruptcy order against GFPI (the Bankruptcy Motion). Following that hearing, further written submissions were provided by the parties concerning the impact of the decision of the Supreme Court of Canada in *Re Indalex* on the issues in the two motions.

50 The GFPI situation is a prime example of the flexible operation of the *CCAA*. The assets of the liquidating company were sold in a manner to provide the maximum benefit possible to the widest group of stakeholders.

51 In this case the sale of certain of the assets on a going concern basis permitted the continuation of employment and benefits for many in the locality of the plants that they had previously worked in. The alternative in bankruptcy under the *BIA* might well have resulted in loss of employment for many and less recovery for all the secured creditors.

52 The liquidation of the applicant under the *CCAA* did not proceed under an explicit Plan voted on by the creditors and approved by the Court.

53 What did proceed was an Initial Order that in addition to a stay of proceedings (which has continued), permitted, but did not require the Applicant to pay ordinary operating expenses in the course of liquidating assets under the *CCAA* for the benefit of all stakeholders.

54 The Initial Order specifically provides in paragraph 5 as follows:

[5] **THIS COURT ORDERS** that the Applicants shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order;

- (a) all outstanding and future wages, salaries, employee benefits and pension contributions, vacation pay, bonuses, and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements, which, for greater certainty, shall not include any payments in respect of employee termination or severance; and

55 No creditors including those representing the members of the pension plans opposed the granting of the Initial Order; the representatives of pension plans did not oppose the sale of assets on the occasions in which approval was sought and did not raise the issue of deemed trust until the windup orders made in August 2012.

56 There was no objection on the part of any party to the payment which the Applicant made to the pension plans being the regular and ordinary contributions under the plans from 2009 until the wind up date.

57 Up to August 2012 there was no request made on the part of the pension plans to set aside the Initial Order and provide for what might have been expected to be a deemed trust under wind up.

## THE FIRST ISSUE.

**Are any funds held by the Monitor and/or GFPI deemed to be held in trust pursuant to subsections 57(3) or 57(4) of the PBA for the beneficiaries of each of the Pension Plans as a result of the wind-up of the Pension Plans, and if so, what amounts of the funds held by the Monitor and/or GFPI are deemed to be held in trust?**

**58** As noted above one of the two defined benefit pension plans at issue in *Indalex* was wound up prior to the commencement of the *CCAA* proceeding, and the other pension plan was wound up after the filing and the sale of *Indalex's* assets. The Supreme Court of Canada in *Indalex* did not find a deemed trust in respect of the latter pension plan. In considering this first issue, therefore, it is necessary to address the threshold issue of whether a deemed trust can be created during the pendency of a stay of proceedings.

**59** The majority in the Supreme Court of Canada in *Indalex* concluded that prior to an Initial Order a deemed trust did indeed arise when a pension plan was wound up in respect of windup deficits notwithstanding the difficulty in ascertaining the precise amount of the trust.

**60** One of the arguments made before the Supreme Court of Canada in *Indalex* and was rejected was that the priorities under the *CCAA* should parallel those under the *BIA* with the result that at the time of the Initial Order under the *CCAA* the *BIA* priorities by which pension claims would be unsecured would prevail. The following passage in the decision of Deschamps J. for herself and the majority that dealt with that issue rejected the proposition:

[50] The Appellants' first argument would expand the holding of *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 (CanLII), 2010 SCC 60, [2010] 3 S.C.R. 379, so as to apply federal bankruptcy priorities to *CCAA* proceedings, with the effect that claims would be treated similarly under the *CCAA* and the *BIA*. In *Century Services*, the Court noted that there are points at which the two schemes converge:

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.]

[51] In order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements, Yet this does not mean that courts may read bankruptcy priorities into the *CCAA* at will. Provincial legislation defines the priorities to which creditors are entitled until

that legislation is ousted by Parliament. Parliament did not expressly apply all bankruptcy priorities either to *CCAA* proceedings or to proposals under the *BIA*. Although the creditors of a corporation that is attempting to reorganize may bargain in the shadow of their bankruptcy entitlements, those entitlements remain only shadows until bankruptcy occurs. At the outset of the insolvency proceedings, Indalex opted for a process governed by the *CCAA*, leaving no doubt that although it wanted to protect its employees' jobs, it would not survive as their employer. This was not a case in which a failed arrangement forced a company into liquidation under the *BIA*. Indalex achieved the goal it was pursuing. It chose to sell its assets under the *CCAA*, not the *BIA*.

[52] The provincial deemed trust under the *PBA* continues to apply in *CCAA* proceedings, subject to the doctrine of federal paramountcy (*Crystalline Investments Ltd. v. Domgroup Ltd*, 2004 SCC 3 (CanLII), 2004 SCC 3, [2004] 1 S.C.R. 60, at para. 43). The Court of Appeal therefore did not err in finding that at the end of a *CCAA* liquidation proceeding, priorities may be determined by the *PPSA*'s scheme rather than the federal scheme set out in the *BIA*.

[56] A party relying on paramountcy must "demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law" (*Canadian Western Bank*, [2007] 2 S.C.R. 3, at para. 75). This Court has in fact applied the doctrine of paramountcy in the area of bankruptcy and insolvency to come to the conclusion that a provincial legislature cannot, through measures such as a deemed trust, affect priorities granted under federal legislation (*Husky Oil*).

[57] None of the parties question the validity of either the federal provision that enables a *CCAA* court to make an order authorizing a DIP charge or the provincial provision that establishes the priority of the deemed trust. However, in considering whether the *CCAA* court has, in exercising its discretion to assess a claim, validly affected a provincial priority, the reviewing court should remind itself of the rule of interpretation stated in *Attorney General of Canada v. Law Society of British Columbia*, 1982 CanLII 29 (SCC), [1982] 2 S.C.R. 307 (at p. 356), and reproduced in *Canadian Western Bank* (at para. 75):

When a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another

applicable construction which would bring about a conflict between the two statutes.

**61** In the context of evaluating the important policy considerations of maintaining a stay of proceedings under a liquidating *CCAA*, it is important for the Court to consider the appropriate time for the *CCAA* proceeding to either come to an end or to lift the stay of proceedings to provide for an orderly transition from the *CCAA* process to the *BIA*. These proceedings are a good example. Initially, GE Canada initiated bankruptcy proceedings against GFPI. The response of GFPI was to seek protection under the *CCAA* and carry out an orderly liquidation of its assets. The Court permitted the orderly liquidation of the assets in the context of the *CCAA* to maximize recovery in the assets.

**62** Now, the usefulness of the *CCAA* proceedings has come to an end. Is it appropriate for the Court to allow the Second Lien Lenders to institute bankruptcy proceedings and to forthwith issue a Bankruptcy Order in respect of GFPI? The Second Lien Lenders urge that the regime that will be in place as a result of the Bankruptcy Order will be that contemplated by Parliament in the context of a liquidation and distribution of a bankrupt's assets. The process carried out for the transition from the *CCAA* proceedings to the *BIA* will it is suggested be as intended by Parliament and consistent with the principles established by the Supreme Court of Canada in the *Re Century Services* case.

**63** It is clear that there are insufficient proceeds to pay the claims of all of the creditors of GFPI. Reversing priorities can be a legitimate purpose for the institution of bankruptcy proceedings. Lifting the stay provided for in the Initial Order at this time, the Second Lien Lenders submit is the logical extension of that legitimate purpose. Accordingly, it is said appropriate in the circumstances of this case that the stay be lifted and that a Bankruptcy Order be issued by the Court in respect of GFPI forthwith.

**64** I accept that to impose the same priorities under the *CCAA* as the *BIA* without careful consideration might well undermine the flexibility of the *CCAA*. For example the *CCAA* Court itself may make an order on application on notice declaring a person to be a critical supplier (s. 11.4) with the charge in favour of that supplier. This is but one example of the flexibility of the *CCAA* that may not be available under the *BIA* once approved by the Court. The same is the case for DIP financing as was the case in *Indalex*.

**65** Where there is a *CCAA* Plan approved by creditors the effect of the contract created may alter what would otherwise be priorities under the *BIA*.

**66** Where there is a liquidating *CCAA* which proceeds by way of an Initial Order and the subsequent sale of assets with Vesting Orders all the creditors have an opportunity to object to the sales or process which is in effect an implicit *CCAA* Plan. A vote becomes necessary only when there is lack of consensus and a priority dispute requires resolution by a vote. In this case the claim of the secured creditors exceeded and continues to exceed, the value of the assets.

67 There may be good and solid reasons acceptable to creditors and stakeholders who agree to a process under the *CCAA* either in a formal Plan or during the course of a liquidation to alter the priorities that would come into play should there be an assignment or petition into bankruptcy.

68 The position of the Pension Administrator, the Superintendent of Financial Services and those parties in support of their position, in this case is that in the circumstances the deemed trust which they say arises under the *PBA* should prevail over other creditor claims notwithstanding the *CCAA* Initial Order.

69 The arguments in support of a deemed trust arising upon windup of the pension plans within the *CCAA* regime are summarized as follows:

- i) GFPI should not be excused from any obligation with respect to the pension plans.
- ii) The wind ups which triggered the deemed trusts were the subject of specific judicial authorization and even assuming the stay of proceedings under the Initial Order applies, leave of the Court has been given to windup which triggers the deemed trusts.
- iii) The deemed trusts are triggered automatically upon wind up by independent operation of a valid provincial law which has not been overridden by specific order.
- iv) The Second Lien Creditor should not be permitted to challenge the deemed trusts at this stage since they did not challenge the windup orders.<sup>5</sup>

70 From my review of the decisions of the Supreme Court of Canada in *Century Services* and *Indalex* I am of the view that the task of a *CCAA* supervising judge when confronted with seeming conflict between Federal insolvency statute provisions and those of Provincial pension obligations is to make the provisions work without resort to the issue of federal paramountcy except where necessary.

71 The decision of the Supreme Court of Canada in *Indalex* assists in the execution of this task. The deemed trust that arises upon wind up prevails when the windup occurs before insolvency as opposed to the position that arises when wind up arises after the granting of an Initial Order.

72 The *Indalex* decision provides predictability and certainty of entitlement to the stakeholders of an insolvent company. If on the application for an Initial Order any party seeks to challenge that priority for the purpose of providing DIP financing in furtherance of a Plan or work out liquidation they are free to do so at the time of the Initial Order. Secured creditors can then decide whether they are willing to pursue a Plan or immediately apply for a bankruptcy order.<sup>6</sup>

#### **Should GFPI be excused from wind up deficiency payments?**

73 I am of the view that the question advanced by the Pension Administrators should be put



another way "Is GFPI obligated in view of the provisions in para. 5 of the Initial Order (see paragraph 54) above to make the special payments that arise by virtue of the provisions of the *PBA*?

**74** I accept the argument of the Pension Administrator and all those urging the deemed trust application that the Approval and Vesting Orders necessarily do not for all purposes freeze priorities at the point of sale. Absent other order of the Court, made at the time however, they do provide the certainty required by creditors who are asked to concur with the sales.

**75** In the situation of GFPI there was a recognition in para. 5 of the Initial Order that there may be a challenge to expenses on an ongoing basis.

**76** Where distribution to creditors is made following a sale of assets on full notice, that distribution in accordance with an Approval and Vesting Order does freeze the priorities with respect to that distribution, absent specific direction otherwise.

**77** In this case, the issue of priority is said to arise in respect of a specific sum of money in the hands of the Monitor in respect of funds from assets sold and not distributed and is said to be determined in accordance with the Court Order made at the time of determination which acknowledged all the pension obligations including wind up.

**78** To suggest that all claims and priorities never sought would apply to the Approval Orders past or future would, in my view, be entirely contrary to the principles and scheme of the *CCAA*. To conclude otherwise would risk that secured creditors to whom distribution had been made would be at risk of disbursement and unpaid secured creditors to uncertainty of priority in future recovery.

**79** This is why in my view the only consistent and predictable operation of the *CCAA* should give predictability as of the Initial Order to enable an informed decision to be made whether or not to proceed with bankruptcy. This issue is implicitly revisited every time there is a sale and distribution of assets.

**80** The Supreme Court of Canada decision in *Indalex* stands for the proposition that provincial provisions in pension areas prevail prior to insolvency but once the federal statute is involved the insolvency provision regime applies.

**81** Justice Cromwell at paragraphs 177 and 178 in *Indalex* spoke of the problem of extending the deemed trust. While he was speaking of the entirety of the issue his comments below are equally applicable to a deemed trust said to arise during insolvency:

177 Second, extending the deemed trust protections to the wind-up deficiency might well be viewed as counter-productive in the greater scheme of things. A deemed trust of that nature might give rise to considerable uncertainty on the part of other creditors and potential lenders. This uncertainty might not only complicate creditors' rights, but it might also affect the availability of funds from

lenders. The wind-up liability is potentially large and, while the business is ongoing, the extent of the liability is unknown and unknowable for up to five years. Its amount may, as the facts of this case disclose, fluctuate dramatically during this time. A liability of this nature could make it very difficult to assess the creditworthiness of a borrower and make an appropriate apportionment of payment among creditors extremely difficult.

178 While I agree that the protection of pension plans is an important objective, it is not for this Court to decide the extent to which that objective will be pursued and at what cost to other interests. In her conclusion, Justice Deschamps notes that although the protection of pension plans is a worthy objective, courts should not use the law of equity to re-arrange the priorities that Parliament has established under the *CCAA*.

**82** That consistency prevails if the limitation on deemed trust is limited to those plans already in windup as of the date of the Initial Order.

**83** During the course of the sale of assets the Initial Order continued to operate presumably to the advantage of all stakeholders since the asset sale as here proceeded in an advantageous fashion for maximizing return on assets, for the benefit of those who were able to transfer employment and in an advantageous fashion for the pension plans which received the benefit of ongoing regular payments.

**84** The alternative had the bankruptcy petition proceeded would have seen a significant loss particularly to the pension plans.

**85** I note as have many judges before me that the solution to the problem created by section 67 of the *BIA* which leaves pension obligations unsecured and Provincial statutes which seek to raise the priority lies with the federal and provincial governments not with judicial determination. As Justice Deschamps noted in *Indalex*:

[81] There are good reasons for giving special protection to members of pension plans in insolvency proceedings. Parliament considered doing so before enacting the most recent amendments to the *CCAA*, but chose not to (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36, in force September 18, 2009, SI/2009- 68; see also Bill C-501, *An Act to amend the Bankruptcy and Insolvency Act and other Acts (pension protection)*, 3rd Sess., 40th Parl., March 24, 2010 (subsequently amended by the Standing Committee on Industry, Science and Technology, March 1, 2011)). A report of the Standing Senate Committee on Banking, Trade and Commerce gave the following reasons for this choice:

Although the Committee recognizes the vulnerability of current pensioners, we do not believe that changes to the BIA regarding pension claims should be made at this time. Current pensioners can also access retirement benefits from the Canada/Quebec Pension Plan, and the Old Age Security and Guaranteed Income Supplement programs, and may have private savings and Registered Retirement Savings Plans that can provide income for them in retirement. The desire expressed by some of our witnesses for greater protection for pensioners and for employees currently participating in an occupational pension plan must be balanced against the interests of others. As we noted earlier, insolvency -- at its essence -- is characterized by insufficient assets to satisfy everyone, and choices must be made.

The Committee believes that granting the pension protection sought by some of the witnesses would be sufficiently unfair to other stakeholders that we cannot recommend the changes requested. For example, we feel that super priority status could unnecessarily reduce the moneys available for distribution to creditors. In turn, credit availability and the cost of credit could be negatively affected, and all those seeking credit in Canada would be disadvantaged.

**86** I conclude that given the uncertainty in this area of legal decision together with the provisions of paragraph 5 of the Initial Order that GFPI was not under an obligation to make the special windup payments and was correct is seeking direction from this Court.

**87** I can only presume that had GFPI sought to make the special payments that they would have been opposed on much the same grounds as now advanced by the Second Lien Lenders.

#### THE SECOND ISSUE

##### **Did the Court Order authorize the Deemed Trust?**

**88** It is urged in the second ground for priority of the deemed trust that this Court authorized the wind up of the Pension plans which by the operation of the *PBA* imposes the deemed trust.

**89** The Order authorizing the windup in its operative provisions with respect to wind up is as follows:

**This Court Orders** that the Monitor is hereby authorized and directed, until further Court Order, to hold back from any distribution to creditors of GFPI an

amount of \$191,245.00 which is estimated to be the amount necessary to satisfy the wind-up deficit of the Timmins Salaried Plan. For greater certainty nothing in this order affects or determines the priority or security of the claims against these funds.

**This Court Orders** that with respect to the Remaining Applicants, the Stay Period as defined by the Initial Order, be and is hereby extended to November 30, 2011.

90 Similar wording was in the order with respect to the Executive Plan.

91 Nothing in those Orders dealt with the issue of deemed trust. No one appearing raised the issue of deemed trust. The paragraph above dealt with the issue presented and preserved the argument that arises today namely whether in context of a claimed deemed trust the estimated windup deficit was to be held from distribution.

92 One can understand why the issue was not raised beyond setting aside the amount and leaving the issue for later determination. For their own reasons each side was content to have the *CCAA* process continued. It was to the benefit of all party stakeholders.

93 When a pension plan is wound up the precise amount of money necessary to fulfill the obligation to each and every pensioner is at that time uncertain. Over time as windup occurs those amounts become more certain and that is why the deemed trust concept comes into play.

94 It does seem to me that a commitment to make wind up deficiency payments is not in the ordinary course of business of an insolvent company subject to a *CCAA* order unless agreed to. Even if the obligation could be said to be in the ordinary course for an insolvent company GFPI was not obliged to make the payments, (See paragraph 45 of the Initial Order above).

95 This is precisely the reason for the granting of a stay of proceedings that is provided for by the *CCAA*. Anyone seeking to have a payment made that would be regarded as being outside the ordinary course of business must seek to have the stay lifted or if it is to be regarded as an ordinary course of business obligation, persuade the applicant and creditors that it should be made. The decision of the Supreme Court of Canada in *Indalex* appears to stand for the proposition that once a valid Initial Order is made under the *CCAA* the Federal insolvency regime is paramount, and absent any agreement or other Order where there is conflict, the Initial Order prevails over an applicant's obligation under the provincial statute.

96 This conclusion provides the predictability and certainty that is necessary for those who are willing to consider financing a distressed entity. It is unlikely that lenders would be willing to support a distressed entity if they had little or no information on the amount or timing of pension obligations.

**97** The Supreme Court of Canada decision in *Indalex* alerts lenders who are aware or are taken to be aware prior to insolvency of the fact of a deemed trust when there is wind up even though the amount may not be known.

**98** Where a pension plan has not been wound up prior to insolvency the potential for a windup deficiency is entirely uncertain. Since a deemed trust does not arise until there is a windup order it would be entirely inconsistent with the insolvency regime of the *CCAA* (absent additional legislation) to expose lending creditors to an uncertain priority both in time and amount.

**99** It is to be noted that on the sale of assets as they occurred there was no issue raised about the priority of claims prior to those sales or distribution of assets as reflected in the fact that payments were made to entirely discharge the security of the First Lien Lenders and a portion of the obligation to the Second Lien lenders.

**100** The Court did not authorize a deemed trust to prevail in insolvency by granting windup orders.

**Should the Stay be lifted to permit the petition in bankruptcy to proceed?**

**101** If one accepts the above analysis a lifting of the stay to permit bankruptcy is not necessary to defeat a deemed trust said to arise after the Initial Order.

**102** The basis of the motion on behalf of West Face Capital Inc. (the Second Lien Lenders) is set out in paragraph 2 of their factum:

The Second Lien Lenders seek an Order lifting the stay of proceedings in respect of GFPI for the purpose of facilitating the issuance of a Bankruptcy Order in respect of GFPI forthwith. It is appropriate that a bankruptcy proceeding be put into place immediately, otherwise the priority secured interests of the Second Lien Lenders will be irrevocably prejudiced. In the absence of a bankruptcy proceeding, certain parties with an interest in advancing the claims of the pension beneficiaries have taken steps to re-position claims as priority claims or claims that must be paid immediately. The factual and legal basis for those claims have been advanced during the *CCAA* proceedings, notwithstanding the stay of proceedings.

**103** Those opposed to the motion to lift the stay (which is supported by GFPI and the Monitor) urge that what is being requested is extraordinary relief from the requirements of the *PBA* and GFPI should not be excused from its obligation to make special payments simply at the asking.

**104** While acknowledging that the court does have broad discretion, it is urged there is nothing in the circumstances of this case which would justify relieving GFPI of its obligation to make special payments.

**105** It is further submitted that there is no decision that stands for the proposition that bankruptcy is automatic at the end of a *CCAA* proceeding and no independent reason for granting the bankruptcy order.

**106** It is well settled that bankruptcy may well be an appropriate outcome of a *CCAA* process that has failed or has run its course. In *Century Services* 2010 SCC 60 at paragraph 23, Justice Deschamps noted "because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation distribution necessarily supplies the backdrop for what will happen if a *CCAA* is ultimately unsuccessful".

**107** The issue of terminating a *CCAA* proceeding by permitting a petition in bankruptcy to proceed is one of discretion on the part of the supervising judge (see *Ivaco* (Re) [2006] O.J. No. 4152 para. 77 and *Nortel Networks Corp. (Re)* 2009 ONCA 833 at para. 41.)

**108** Those who seek to have a stay lifted or to oppose the stay being lifted to obtain other relief must be acting in good faith. There is no evidence of lack of good faith here beyond the suggestion of delay.

**109** The parties resisting the lifting of the stay urge that it not be granted on several grounds. The first is based on the delay on the part of West Face in bringing the motion. It is asserted that the motion should have been brought when the applicant first made it returnable on its motion for direction.

**110** It is also urged that given the passage of time that the Monitor should be directed to make payments of those amounts which would otherwise have been made to date under the windup orders of the Superintendent.

**111** The argument advanced by the Pension Administrator is that the *CCAA* process has completed what it set out to do, namely, liquidate the assets of GFPI and therefore there is no purpose to be served by lifting the stay and therefore the Order should not be granted to allow bankruptcy.

**112** West Face seeks to lift the stay of proceedings granted by the Initial Order to enable the Petition commenced in March 2010 to proceed.

**113** Like those opposing, West Face takes the position that the *CCAA* process has run its course and there is no likelihood of recovery on any other assets and adds therefore no reason for the applicant to continue to make any pension payments on account of pension plans. Since the security of West Face on behalf of the Second Liens Lenders is valid they are entitled to be paid from the assets on hand and a bankruptcy Order would expedite recovery.

**114** What then is the process that is involved under the *CCAA* when there is not one but several sales of assets of an insolvent company over a period of time during which no one objects to the

continuation of "payments being made in the ordinary course" which include ongoing payments to pension plans.

**115** The *CCAA* continues to be sufficiently flexible to allow for an ongoing sale of assets without the necessity of a formal plan voted on by creditors. As I noted above, a sale of assets following an Initial Order is an implicit plan.

**116** In this case following the sale of the major assets to Georgia Pacific there was a distribution the effect of which was to pay out the First Lien Lenders in entirety and indeed some payments to the Second Lien Lenders.

**117** Following the granting of leave in *Indalex* by the Supreme Court of Canada all of the parties in this case recognized that the issue of priority of deemed trusts would likely be clarified by that Court's decision in that case.

**118** From the time that the motion of GFPI for direction with respect to payments on windup deficiency was first brought before this court, there was agreement by all Counsel that the Supreme Court decision in *Indalex* if not determinative would provide considerable guidance on the issues in this case.

**119** To my knowledge no party has been prejudiced by the delay in dealing with the priority issue. For this reason I do not accept the proposition that West Face should be denied leave on the basis of delay.

**120** This leaves the question as to whether or not on the facts of this case leave to lift the stay should be granted. It was to the advantage of all stakeholders presumably including the pension plans and the Second Lien Lenders that the *CCAA* process be utilized for the sale of assets rather than the *BIA* process.

**121** I am of the view that in the absence of provisions in a Plan under the *CCAA* or a specific court order, any creditor is at liberty to request that the *CCAA* proceedings be terminated if that creditor's position may be better advanced under the *BIA*.

**122** The question then is whether it is fair and reasonable bearing in mind the interests of all creditors that those of the creditor seeking preference under the *BIA* be allowed to proceed. In this Court's decision in *Indalex*, I questioned whether it would be fair to permit the stay to be lifted if it was simply because of the uncertainty as to whether at that time prior to the later appeals that the deemed trust provisions of the *PBA* prevailed.

**123** In this case West Face urges its interests should prevail because otherwise a deemed trust which did not exist at the time of the Initial Order would *de facto* be given priority by the requirement that GFPI make wind up deficiency payments, to pay priorities that would not be recognized under the *BIA*.

**124** I conclude that the argument on behalf of West Face should succeed. The purpose of the process under insolvency is to provide predictability to the interests of creditors but at the same time allow for flexibility as under the *CCAA* where that provides a greater return than would the operation of the *BIA*. That has been the case here.

**125** If the purpose under the insolvency statutes is to maximize recovery to the extent possible for all concerned, then the imposition of a priority which arises only in the middle of insolvency except where made like a DIP financing, for the purpose of enhancing recovery would likely result in credit being much more difficult if not impossible to obtain in the first instance.

**126** The Supreme Court of Canada in *Indalex* limited the deemed trust provisions of the *PBA* to obligations prior to insolvency. To deny the relief sought by West Face would in my view be at odds with that decision.

**127** For the above reasons the Order sought by West Face will be granted. Those opposing the stay urged that all payments that should have been made under the deficiency wind up be made until the date of this decision.

**128** While I have some sympathy for the position of the pension plans in these circumstances I am satisfied that the amounts held by the Monitor should not be applied to the pension plans. From the time of the return of the motion for directions all parties were aware of the need for a determination to be made following the Supreme Court of Canada decision in *Indalex*.

### **Conclusion**

**129** As noted above in this decision virtually all of the judges who have had to deal with this difficult issue of pensions and insolvency have commented that ultimately these are matters to be dealt with by the Federal and Provincial governments.

**130** The difficulty of dealing with these complex issues is not restricted to Canada. In her book of 2008<sup>7</sup> Prof. Janis Sara has chronicled the way in which various countries around the world have sought to deal with the difficulty of pension priority in the context of business financing and insolvency. The conclusion is there is no easy answer.

**131** I have no doubt that the question of pensions will be an ongoing issue for some time to come. There is an urgency that legislators both Federal and Provincial address the issue.

**132** In this case and for the above reasons the priority of proceeds will be to the Secured Creditors in respect of those amounts that otherwise would be payable in respect of windup deficiencies.

**133** I would not think this is an appropriate matter for costs disposition but if any Counsel disagrees or there is any further issue with respect to an Order following from this decision I may be



spoken to.

C.L. CAMPBELL J.

1 Decision in this Court at 2010 ONSC 1114 and in Court of Appeal for Ontario, 2011 ONCA 265.

2 2010 ONSC 1114, 2011 ONCA 265.

3 Pension Benefit Act RSO 1990, c. P.8 57 Accrued contributions

(3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into a pension fund. R.S.O. 1990, c. P.8, s. 57(3).

Wind up

(4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations. R.S.O. 1990, c.P.9, s. 57(4).

4 2010 SCC 60 at para. 77.

5 submission was made in the factum of PWC that all funds held by the Monitor should be regarded as proceeds of accounts and inventory therefore resulting in priority being directed by the Personal Property Security Act (PPSA) s. 30(7) which would subordinate other security to the deemed trusts. This submission was not seriously pursued and in view of the conclusion I reached on other grounds it is not necessary to deal with the argument.

6 It is not entirely clear from the various decisions in *Indalex* as to precisely when the deemed trust which can take priority operates. The date of the Initial Order was given as one possibility the other being the date of sale of the assets. In this case it does not really matter which date applies as the Initial Order and primary asset sale pre-date any deemed trust.

7 Employee & Pension Claims during Company Insolvency - A Comparative Study of 62 Jurisdictions, Thomson & Carswell.



*Case Name:*

**Grant Forest Products Inc. v. GE Canada Leasing Services Co.**

**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 Grant Forest  
Products Inc., Grant Alberta Inc., Grant  
Forest Products Sales Inc., and  
Grant U.S. Holdings G.P.  
Between  
Grant Forest Products Inc., Grant Alberta  
Inc., Grant Forest Products Sales  
Inc., and Grant U.S. Holdings GP, Applicants, and  
The Toronto-Dominion Bank, in its capacity  
as agent for the secured lenders  
holding first lien security and the Bank  
of New York Mellon, in its capacity  
as agent for secured lenders holding  
second lien security, Respondents**

[2015] O.J. No. 4147

2015 ONCA 570

2015 CarswellOnt 11970

26 C.B.R. (6th) 218

256 A.C.W.S. (3d) 269

20 C.C.P.B. (2d) 161

387 D.L.R. (4th) 426

9 E.T.R. (4th) 205

26 C.C.E.L. (4th) 176

337 O.A.C. 237

Docket: C58636

Ontario Court of Appeal

**D.H. Doherty, E.E. Gillese and P.D. Lauwers JJ.A.**

Heard: February 3, 2015.

Judgment: August 7, 2015.

(148 paras.)

*Bankruptcy and insolvency law -- Creditors and claims -- Claims -- Priorities -- Secured claims -- Appeal by Superintendent from order placing debtor companies in bankruptcy and prioritizing claims of unpaid secured creditors over debtors' pension plans dismissed -- Placing companies in bankruptcy after all assets sold and companies ceased operations was appropriate -- Claims of pension plans to funds held back by companies and monitor, created in course of CCAA proceeding, ranked below claims of secured creditors created prior to insolvency -- Secured creditor did nothing wrong in seeking bankruptcy order to gain priority over pension plans.*

*Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Claims -- Priority -- Appeal by Superintendent from order placing debtor companies in bankruptcy and prioritizing claims of unpaid secured creditors over debtors' pension plans dismissed -- Placing companies in bankruptcy after all assets sold and companies ceased operations was appropriate -- Claims of pension plans to funds held back by companies and monitor, created in course of CCAA proceeding, ranked below claims of secured creditors created prior to insolvency -- Secured creditor did nothing wrong in seeking bankruptcy order to gain priority over pension plans.*

*Pensions and benefits law -- Private pension plans -- Administration of pensions -- Winding-up of plan -- Appeal by Superintendent from order placing debtor companies in bankruptcy and prioritizing claims of unpaid secured creditors over debtors' pension plans dismissed -- Placing companies in bankruptcy after all assets sold and companies ceased operations was appropriate -- Claims of pension plans to funds held back by companies and monitor, created in course of CCAA proceeding, ranked below claims of secured creditors created prior to insolvency -- Secured creditor did nothing wrong in seeking bankruptcy order to gain priority over pension plans.*

Appeal by the Superintendent of Financial Services from an order placing the debtor companies into bankruptcy, and granting relief to certain secured creditors, following a sale of assets conducted pursuant to the CCAA. The CCAA proceedings were conducted as liquidation. The First Lien

Lenders to the debtor companies were paid in full in January 2012. The Second Lien Lenders received a distribution of \$6 million, leaving approximately \$150 million owing. West Face, one of the Second Lien Lenders, was owed \$31 million. Two of the four pension plans sponsored by the debtor companies were ordered wound up, with certain amounts to be held back to satisfy any deficit resulting from such winding up of the plans. On West Face's motion, an order was made declaring that the funds held back by the debtor companies were not subject to any trust obligations vis-a-vis the pension plans, relieving the monitor and debtor companies from any obligation to make further contributions to the plans, and placing the debtor companies into bankruptcy. The judge considered it significant that the rights the pension plans sought to assert were created only after the debtor companies became insolvent.

HELD: Appeal dismissed. The judge did not err in exercising his discretion to order the debtor companies into bankruptcy. The companies were no longer operating and had no assets other than the held back funds to distribute. West Face did nothing improper in seeking the order under appeal. It was entitled to seek an order to alter priorities in its favour. The order reflected the proper application of bankruptcy law in terms of prioritizing the claims of the secured creditors, including West Face, existing prior to the CCAA proceedings, over those of the pension plans, created in the proceedings.

**Statutes, Regulations and Rules Cited:**

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Financial Services Commission of Ontario Act, 1997, S.O. 1997, c. 28

Pension Benefits Act, R.S.O. 1990, c. P.8, s. 57(3), s. 57(4)

Personal Property Security Act, R.S.O. 1990, c. P.10, s. 30(7)

**Appeal From:**

On appeal from the order of Justice Colin Campbell of the Superior Court of Justice, dated September 20, 2013, with reasons reported at 2013 ONSC 5933, 6 C.B.R. (6th) 1.

**Counsel:**

Mark Bailey and Deborah McPhail, for the appellant Superintendent of Financial Services.

Jane Dietrich, for the respondents Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., and Grant U.S. Holdings GP.

John Marshall and Roger Jaipargas, for the respondent West Face Capital Inc.

Alex Cobb, for the respondent Mercer (Canada) Limited.

David Byers and Dan Murdoch, for the respondent Ernst & Young Inc.

Andrew J. Hatnay, James Harnum and Adrian Scotchmer, for the intervener the court-appointed Representative Counsel to non-union active employees and retirees of U.S. Steel Canada Inc. in its CCAA proceedings.

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The judgment of the Court was delivered by

**E.E. GILLESE J.A.:**--

#### **OVERVIEW**

**1** The debtor companies in this case obtained protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") and entered into a liquidation process. After selling their assets and paying out the first lien lenders in full, there were insufficient funds to satisfy the claims of the second lien lenders and the claims asserted on behalf of two of the debtor companies' pension plans. A contest ensued between one of the secured creditors and the pension claimants.

**2** The CCAA judge ordered the remaining debtor companies into bankruptcy, thereby resolving the contest in favour of the secured creditor.

**3** Ontario's Superintendent of Financial Services (the "**Superintendent**") appeals.

**4** During the CCAA proceeding, the Superintendent made wind up orders in respect of the two pension plans. He contends that a deemed trust arose on wind up of each plan (the "**wind up deemed trust**"). He says that those wind up deemed trusts, which encompass all unpaid contributions, took priority over the claims of the secured creditors because the remaining funds are the proceeds of sale of the debtor companies' accounts and inventory.

**5** The basis for the Superintendent's position is a combination of ss. 57(3) and (4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("**PBA**") and s. 30(7) of the *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("**PPSA**").

**6** Sections 57(3) and (4) of the PBA read as follows:

57 (3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.

57 (4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

7 The priority of the PBA deemed trusts is established by s. 30(7) of the PPSA. Section 30(7) reverses the first-in-time principle for certain assets and gives the beneficiaries of the deemed trusts priority over an account or inventory and its proceeds. Section 30(7) states:

30 (7) A security interest in an account or inventory and its proceeds is subordinate to the interest of a person who is the beneficiary of a deemed trust arising under the *Employment Standards Act* or under the *Pension Benefits Act*.

8 The Superintendent contends that the decision below is wrong because, among other things, he says that it is inconsistent with the Supreme Court of Canada's recent decision in *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271.

9 For the reasons that follow, I would dismiss the appeal.

#### **THE CAST OF CHARACTERS**

10 Grant Forest Products Inc. ("**GFPI**") and certain of its subsidiaries carried on an oriented strand board manufacturing business from facilities in Ontario, Alberta and the United States. At the beginning of these proceedings, GFPI and its subsidiaries were the third largest such manufacturer in North America.

11 GFPI and related companies (the "**Applicants**") brought an application for protection from creditors under the CCAA (the "**CCAA Proceeding**"). Following the sale of certain assets, the CCAA Proceeding was terminated in relation to some of the Applicants. GFPI, Grant Forest Products Sales Inc. and Grant Alberta Inc. are the "**Remaining Applicants**" in the CCAA Proceeding.

12 Mercer (Canada) Ltd. is the administrator of the two pension plans in question in the CCAA Proceeding (the "**Administrator**"). Mercer replaced PricewaterhouseCoopers Inc. as administrator in August 2013.



13 Stonecrest Capital Inc. was appointed the chief restructuring organization (the "**CRO**") by court order dated June 25, 2009.

14 Ernst & Young Inc. was appointed the monitor (the "**Monitor**") by court order dated June 25, 2009.

15 The "**First Lien Lenders**" are the first-ranking secured creditors in the CCAA Proceeding. Following the sale of assets during the CCAA Proceeding, distributions were made and the First Lien Lenders were paid in full.

16 The "**Second Lien Lenders**" are secured creditors ranking behind the First Lien Lenders, and are collectively owed approximately \$150 million.

17 The Bank of New York Mellon served as agent for the Second Lien Lenders in these proceedings (the "**Second Lien Lenders' Agent**").

18 The Superintendent is the regulator of pension plans under the PBA and the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28. He is also the administrator of the pension benefits guarantee fund under the PBA, which partially insures pension benefits in certain circumstances.

19 West Face Long Term Opportunities Limited Partnership, West Face Long Term Opportunities (USA) Limited Partnership, West Face Long Term Opportunities Master Fund L.P. and West Face Long Term Opportunities Global Master L.P. (collectively, "**West Face**"), are parties to the **Second Lien Credit Agreement** with the Remaining Applicants. The Second Lien Lenders (including West Face) are currently the highest ranking secured creditors. West Face is owed approximately \$31 million.

20 Shortly after the oral hearing of this appeal, the court-appointed representative counsel to non-union active and retired employees of United States Steel Canada Inc. ("**USSC**") in USSC's unrelated proceedings under the CCAA (the "**Intervener**") sought leave to intervene. The Intervener wished to have the opportunity to make submissions on the issues raised in this appeal from the perspective of retirees and pension beneficiaries. Approximately 6,000 affected employees and retirees of USSC are subject to the representation order.

21 By endorsement dated March 19, 2015, this court granted the Intervener leave to intervene as a friend of the court: *Re Grant Forest Products Inc.*, 2015 ONCA 192. Under the terms of that endorsement, the Intervener was limited to addressing only those issues already raised on the appeal and to the existing record.

## **BACKGROUND IN BRIEF**

### **Sale of the Applicants' Assets**

22 On March 19, 2009, GE Canada Leasing Services Company applied for a bankruptcy order against GFPI under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("**BIA**"). In response, the Applicants sought protection under the CCAA through the CCAA Proceeding.

23 The court gave that protection by order dated June 25, 2009 (the "**Initial Order**"). The Initial Order also stayed the bankruptcy application against GFPI and approved a marketing process designed to locate potential investors to purchase, as a going concern, the Applicants' business and operations. Consequently, the CCAA Proceeding proceeded as a liquidation, rather than as a restructuring.

24 In the CCAA Proceeding, no order was made authorizing a debtor-in-possession financing or other "super priority" lending arrangement.

25 GFPI's assets were sold in a number of transactions that closed between May 26, 2010 and November 7, 2012.

26 GFPI and certain of its subsidiaries sold the large majority of their core operating assets to Georgia Pacific LLC and certain of its affiliates ("**Georgia Pacific**"). The sale to Georgia Pacific was court approved on March 30, 2010, and closed on May 26, 2010. On sale, Georgia Pacific assumed the Pension Plan for Hourly Employees of Grant Forest Products Inc. -- Englehart Plan, which was the pension plan associated with the assets it had purchased.

27 Other than the assets sold to Georgia Pacific, GFPI's only other significant operating asset was a 50% interest in a mill in Alberta. The sale of that interest was approved by court order on January 5, 2011, and closed on February 17, 2011. Additional assets were sold over the following two years, with the final sale closing on November 7, 2012.

28 Each sale was court approved and subject to the standard provision that all encumbrances and claims which applied to the assets prior to the sale applied to the sale proceeds with the same priority.

29 The court made distribution orders that resulted in the First Lien Lenders being paid in full in January of 2012.

30 A distribution of \$6 million was made to the Second Lien Lenders. Approximately \$150 million remains owing to those lenders under the Second Lien Credit Agreement. Of that amount, West Face is owed approximately \$31 million.

31 As of February 1, 2013, GFPI held cash of approximately US\$2.1 million and the Monitor held cash of approximately \$6.6 million and US\$0.3 million (the "**Remaining Funds**").

#### **The Pension Plans**

32 GFPI was the employer, sponsor and administrator of four pension plans. The two plans of

significance in this appeal are (1) the Pension Plan for Salaried Employees of GFPI -- Timmins Plant (the "**Salaried Plan**") and (2) the Pension Plan for Executive Employees of GFPI (the "**Executive Plan**") (together, the "**Plans**").

33 Both of the Plans are defined benefit pension plans under the PBA.

34 The Initial Order provided that the Applicants were "entitled but not required" to pay "all outstanding and future ... pension contributions ... incurred in the ordinary course of business".

35 On August 26, 2011, the "Timmins Pension Plan Order" was made. This order authorized GFPI to take steps to initiate the wind up of the Salaried Plan and to work with the Superintendent to appoint a replacement plan administrator for the Salaried Plan. This order also directed the Monitor to hold back approximately \$191,000 from any distribution to creditors. The holdback was thought to be sufficient to satisfy the anticipated wind up deficit of the Salaried Plan. The Timmins Pension Plan Order expressly provided that nothing in it "affects or determines the priority or security of the claims" against the holdback.

36 A similar order was made in respect of the Executive Plan on September 21, 2011. However, the hold back amount in respect of the Executive Plan was \$2,185,000.

37 The Administrator recommended that the Plans be wound up and on February 27, 2012, the Superintendent ordered the Plans wound up (the "**Superintendent's Wind Up Orders**"). Under those orders, the effective date of wind up for the Executive Plan is June 10, 2010, and for the Salaried Plan it is March 31, 2011.

38 As will become apparent, it is significant that the Plans were ordered to be wound up after the CCAA Proceeding commenced.

### **The Pension Motion**

39 GFPI continued to make all required contributions to the Plans (both current service and special payments) until June 2012. However, on June 8, 2012, the Remaining Applicants brought a motion seeking an order declaring that none of GFPI, the CRO or the Monitor were required to make further contributions to the Plans (the "**Pension Motion**"). The grounds for the motion included that there was uncertainty relating to the priority of amounts owing in respect of the wind up deficits in the Plans and it was possible that *Indalex*, which was then before the Supreme Court, might have an impact on that matter.

40 When the wind up reports showed that the estimated deficits in the Plans had increased, by order dated June 25, 2012, the hold back for the Salaried Plan was increased from approximately \$191,000 to \$726,372 and for the Executive Plan from approximately \$2.185 million to \$2,384,688 (collectively, the "**Reserve Funds**").

**41** The Pension Motion was originally returnable on June 25, 2012. However, it was adjourned several times.

**42** On the first return date, acting on his own motion, the CCAA judge adjourned the Pension Motion and directed that further notice be given to the Second Lien Lenders. By endorsement dated June 25, 2012, a term of the adjournment was that no further payments were to be made to the Plans.<sup>1</sup>

**43** It should be noted that several weeks prior, on March 19, 2012, counsel for the Second Lien Lenders' Agent sent an email to all those on the Service List saying that it no longer represented the Agent and asking to be removed from the Service List.

**44** On August 8, 2012, the Remaining Applicants served a notice of return of the Pension Motion for August 27, 2012.

**45** On August 27, 2012, again on his own motion and over the objections of the pension claimants, the CCAA judge adjourned the Pension Motion to a date to be determined at a comeback hearing to be held prior to the end of September 2012. He also directed the Monitor to provide additional communication to the Second Lien Lenders and to seek their positions on the Pension Motion.

**46** By letter dated August 31, 2012, the Monitor advised the Second Lien Lenders' Agent that the Pension Motion had been adjourned at the hearing on August 27 and requested a conference call with, among others, the various Second Lien Lenders, to determine what positions they would take on the Pension Motion.

**47** The conference call took place on September 5, 2012. West Face did not participate in it. The two Second Lien Lenders that did attend on the call indicated that they supported the Pension Motion.

**48** On September 17, 2012, the Pension Motion was scheduled to be heard on October 22, 2012.

**49** On September 21, 2012, the Monitor sent the Second Lien Lenders' Agent a letter advising that the Pension Motion would be heard on October 22, 2012. In the letter, the Monitor also indicated that any Second Lien Lender that wished to make its position on the Pension Motion known should contact the Monitor.

**50** When West Face became aware that the Second Lien Lenders' Agent would not be able to obtain timely instructions in respect of the Pension Motion, it retained its own counsel to respond to the Pension Motion.

**51** By letter dated October 12, 2012, West Face advised the Monitor that it would support the Pension Motion.

52 West Face served a notice of appearance in the CCAA Proceeding on October 19, 2012. It sought an adjournment of the October 22, 2012 hearing date but the Administrator opposed the adjournment request.

**The Bankruptcy Motion**

53 By notice of motion dated October 21, 2012, West Face then brought a motion returnable on October 22, 2012, seeking to be substituted for GE Canada Leasing Services Company in the outstanding bankruptcy application issued against GFPI. Alternatively, it sought to have the court lift the stay of proceedings in the CCAA Proceeding and permit it to petition the Remaining Applicants into bankruptcy (the "**Bankruptcy Motion**").

54 On October 22, 2012, it was submitted<sup>2</sup> that the Bankruptcy Motion should be adjourned but that the Pension Motion should be argued. The CCAA judge adjourned both motions (together, the "**Motions**"), however, citing the close relationship between the two. The adjournment continued the terms of the adjournment of the Pension Motion on June 25, 2012.

**The Motions are Heard**

55 The first round of oral submissions on the Motions was heard on November 27, 2012. The CCAA judge reserved his decision.

56 The Supreme Court released its decision in *Indalex* on February 1, 2013.

57 On February 6, 2013, the CCAA judge identified certain additional issues to be dealt with on the Motions and directed the parties to make written submissions on them.

58 A further oral hearing on the Motions took place on July 23, 2013.

**The Transition Order**

59 The CCAA judge dealt with the Motions by order dated September 20, 2013 (the "**Transition Order**"). Among other things, in the Transition Order, the court ordered that:

1. none of the funds held by GFPI or the Monitor are subject to a deemed trust pursuant to ss. 57(3) and (4) of the PBA;
2. none of GFPI, the CRO or the Monitor shall make any further payments to the Plans; and
3. GFPI and each of the other Remaining Applicants are adjudged bankrupt and ordered into bankruptcy.

60 In short, the Transition Order resolved the priority contest between the pensioners and West Face in favour of West Face.

### **The Appeal**

61 The Superintendent then sought and obtained leave to appeal to this court.

### **THE DECISION BELOW**

62 In his reasons for decision, the CCAA judge observed that through the CCAA Proceeding, the Applicants' assets had been sold in a way that provided the maximum benefit to the widest group of stakeholders. Moreover, some of the assets were sold on a going concern basis, which provided continued employment and benefits for many. The alternative to the CCAA Proceeding was a bankruptcy proceeding, which might well have resulted in a greater loss of employment and a lower level of recovery for secured creditors.

63 The CCAA judge then found that the Remaining Funds were not subject to wind up deemed trusts.

64 The Superintendent and the Administrator had submitted that, notwithstanding the Initial Order, the wind up deemed trusts should prevail over other creditors' claims.

65 In rejecting this submission, the CCAA judge stated that a wind up deemed trust will prevail when wind up occurs before insolvency but not when a wind up is ordered after the Initial Order is granted. He said that this approach provides predictability and certainty for the stakeholders of the insolvent company and enables secured creditors to decide whether they are willing to pursue a plan of compromise or immediately apply for a bankruptcy order.

66 The CCAA judge relied on the Supreme Court's decision in *Indalex* for the proposition that provincial statutory provisions in the pension area prevail prior to insolvency but once the federal statute is involved, the insolvency regime applies.

67 The CCAA judge also rejected the argument that the CCAA court, in authorizing the wind up of the Plans, had given the wind up deemed trusts priority in the insolvency regime. He noted that the orders authorizing the wind ups explicitly state that they do not affect or determine the priority or security of the claims against those funds, and the orders say nothing in respect of the deemed trust issue.

68 The CCAA judge opined that, on the basis of this analysis, a lifting of the stay was not necessary to defeat the wind up deemed trusts said to have arisen after the Initial Order.

69 The CCAA judge then observed that the issue of whether to terminate a CCAA proceeding and permit a petition in bankruptcy to proceed is a discretionary matter. In the absence of provisions in a plan of compromise under the CCAA or a specific court order, any creditor is at liberty to

request that the CCAA proceedings be terminated if its position might better be advanced under the BIA. The question was whether it was fair and reasonable, bearing in mind the interests of all creditors, that the interests of the creditor seeking preference under the BIA should be allowed to proceed.

70 The CCAA judge found that there was no evidence of a lack of good faith on the part of West Face in seeking to lift the stay, beyond the allegations relating to delay. He went on to reject the argument based on West Face's alleged delay in bringing the Bankruptcy Motion, saying that no party had been prejudiced by the delay.

71 West Face argued that its interests should prevail because otherwise a wind up deemed trust that did not exist at the time of the Initial Order would *de facto* be given priority and that would be contrary to the priorities established under the BIA. The CCAA judge accepted this submission. He said that in *Indalex*, the Supreme Court limited the wind up deemed trust to obligations arising prior to insolvency and to deny West Face the relief it sought would be at odds with that reasoning.

72 Accordingly, the CCAA judge concluded, the monies held by the Monitor should not be applied to the Plans.

#### **A SUMMARY OF THE PARTIES' POSITIONS ON APPEAL**

##### **The Superintendent**

73 The Superintendent submits that the CCAA judge erred in concluding that no wind up deemed trusts arose during the CCAA Proceeding. He contends that where a pension plan is wound up after an initial order is made under the CCAA, but before distribution is complete, unpaid contributions to the pension plan constitute a wind up deemed trust under the PBA. In this case, he says, the wind up deemed trusts arose during the CCAA Proceeding and took priority over other creditors' claims. Those deemed trusts were not rendered inoperative by the doctrine of federal paramountcy because there was no debtor-in-possession loan or charge.

74 The Superintendent further submits that because of the procedural history of this matter, the CCAA judge should have required payment of the full wind up deficits prior to lifting the stay to permit the bankruptcy application. He says that the CCAA judge adjourned the Pension Motion to provide further notice to the Second Lien Lenders when additional notice was not required because the Second Lien Lenders had received sufficient notice. Further, he contends, the adjournments were prejudicial to the pension claimants because if the CCAA judge had considered the Pension Motion in a timely manner, there would have been no basis on which to relieve against pension plan contributions.

75 The Superintendent also submits that the CCAA judge erred in concluding that it was necessary for the pension claimants to have opposed the Initial Order and the sale and vesting orders made during the CCAA Proceeding in order to assert the wind up deemed trusts.

### **The Administrator**

**76** The Administrator supports the Superintendent and adopts his submissions. It offers the following additional reasons in support of the appeal.

**77** First, the Administrator says that the CCAA judge erred by failing to answer the question posed by the Pension Motion, namely, whether GFPI should be relieved from making further payments into the Plans. It submits that the test GFPI had to meet to obtain such relief is: could GFPI make the required payments without jeopardizing the restructuring? Instead of answering that question, the Administrator says that the CCAA judge asked and answered this question: can a wind up deemed trust be created during the pendency of a stay of proceedings? The Administrator contends that the CCAA judge erred in recasting the Pension Motion in this way because the creation of a wind up deemed trust and the obligation to make special payments are two separate concepts. It submits that the existence of a deemed trust has no bearing on whether a CCAA court should grant a debtor relief from the obligation to make special pension payments.

**78** Second, the Administrator submits, contrary to the CCAA judge's finding, where a wind up deemed trust arises before, and has an effective date before, the date of a court-approved distribution to creditors, the priority of that deemed trust must be considered before a distribution is approved.

**79** Third, the Administrator submits that the wind up deemed trust is not rendered inoperative in a CCAA proceeding unless the operation of the wind up deemed trust conflicts with a specific provision in the CCAA or an order issued under the CCAA. The Administrator says that, in the present case, there is no CCAA provision or order that conflicts with the wind up deemed trust. Therefore, those trusts operate and have priority pursuant to s. 30(7) of the PPSA.

**80** Fourth, the Administrator submits that because bankruptcy is not the inevitable result of a liquidating CCAA proceeding, the CCAA judge had to consider the totality of the circumstances, including West Face's lengthy delay in bringing the Bankruptcy Motion, when ordering GFPI into bankruptcy. It says that West Face did not satisfy its onus to have the stay lifted but, even if it did, the Bankruptcy Motion should have been granted on condition that the outstanding amounts owed to the Plans were paid prior to the bankruptcy taking effect.

**81** Finally, the Administrator says that the CCAA judge erred by requiring the Superintendent and it to challenge all orders made in the CCAA Proceeding had they wished to assert the priority of the wind up deemed trusts.

### **The Remaining Applicants**

**82** The Remaining Applicants take no position on the issues raised by the Superintendent. However, if the appeal is successful, they ask that the court affirm that paras. 1-6 of the Transition Order remain operative. Those paragraphs can be found in Schedule A to these reasons.



### **West Face**

**83** West Face maintains that the core issue to be decided on this appeal is whether it was necessary or appropriate for the pension claims to be paid as a "pre-condition" to ordering GFPI into bankruptcy. It says that if this court accepts that the CCAA judge made no error in ordering GFPI into bankruptcy, without first requiring payment of the pension claims, the issues raised by the Superintendent are moot.

**84** West Face further submits that the doctrine of federal paramountcy puts an end to the wind up deemed trust claims. Bankruptcy proceedings are the appropriate forum to resolve wind up deemed trust claims at the close of CCAA proceedings. It would have been improper for the CCAA judge to order payment of the wind up deemed trust deficits before putting GFPI into bankruptcy, as such an order would have usurped Parliament's bankruptcy regime.

### **The Monitor**

**85** Because the Bankruptcy Motion was primarily a priority dispute between two creditor groups, the Monitor took no position on that motion and it takes no position on that issue in this appeal.

**86** However, the Monitor notes that in making the Transition Order, the CCAA judge addressed issues relating to the existence and potential priority of a wind up deemed trust in the CCAA context. Given the relevance of those issues to other insolvency proceedings, the Monitor made the following submissions:

1. the main question giving rise to the Transition Order was whether it was appropriate to lift the stay and order GFPI into bankruptcy;
2. wind up deemed trusts are not created during the pendency of a CCAA proceeding;
3. if wind up deemed trusts did arise during this CCAA Proceeding, because the Superintendent's Wind Up Orders were made after the Initial Order, the earliest date on which those deemed trusts could be effective was February 27, 2012, the date of the Superintendent's Wind Up Orders; and
4. the CCAA judge did not suggest that the pension claimants were obliged to take steps earlier in the CCAA Proceeding to assert the priority of their wind up deemed trust claims. While the CCAA judge did state that the pension claimants were required to obtain an order lifting the stay for a wind up deemed trust to be created, that was because the winding up of a

pension plan is outside of the ordinary course of business and the Initial Order permitted payments of pension contributions only in "the ordinary course of business".

### **The Intervener**

**87** The Intervener's position is that:

1. a pension plan does not have to be wound up as of the CCAA filing date for the wind up deemed trust to be effective;
2. the beneficiaries of the wind up deemed trust have priority in CCAA proceedings ahead of all other secured creditors over certain assets;
3. an initial CCAA order does not operate to invalidate the wind up deemed trust regime; and
4. the CCAA judge erred in granting the Bankruptcy Motion, which was brought to defeat the wind up deemed trust priority regime.

### **THE ISSUES**

**88** The parties do not agree on what issues are raised on this appeal. A comparison of the issues as articulated by each of the Superintendent and West Face demonstrates this.

**89** The Superintendent says that the following three issues are to be determined in this appeal:

1. do unpaid contributions related to a pension plan that is wound up after the initial order in a CCAA proceeding constitute a deemed trust under the PBA?
2. if such unpaid contributions constitute a deemed trust under the PBA, what is the priority of the deemed trust where there is no debtor in possession loan?
3. what actions must pension creditors take to assert the deemed trust under the PBA in a CCAA proceeding, both before and after the deemed trust arises?

**90** West Face, on the other hand, says that there is but one issue for determination: did the pension claims have to be paid as a precondition to an order to put GFPI into bankruptcy at the end

of the CCAA Proceeding?

**91** In these circumstances, it falls to the court to determine what issues must be addressed in order to resolve this appeal.

**92** To do this, I begin by noting two things. First, in appeals of this sort, the role of this court is to correct errors. Put another way, its overriding task is to determine whether the result below is correct. It is not the role of this court to provide advisory opinions on abstract or hypothetical questions: *Kaska Dena Council v. British Columbia (Attorney General)*, 2008 BCCA 455, 85 B.C.L.R. (4th) 69, at para. 12. Second, an appeal lies from an order or judgment and not from the reasons for decision which underlie that order or judgment: *Grand River Enterprises v. Burnham* (2005), 197 O.A.C. 168 (C.A.), at para. 10.

**93** With these parameters in mind, it appears to me that the question which must be answered to decide this appeal and resolve the dispute between the parties is: did the CCAA judge err in lifting the stay and ordering the Remaining Applicants into bankruptcy without first requiring that the wind up deemed trusts deficits be paid in priority to the Second Lien Lenders?

**94** To answer that question, I must address the following issues:

1. what standard of review applies to the CCAA judge's decision to lift the CCAA stay of proceedings and order the Remaining Applicants into bankruptcy?
2. did the CCAA judge make a procedural error in his treatment of the Pension Motion? and
3. did the CCAA judge err in principle, or act unreasonably, in lifting the stay and ordering the Remaining Applicants into bankruptcy?

#### **THE STANDARD OF REVIEW**

**95** The Superintendent submits that the standard of review of a decision made under the CCAA is correctness with respect to errors of law, and palpable and overriding error with respect to the exercise of discretion or findings of fact. As authority for this submission, the Superintendent relies on *Resurgence Asset Management LLC v. Canadian Airlines Corporation*, 2000 ABCA 149, 261 A.R. 120, at para. 29.

**96** I would not accept this submission for two reasons.

**97** First, in articulating this standard of review, *Resurgence* purported to follow *UTI Energy Corp. v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93. However, *UTI* does not set out the

standard of review in the terms expressed by *Resurgence*. At para. 3 of *UTI*, the Alberta Court of Appeal states that discretionary decisions made under the CCAA "are owed considerable deference" and appellate courts should intervene only if the CCAA judge "acted unreasonably, erred in principle, or made a manifest error".

**98** Second, the applicable standard of review has been established by two decisions of this court: *Re Air Canada* (2003), 66 O.R. (3d) 257 and *Re Ivaco Inc.* (2006), 83 O.R. (3d) 108. In *Air Canada*, at para. 25, this court states that deference is owed to discretionary decisions of the CCAA judge. In *Ivaco*, at para. 71, this court reiterated that point and added that appellate intervention is justified only if the CCAA judge erred in principle or exercised his or her discretion unreasonably.

**99** The decision to lift the stay and order the Remaining Applicants into bankruptcy was a discretionary decision: *Ivaco*, at para. 70. Therefore, the question becomes, did the CCAA judge err in principle or exercise his discretion unreasonably in so doing?

**100** Before turning to this question, I will consider whether the CCAA judge made a procedural error in the process leading up to the making of the Transition Order.

#### **DID THE CCAA JUDGE MAKE A PROCEDURAL ERROR?**

**101** The procedural complaint levied against the CCAA judge is based on his having adjourned the Pension Motion on more than one occasion, on his own motion, so that additional notice could be given to the Second Lien Lenders. The Superintendent says that additional notice was not required because the Second Lien Lenders had been given sufficient notice and the resulting delay in having the Pension Motion heard caused prejudice to the pension claimants.

**102** I would not accept this submission. Considered in context, I do not view the CCAA judge as having acted improperly in adjourning the Pension Motion on his own motion.

**103** It is important to begin this analysis by reminding ourselves of the role played by the CCAA judge in a CCAA proceeding. Paragraphs 57-60 of *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379 are instructive in this regard. From those paragraphs, we see that the role of the CCAA judge is more than to simply decide the motions placed before him or her. The CCAA is skeletal in nature. It gives the CCAA judge broad discretionary powers that are to be exercised in furtherance of the CCAA's purposes. The CCAA judge must "provide the conditions under which the debtor can attempt to reorganize" (para. 60). This includes supervising the process and advancing it to the point where it can be determined whether reorganization will succeed. In performing these tasks, the CCAA judge "must be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors" (para. 60).

**104** *Century Services*, it can be seen, makes it clear that the CCAA judge in the present CCAA Proceeding had to "be cognizant" of the interests of the Second Lien Lenders, as well as those of the moving parties and the pension claimants.

**105** It would have been apparent to the CCAA judge that the Pension Motion had the potential to adversely affect the interests of the Second Lien Lenders. At the time that the Pension Motion was brought, the Applicants' assets had been sold and only limited funds were left for distribution. Those funds were clearly insufficient to meet the claims of both the Second Lien Lenders and the pension claimants. It will be recalled that by means of the motion, GFPI, the CRO and the Monitor sought to be relieved of any obligation to continue making contributions into the Plans. The Pension Motion was vigorously opposed. Had the CCAA judge refused to grant the Pension Motion and contributions continued to be made to the Plans, the Second Lien Lenders would have been prejudiced because there would have been even fewer funds available to satisfy their claims.

**106** The CCAA judge was also aware that in March 2012 -- some three months before the Pension Motion was brought -- counsel for the Second Lien Lenders' Agent had given notice that it was to be removed from the service list because it no longer represented the Second Lien Lenders' Agent.

**107** Despite service of the Pension Motion on the Second Lien Lenders' Agent and on the Second Lien Lenders, in these circumstances, it is understandable that the CCAA judge had concerns about the adequacy of notice to the Second Lien Lenders.

**108** That this concern drove the adjournments is apparent from the CCAA judge's direction to the Monitor on August 27, 2012, to provide additional communication to the Second Lien Lenders themselves, not the Agent. (The Monitor followed those directions, holding a conference call directly with the Second Lien Lenders themselves.)

**109** In these circumstances, I do not accept that the adjournments of the Pension Motion amounted to procedural unfairness. Rather, the adjournments are consonant with the Supreme Court's dictates in *Century Services*, described above.

**DID THE CCAA JUDGE ERR IN PRINCIPLE OR ACT UNREASONABLY IN LIFTING THE STAY AND ORDERING THE REMAINING APPLICANTS INTO BANKRUPTCY?**

**110** In general terms, I see no error in the CCAA judge's exercise of discretion to lift the CCAA stay and order the Remaining Applicants into bankruptcy.

**111** At the time the Motions were heard, GFPI had long since ceased operating, its assets had been sold, and the bulk of the sale proceeds had been distributed. It was a liquidating CCAA with nothing left to liquidate. Nor was there anything left to reorganise or restructure. All that was left was to distribute the Remaining Funds and it was clear that those funds were insufficient to meet the claims of both the Second Lien Lenders and the pension claimants.

**112** In those circumstances, the breadth of the CCAA judge's discretion was sufficient to "construct a bridge" to the BIA -- that is, he had the discretion to lift the stay and order the Remaining Applicants into bankruptcy. Although this was not a situation in which creditors had

rejected a proposal, the reasoning of the Supreme Court at paras. 78 and 80 of *Century Services* applied:

... 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 [Superintendent] seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes that would allow the enforcement of property interests at the conclusion of CCAA proceedings that would be lost in bankruptcy (*Ivaco*, at paras. 62-63). [Citation excluded.]

...

[T]he 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 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*. [Emphasis added.]

**113** Consequently, the question for this court is whether the CCAA judge erred in principle, or exercised his discretion unreasonably, by lifting the stay and ordering the Remaining Applicants into bankruptcy.

**114** The various complaints levied against the CCAA judge's exercise of discretion can be summarized as raising the following questions. Did the motion judge err in:

1. failing to properly take into consideration West Face's conduct in bringing the Bankruptcy Motion?
2. failing to recognize, and require payment of, the wind up deemed trusts that arose during the CCAA Proceeding before ordering GFPI into bankruptcy?

3. wrongly considering that the pension claimants had to take certain steps earlier in the CCAA Proceeding in order to successfully assert their claims? and
4. failing to consider the question posed by the Pension Motion, namely, whether GFPI, the CRO and the Monitor should be relieved from making further payments into the Plans?

### **1. West Face's Conduct**

**115** Two complaints are levied about West Face's conduct. The first is that West Face delayed in bringing the Bankruptcy Motion and the second is that West Face brought that motion to defeat the wind up deemed trust regime.

**116** Even if delay is a relevant consideration when considering West Face's conduct, I do not accept that West Face failed to bring the Bankruptcy Motion in a timely manner. The Pension Motion was brought on June 8, 2012, and originally returnable on June 25, 2012. Although in March 2012, West Face had been served with notice that counsel for the Second Lien Lenders' Agent no longer represented the Agent, the record is not clear on when West Face discovered that the Agent could not obtain timely instructions from the Second Lien Lenders in respect of the Pension Motion. From the record, it appears that West Face acted promptly upon discovering that fact. West Face retained its own counsel on October 19, 2012, served a notice of appearance that same day and brought the Bankruptcy Motion on October 21, 2012, returnable on October 22, 2012.

**117** In the circumstances, I do not view West Face as having been dilatory in the bringing of the Bankruptcy Motion.

**118** As for the submission that the Bankruptcy Motion was brought to defeat the wind up deemed trust priority regime, assuming that to have been West Face's motivation, it does not disentitle West Face from being granted the relief it sought in the Bankruptcy Motion. A creditor may seek a bankruptcy order under the BIA to alter priorities in its favour: see *Federal Business Development Bank v. Québec*, [1988] 1 S.C.R. 1061, at p. 1072; *Bank of Montreal v. Scott Road Enterprises Ltd.* (1989), 57 D.L.R. (4th) 623 (B.C.C.A), at pp. 627, 630-31; and *Ivaco*, at para. 76.

### **2. The Wind up Deemed Trusts**

**119** The Superintendent (joined by the Administrator and the Intervener) makes two submissions as to why the CCAA judge erred in failing to order payment of the wind up deemed trusts deficits before ordering the Remaining Applicants into bankruptcy. First, he submits that, unlike bankruptcy where PBA deemed trusts are inoperative, the wind up deemed trusts in this case were not rendered inoperative because they did not conflict with a provision of the CCAA or an order made under the CCAA (for example, an order establishing a debtor-in-possession charge). Second, he contends that

*Indalex* requires that the wind up deemed trusts be given priority in this case.

**120** I would not accept either submission.

***Federal Paramountcy***

**121** In my view, the first submission misses a crucial point: federal paramountcy in this case is based on the BIA.

**122** As I have explained, at the time that the Motions were heard, it was open to the CCAA judge to order the Remaining Applicants into bankruptcy. Once the CCAA judge exercised his discretion and made that order, the priorities established by the BIA applied to the Remaining Funds and rendered the wind up deemed trust claims inoperative.

**123** Because wind up deemed trusts are created by provincial legislation, their payment could not be ordered when the Motions were heard because payment would have had the effect of frustrating the priorities established by the federal law of bankruptcy. A provincial statute cannot alter priorities within the federal scheme nor can it be used in a manner that subverts the scheme of distribution under the BIA: *Century Services*, at para. 80.

***Indalex***

**124** As for the second submission, in my view, *Indalex* does not assist in the resolution of the priority dispute in this case.

**125** In *Indalex*, the CCAA court authorized debtor-in-possession ("DIP") financing and granted the DIP charge priority over the claims of all creditors.

**126** There were two pension plans in issue in *Indalex*: the executives' plan and the salaried employees' plan. When the CCAA proceedings began, the executives' plan had not been declared wound up. As s. 57(4) of the PBA provides that the wind up deemed trust comes into existence only when the pension plan is wound up, no wind up deemed trust existed in respect of the executives' plan.

**127** The salaried employees' pension plan was in a different position, however. That plan had been declared wound up prior to the commencement of the CCAA proceeding and the wind up was in process.

**128** A majority of the Supreme Court concluded that the PBA wind up deemed trust for the salaried employees' pension plan continued in the CCAA proceeding, subject to the doctrine of federal paramountcy. However, the CCAA court-ordered priority of the DIP lenders meant that federal and provincial laws gave rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge superseded the deemed trust.



129 Both the facts and the issues in *Indalex* differ from those of the present case.

130 There are two critical factual distinctions. First, the wind up deemed trust under consideration in *Indalex* arose before the CCAA proceeding commenced. In this case, neither of the Plans had been declared wound up at the time the Initial Order was made -- the Superintendent's Wind Up Orders were made after the CCAA Proceeding commenced.

131 Second, the BIA played no part in *Indalex*. In this case, however, the BIA was implicated from the beginning of the CCAA Proceeding. Prior to the issuance of the Initial Order, one of the debtor companies' creditors (GE Canada) had issued a bankruptcy application, which was stayed by the Initial Order. Further, and importantly, at the time the priority contest came to be decided in this case, both the Pension Motion and the Bankruptcy Motion were before the CCAA judge and he found that there was no point to continuing the CCAA proceeding.<sup>3</sup>

132 The issues for resolution in *Indalex* were whether: the deemed trust in s. 57(4) applied to wind up deficiencies; such a deemed trust superseded a DIP charge; the company had fiduciary obligations to the pension plan members when making decisions in the context of insolvency proceedings; and, a constructive trust was properly imposed as a remedy for breach of fiduciary duties.

133 As I already explained, because of the point in the proceedings at which the Motions were heard, the primary issue for the CCAA judge in this case was whether to lift the CCAA stay and order the Remaining Applicants into bankruptcy.

134 Given the legal and factual differences between the two cases, I do not find *Indalex* to be of assistance in the resolution of this dispute.

### 3. Steps by the Pension Claimants

135 It was submitted that the CCAA judge wrongly required the pension claimants to have taken steps earlier in the CCAA Proceeding, had they wished to assert their wind up deemed trust claims.

136 I understand this submission to be based largely on paras. 94 and 95 of the CCAA judge's reasons. The relevant parts of those paragraphs read as follows:

[94] It does seem to me that a commitment to make wind up deficiency payments is not in the ordinary course of business of an insolvent company subject to a CCAA order unless agreed to. Even if the obligation could be said to be in the ordinary course for an insolvent company GFPI was not obliged to make the payments ... .

[95] This is precisely the reason for the granting of a stay of proceedings that is

provided for by the *CCAA*. Anyone seeking to have a payment made that would be regarded as being outside the ordinary course of business must seek to have the stay lifted or if it is to be regarded as an ordinary course of business obligation, persuade the applicant and creditors that it should be made.

**137** I do not read the *CCAA* judge's reasons as saying that the pension claimants had to have taken certain steps earlier in the *CCAA* Proceeding in order to assert their claims. Rather, I understand the *CCAA* judge to be saying the following. A contribution towards a wind up deficit made by an insolvent company subject to a *CCAA* order is not a payment made in the ordinary course of business. The Initial Order only permitted payments in the ordinary course of business. Thus, if during the *CCAA* Proceeding the pension claimants wanted payments be made on the wind up deficits, they would have had to have taken steps to accomplish that. These steps include reaching an agreement with the Applicants and secured creditors or seeking to have the stay lifted and an order made compelling the making of the payments.

**138** Understood in this way, I see no error in the *CCAA* judge's reasoning. I would add that the timing of the relevant events supports this reasoning. When the Initial Order was made, the Plans were on-going -- the Superintendent's Wind Up Orders were not made until almost three years later. The Initial Order permitted, but did not require, GFPI to pay "all outstanding and future ... pension contributions ... incurred in the ordinary course of business". The nature and magnitude of contributions to ongoing pension plans is different from those made to pension plans in the process of being wound up. Thus, it does not seem to me that payments made on wind up deficits fall within the terms of the Initial Order which permitted the making of pension contributions "incurred in the ordinary course of business".

**139** Accordingly, had the pension creditors sought to have payments made on the wind up deficits, they would have had to have taken steps -- such as those suggested by the *CCAA* judge -- to enable and/or compel such payments to be made.

#### **4. The Question Posed by the Pension Motion**

**140** I do not accept that the *CCAA* judge erred by failing to answer the question posed by the Pension Motion. That question, it will be recalled, was whether GFPI, the CRO and the Monitor should be relieved from making further payments into the Plans.

**141** In ordering the Remaining Applicants into bankruptcy, the *CCAA* judge found that there was no point to continuing the *CCAA* Proceeding. It was plain and obvious that there were insufficient funds to meet the claims against the Remaining Funds. Accordingly, there was no need for the *CCAA* judge to address the question posed by the Pension Motion because distribution of the Remaining Funds had to be in accordance with the BIA priorities scheme.

#### **A CONCLUDING COMMENT**

142 In my view, this case illustrates the value that a CCAA proceeding -- rather than a bankruptcy proceeding -- offers for pension plan beneficiaries. Three examples demonstrate this.

143 First, from the outset of the CCAA Proceeding until June 2012, all pension contributions (both ongoing and special payments) continued to be made into the Plans. Had GFPI gone into bankruptcy, those payments would not have been made to the Plans.

144 Second, on the sale to Georgia Pacific, Georgia Pacific assumed the Pension Plan for Hourly Employees of Grant Forest Products Inc. -- Englehart Plan. Had GFPI gone into bankruptcy, it is unlikely in the extreme that the Englehart Plan would have continued as an on-going plan.

145 Third, the CCAA Proceeding gave GFPI sufficient "breathing space" to enable it to take steps to ensure that the Plans continued to be properly administered. This is best seen from the orders dated August 26, 2011, and September 21, 2011. Through those orders, GFPI was authorized to initiate the Plans' windups and work with the Superintendent in appointing a replacement administrator, and the Monitor was authorized to hold back funds against which the pension claimants could assert their claims. Co-operation of this sort typically leads to reduced costs of administration with the result that more funds are available to plan beneficiaries.

146 I hasten to add that these remarks are not intended to suggest a lack of sympathy for the position of pension plan beneficiaries in insolvency proceedings. Rather, it is to recognize that while no panacea, at least there is some prospect of amelioration of that position in a CCAA proceeding.

#### **DISPOSITION**

147 Accordingly, I would dismiss the appeal. Dismissal of the appeal would leave paras. 1-6 of the Transition Order operative, thus nothing more need be said in relation to the Remaining Applicants' submissions.

148 If the parties are unable to agree on costs, I would permit them to make written submissions to a maximum of three pages in length, within fourteen days of the date of release of these reasons.

E.E. GILLESE J.A.

D.H. DOHERTY J.A.:-- I agree.

P.D. LAUWERS J.A.:-- I agree.

\* \* \* \* \*

#### **Schedule A**

Paragraphs 1-6 of the Transition Order read as follows:

SERVICE

1. THIS COURT ORDERS that the Motions are properly returnable and hereby dispenses with further service thereof.

#### CAPITALIZED TERMS

2. THIS COURT ORDERS that all capitalized terms not defined herein shall have the meaning ascribed to them in the Stephen Affidavit.

#### APPROVAL OF ACTIVITIES

3. THIS COURT ORDERS that the Twenty-Sixth Report, the Twenty-Seventh Report and the Twenty-Ninth Report and the activities of the Monitor as set out therein be and are hereby approved.

#### EXTENSION OF STAY PERIOD

4. THIS COURT ORDERS that the Stay Period in respect of the Remaining Applicants as defined in the Order of Mr. Justice Newbould made in these proceedings on June 25, 2009 (the "Initial Order"), as previously extended until January 31, 2014, be and is hereby extended until the filing of the Monitor's Discharge Certificate as defined in paragraph 23 hereof or further order of this Court.
5. THIS COURT ORDERS that none of GFPI, Stonecrest Capital Inc. ("SCI") in its capacity as Chief Restructuring Organization (the "CRO"), or the Monitor shall make any further payments to either of the Timmins Salaried Plan or the Executive Plan (collectively, the "Pension Plans") or their respective trustees or to the Pension Administrator.
6. THIS COURT ORDERS and declares that none of GFPI, the CRO or the Monitor shall incur any liability for not making any payments when due to the Pension Plans or their respective trustees or the Pension Administrator.

1 Although the wording of the endorsement is somewhat unclear, it appears that all parties proceeded on that basis. The relevant part of the endorsement states: "I am satisfied that GFPI, CRO and the monitor hold funds that may otherwise be due under the pension plans pending notice to second lien creditors ..."

2 The record is unclear as to which party or parties made this submission.

3 See para. 62 of the reasons, where the CCAA judge states that the usefulness of the CCAA proceeding had come to an end.

**TAB 14**

**Most Negative Treatment:** Distinguished

**Most Recent Distinguished:** Bauscher-Grant Farms Inc. v. Lake Diefenbaker Potato Corp. | 1998 CarswellSask 335, 167 Sask. R. 14, [1998] S.J. No. 344, 80 A.C.W.S. (3d) 62, [1998] 8 W.W.R. 751 | (Sask. Q.B., May 11, 1998)

1993 CarswellOnt 183

Ontario Court of Justice (General Division — Commercial List)

Lehndorff General Partner Ltd., Re

1993 CarswellOnt 183, [1993] O.J. No. 14, 17 C.B.R. (3d) 24, 37 A.C.W.S. (3d) 847, 9 B.L.R. (2d) 275

**Re Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36; Re Courts of Justice Act, R.S.O. 1990, c. C-43; Re plan of compromise in respect of LEHNDORFF GENERAL PARTNER LTD. (in its own capacity and in its capacity as general partner of LEHNDORFF UNITED PROPERTIES (CANADA), LEHNDORFF PROPERTIES (CANADA) and LEHNDORFF PROPERTIES (CANADA) II) and in respect of certain of their nominees LEHNDORFF UNITED PROPERTIES (CANADA) LTD., LEHNDORFF CANADIAN HOLDINGS LTD., LEHNDORFF CANADIAN HOLDINGS II LTD., BAYTEMP PROPERTIES LIMITED and 102 BLOOR STREET WEST LIMITED and in respect of THG LEHNDORFF VERMÖGENSVERWALTUNG GmbH (in its capacity as limited partner of LEHNDORFF UNITED PROPERTIES (CANADA))**

Farley J.

Heard: December 24, 1992

Judgment: January 6, 1993

Docket: Doc. B366/92

Counsel: *Alfred Apps, Robert Harrison and Melissa J. Kennedy*, for applicants.

*L. Crozier*, for Royal Bank of Canada.

*R. C. Heintzman*, for Bank of Montreal.

*J. Hodgson, Susan Lundy and James Hilton*, for Canada Trustco Mortgage Corporation.

*Jay Schwartz*, for Citibank Canada.

*Stephen Golick*, for Peat Marwick Thorne \* Inc., proposed monitor.

*John Teolis*, for Fuji Bank Canada.

*Robert Thornton*, for certain of the advisory boards.

Subject: Corporate and Commercial; Insolvency

**Related Abridgment Classifications**

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

**Bankruptcy and insolvency**

XIX Companies' Creditors Arrangement Act

XIX.2 Initial application

XIX.2.b Grant of stay

XIX.2.b.i General principles

**Headnote**

**Corporations — Arrangements and compromises — Under Companies' Creditors Arrangements Act — Arrangements — Effect of arrangement — Stay of proceedings**

Corporations — Arrangements and compromises — Companies' Creditors Arrangement Act — Stay of proceedings — Stay being granted even where it would affect non-applicants that were not companies within meaning of Act — Business operations of applicants and non-applicants being so intertwined as to make stay appropriate.

The applicant companies were involved in property development and management and sought the protection of the *Companies' Creditors Arrangement Act* ("CCAA") in order that they could present a plan of compromise. They also sought a stay of all proceedings against the individual company applicants either in their own capacities or because of their interest in a larger group of companies. Each of the applicant companies was insolvent and had outstanding debentures issued under trust deeds. They proposed a plan of compromise among themselves and the holders of the debentures as well as those others of their secured and unsecured creditors deemed appropriate in the circumstances.

A question arose as to whether the court had the power to grant a stay of proceedings against non-applicants that were not companies and, therefore, not within the express provisions of the CCAA.

**Held:**

The application was allowed.

It was appropriate, given the significant financial intertwining of the applicant companies, that a consolidated plan be approved. Further, each of the applicant companies had a realistic possibility of being able to continue operating even though each was currently unable to meet all of its expenses. This was precisely the sort of situation in which all of the creditors would likely benefit from the application of the CCAA and in which it was appropriate to grant an order staying proceedings.

The inherent power of the court to grant stays can be used to supplement s. 11 of the CCAA when it is just and reasonable to do so. Clearly, the court had the jurisdiction to grant a stay in respect of any of the applicants that were companies fitting the criteria in the CCAA. However, the stay requested also involved limited partnerships where (1) the applicant companies acted on behalf of the limited partnerships, or (2) the stay would be effective against any proceedings taken by any party against the property assets and undertakings of the limited partnerships in which they held a direct interest. The business operations of the applicant companies were so intertwined with the limited partnerships that it would be impossible for a stay to be granted to the applicant companies that would affect their business without affecting the undivided interest of the limited partnerships in the business. As a result, it was just and reasonable to supplement s. 11 and grant the stay.

While the provisions of the CCAA allow for a cramdown of a creditor's claim, as well as the interest of any other person, anyone wishing to start or continue proceedings against the applicant companies could use the comeback clause in the order to persuade the court that it would not be just and reasonable to maintain the stay. In such a motion, the onus would be on the applicant companies to show that it was appropriate in the circumstances to continue the stay.

**Table of Authorities**

**Cases considered:**



*Amirault Fish Co., Re*, 32 C.B.R. 186, [1951] 4 D.L.R. 203 (N.S. T.D.) — referred to

*Associated Investors of Canada Ltd., Re*, 67 C.B.R. (N.S.) 237, Alta. L.R. (2d) 259, [1988] 2 W.W.R. 211, 38 B.L.R. 148, (sub nom. *Re First Investors Corp.*) 46 D.L.R. (4th) 669 (Q.B.), reversed (1988), 71 C.B.R. 71, 60 Alta. L.R. (2d) 242, 89 A.R. 344 (C.A.) — referred to

*Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.) — referred to

*Canada Systems Group (EST) v. Allen-Dale Mutual Insurance Co.* (1982), 29 C.P.C. 60, 137 D.L.R. (3d) 287 (Ont. H.C.) [affirmed (1983), 41 O.R. (2d) 135, 33 C.P.C. 210, 145 D.L.R. (3d) 266 (C.A.)] — referred to

*Empire-Universal Films Ltd. v. Rank*, [1947] O.R. 775 [H.C.] — referred to

*Feifer v. Frame Manufacturing Corp., Re*, 28 C.B.R. 124, [1947] Que. K.B. 348 (C.A.) — referred to

*Fine's Flowers Ltd. v. Fine's Flowers (Creditors of)* (1992), 10 C.B.R. (3d) 87, 4 B.L.R. (2d) 293, 87 D.L.R. (4th) 391, 7 O.R. (3d) 193 (Gen. Div.) — referred to

*Gaz Métropolitain v. Wynden Canada Inc.* (1982), 44 C.B.R. (N.S.) 285 (C.S. Que.) [affirmed (1982), 45 C.B.R. (N.S.) 11 (Que. C.A.)] — referred to

*Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84, [1991] 2 W.W.R. 136 (C.A.) — referred to

*Inducon Development Corp. Re* (1992), 8 C.B.R. (3d) 306 (Ont. Gen. Div.) — referred to

*International Donut Corp. v. 050863 N.B. Ltd.* (1992), 127 N.B.R. (2d) 290, 319 A.P.R. 290 (Q.B.) — considered

*Keppoch Development Ltd., Re* (1991), 8 C.B.R. (3d) 95 (N.S. T.D.) — referred to

*Langley's Ltd., Re*, [1938] O.R. 123, [1938] 3 D.L.R. 230 (C.A.) — referred to

*McCordic v. Bosanquet* (1974), 5 O.R. (2d) 53 (H.C.) — referred to

*Meridian Developments Inc. v. Toronto Dominion Bank*, 52 C.B.R. (N.S.) 109, [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 53 A.R. 39, 11 D.L.R. (4th) 576 (Q.B.) — referred to

*Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 1 (Q.B.) — referred to

*Northland Properties Ltd., Re* (1988), 73 C.B.R. (N.S.) 141 (B.C. S.C.) — referred to

*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101, (sub nom. *Elum Corp. v. Comiskey*) 41 O.A.C. 282, 1 O.R. (3d) 289 (C.A.) — referred to

*Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 2 C.B.R. (3d) 303, 51 B.C.L.R. (2d) 105 (C.A.), affirming (1990), 2 C.B.R. (3d) 291, 47 B.C.L.R. (2d) 193 (S.C.), leave to appeal to S.C.C. refused (1991), 7 C.B.R. (3d) 164 (note), 55 B.C.L.R. (2d) xxxiii (note), 135 N.R. 317 (note) — referred to

*Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659, 16 C.B.R. 1, [1934] 4 D.L.R. 75 — referred to

*Seven Mile Dam Contractors v. R.* (1979), 13 B.C.L.R. 137, 104 D.L.R. (3d) 274 (S.C.), affirmed (1980), 25 B.C.L.R. 183 (C.A.) — referred to

*Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312, 86 D.L.R. (4th) 621 (Ont. Gen. Div.) — referred to

*Slavik, Re* (1992), 12 C.B.R. (3d) 157 (B.C. S.C.) — considered

*Stephanie's Fashions Ltd., Re* (1990), 1 C.B.R. (3d) 248 (B.C. S.C.) — referred to

*Ultracare Management Inc. v. Zevenberger (Trustee of)* (1990), 3 C.B.R. (3d) 151, (sub nom. *Ultracare Management Inc. v. Gammon*) 1 O.R. (3d) 321 (Gen. Div.) — referred to

*United Maritime Fishermen Co-operative, Re* (1988), 67 C.B.R. (N.S.) 44, 84 N.B.R. (2d) 415, 214 A.P.R. 415 (Q.B.), varied on reconsideration (1988), 68 C.B.R. (N.S.) 170, 87 N.B.R. (2d) 333, 221 A.P.R. 333 (Q.B.), reversed (1988), 69 C.B.R. (N.S.) 161, 88 N.B.R. (2d) 253, 224 A.P.R. 253, (sub nom. *Cdn. Co-op. Leasing Services v. United Maritime Fishermen Co-op.*) 51 D.L.R. (4th) 618 (C.A.) — referred to

**Statutes considered:**

Bankruptcy Act, R.S.C. 1985, c. B-3 —

s. 85

s. 142

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 — preamble

s. 2

s. 3

s. 4

s. 5

s. 6

s. 7

s. 8

s. 11

Courts of Justice Act, R.S.O. 1990, c. C.43.

Judicature Act, The, R.S.O. 1937, c. 100.

Limited Partnerships Act, R.S.O. 1990, c. L.16 —

s. 2(2)

s. 3(1)

s. 8

s. 9

s. 11

s. 12(1)

s. 13

s. 15(2)

s. 24

Partnership Act, R.S.A. 1980, c.P-2 — Pt. 2

s. 75

**Rules considered:**

Ontario, Rules of Civil Procedure —

r. 8.01

r. 8.02

Application under Companies' Creditors Arrangement Act to file consolidated plan of compromise and for stay of proceedings.

**Farley J.:**

1 These are my written reasons relating to the relief granted the applicants on December 24, 1992 pursuant to their application under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") and the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("CJA"). The relief sought was as follows:

- (a) short service of the notice of application;
- (b) a declaration that the applicants were companies to which the CCAA applies;
- (c) authorization for the applicants to file a consolidated plan of compromise;
- (d) authorization for the applicants to call meetings of their secured and unsecured creditors to approve the consolidated plan of compromise;

(e) a stay of all proceedings taken or that might be taken either in respect of the applicants in their own capacity or on account of their interest in Lehndorff United Properties (Canada) ("LUPC"), Lehndorff Properties (Canada) ("LPC") and Lehndorff Properties (Canada) II ("LPC II") and collectively (the "Limited Partnerships") whether as limited partner, as general partner or as registered titleholder to certain of their assets as bare trustee and nominee; and

(f) certain other ancillary relief.

2 The applicants are a number of companies within the larger Lehndorff group ("Group") which operates in Canada and elsewhere. The group appears to have suffered in the same way that a number of other property developers and managers which have also sought protection under the CCAA in recent years. The applicants are insolvent; they each have outstanding debentures issues under trust deeds; and they propose a plan of compromise among themselves and the holders of these debentures as well as those others of their secured and unsecured creditors as they deemed appropriate in the circumstances. Each applicant except THG Lehndorff Vermögensverwaltung GmbH ("GmbH") is an Ontario corporation. GmbH is a company incorporated under the laws of Germany. Each of the applicants has assets or does business in Canada. Therefore each is a "company" within the definition of s. 2 of the CCAA. The applicant Lehndorff General Partner Ltd. ("General Partner Company") is the sole general partner of the Limited Partnerships. The General Partner Company has sole control over the property and businesses of the Limited Partnerships. All major decisions concerning the applicants (and the Limited Partnerships) are made by management operating out of the Lehndorff Toronto Office. The applicants aside from the General Partner Company have as their sole purpose the holding of title to properties as bare trustee or nominee on behalf of the Limited Partnerships. LUPC is a limited partnership registered under the *Limited Partnership Act*, R.S.O. 1990, c. L.16 ("Ontario LPA"). LPC and LPC II are limited partnerships registered under Part 2 of the *Partnership Act*, R.S.A. 1980, c. P-2 ("Alberta PA") and each is registered in Ontario as an extra provincial limited partnership. LUPC has over 2,000 beneficial limited partners, LPC over 500 and LPC II over 250, most of whom are residents of Germany. As at March 31, 1992 LUPC had outstanding indebtedness of approximately \$370 million, LPC \$45 million and LPC II \$7 million. Not all of the members of the Group are making an application under the CCAA. Taken together the Group's indebtedness as to Canadian matters (including that of the applicants) was approximately \$543 million. In the summer of 1992 various creditors (Canada Trustco Mortgage Company, Bank of Montreal, Royal Bank of Canada, Canadian Imperial Bank of Commerce and the Bank of Tokyo Canada) made demands for repayment of their loans. On November 6, 1992 Funtanua Investments Limited, a minor secured lender also made a demand. An interim standstill agreement was worked out following a meeting of July 7, 1992. In conjunction with Peat Marwick Thorne Inc. which has been acting as an informal monitor to date and Fasken Campbell Godfrey the applicants have held multiple meetings with their senior secured creditors over the past half year and worked on a restructuring plan. The business affairs of the applicants (and the Limited Partnerships) are significantly intertwined as there are multiple instances of intercorporate debt, cross-default provisions and guarantees and they operated a centralized cash management system.

3 This process has now evolved to a point where management has developed a consolidated restructuring plan which plan addresses the following issues:

- (a) The compromise of existing conventional, term and operating indebtedness, both secured and unsecured.
- (b) The restructuring of existing project financing commitments.
- (c) New financing, by way of equity or subordinated debt.
- (d) Elimination or reduction of certain overhead.
- (e) Viability of existing businesses of entities in the Lehndorff Group.
- (f) Restructuring of income flows from the limited partnerships.

- (g) Disposition of further real property assets aside from those disposed of earlier in the process.
- (h) Consolidation of entities in the Group; and
- (i) Rationalization of the existing debt and security structure in the continuing entities in the Group.

Formal meetings of the beneficial limited partners of the Limited Partnerships are scheduled for January 20 and 21, 1993 in Germany and an information circular has been prepared and at the time of hearing was being translated into German. This application was brought on for hearing at this time for two general reasons: (a) it had now ripened to the stage of proceeding with what had been distilled out of the strategic and consultative meetings; and (b) there were creditors other than senior secured lenders who were in a position to enforce their rights against assets of some of the applicants (and Limited Partnerships) which if such enforcement did take place would result in an undermining of the overall plan. Notice of this hearing was given to various creditors: Barclays Bank of Canada, Barclays Bank PLC, Bank of Montreal, Citibank Canada, Canada Trustco Mortgage Corporation, Royal Trust Corporation of Canada, Royal Bank of Canada, the Bank of Tokyo Canada, Funtauna Investments Limited, Canadian Imperial Bank of Commerce, Fuji Bank Canada and First City Trust Company. In this respect the applicants have recognized that although the initial application under the CCAA may be made on an ex parte basis (s. 11 of the CCAA; *Re Langley's Ltd.*, [1938] O.R. 123, [1938] 3 D.L.R. 230 (C.A.); *Re Keppoch Development Ltd.* (1991), 8 C.B.R. (3d) 95 (N.S. T.D.) . The court will be concerned when major creditors have not been alerted even in the most minimal fashion (*Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 306 (Ont. Gen. Div.) at p. 310). The application was either supported or not opposed.

4 "Instant" debentures are now well recognized and respected by the courts: see *Re United Maritime Fishermen Cooperative* (1988), 67 C.B.R. (N.S.) 44 (N.B. Q.B.) , at pp. 55-56, varied on reconsideration (1988), 68 C.B.R. (N.S.) 170 (N.B. Q.B.) , reversed on different grounds (1988), 69 C.B.R. (N.S.) 161 (N.B. C.A.) , at pp. 165-166; *Re Stephanie's Fashions Ltd.* (1990), 1 C.B.R. (3d) 248 (B.C. S.C.) at pp. 250-251; *Nova Metal Products Inc. v. Comiskey (Trustee of)* (sub nom. *Elan Corp. v. Comiskey* ) (1990), 1 O.R. (3d) 289, 1 C.B.R. (3d) 101 (C.A.) per Doherty J.A., dissenting on another point, at pp. 306-310 (O.R.); *Ultracare Management Inc. v. Zevenberger (Trustee of)* (sub nom. *Ultracare Management Inc. v. Gammon* ) (1990), 1 O.R. (3d) 321 (Gen. Div.) at p. 327. The applicants would appear to me to have met the technical hurdle of s. 3 and as defined s. 2) of the CCAA in that they are debtor companies since they are insolvent, they have outstanding an issue of debentures under a trust deed and the compromise or arrangement that is proposed includes that compromise between the applicants and the holders of those trust deed debentures. I am also satisfied that because of the significant intertwining of the applicants it would be appropriate to have a consolidated plan. I would also understand that this court (Ontario Court of Justice (General Division)) is the appropriate court to hear this application since all the applicants except GmbH have their head office or their chief place of business in Ontario and GmbH, although it does not have a place of business within Canada, does have assets located within Ontario.

5 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 plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4, 5, 6, 7, 8 and 11 of the CCAA; *Reference re Companies' Creditors Arrangement Act*, [1934] S.C.R. 659 at p. 661, 16 C.B.R. 1, [1934] 4 D.L.R. 75; *Meridian Developments Inc. v. Toronto Dominion Bank*, [1984] 5 W.W.R. 215 (Alta. Q.B.) at pp. 219-220; *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361 (Q.B.) , at pp. 12-13 (C.B.R.); *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 2 C.B.R. (3d) 303 (B.C. C.A.) , at pp. 310-311, affirming (1990), 2 C.B.R. (3d) 291, 47 B.C.L.R. (2d) 193 (S.C.) , leave to appeal to S.C.C. dismissed (1991), 7 C.B.R. (3d) 164 (S.C.C.) .; *Nova Metal Products Inc. v. Comiskey (Trustee of)* , supra, at p. 307 (O.R.); *Fine's*

*Flowers v. Fine's Flowers (Creditors of)* (1992), 7 O.R. (3d) 193 (Gen. Div.), at p. 199 and "Reorganizations Under The Companies' Creditors Arrangement Act", Stanley E. Edwards (1947) 25 Can. Bar Rev. 587 at p. 592.

6 The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA. see *Nova Metal Products Inc. v. Comiskey (Trustee of)*, supra at pp. 297 and 316; *Re Stephanie's Fashions Ltd.*, supra, at pp. 251-252 and *Ultracare Management Inc. v. Zevenberger (Trustee of)*, supra, at p. 328 and p. 330. It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed: see *Meridian Developments Inc. v. Toronto Dominion Bank*, supra, at p. 220 (W.W.R.). The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and all of the creditors: see *Quintette Coal Ltd. v. Nippon Steel Corp.*, supra, at pp. 108-110; *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84 (C.A.), at pp. 315-318 (C.B.R.) and *Re Stephanie's Fashions Ltd.*, supra, at pp. 251-252.

7 One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors. Unlike the *Bankruptcy Act*, R.S.C. 1985, c. B-3, before the amendments effective November 30, 1992 to transform it into the *Bankruptcy and Insolvency Act* ("BIA"), it is possible under the CCAA to bind secured creditors it has been generally speculated that the CCAA will be resorted to by companies that are generally larger and have a more complicated capital structure and that those companies which make an application under the BIA will be generally smaller and have a less complicated structure. Reorganization may include partial liquidation where it is intended as part of the process of a return to long term viability and profitability. See *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*, supra, at p. 318 and *Re Associated Investors of Canada Ltd.* (1987), 67 C.B.R. (N.S.) 237 (Alta. Q.B.) at pp. 245, reversed on other grounds at (1988), 71 C.B.R. (N.S.) 71 (Alta. C.A.). It appears to me that the purpose of the CCAA is also to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company or simply a substantial downsizing of its business operations, provided the same is proposed in the best interests of the creditors generally. See *Re Associated Investors of Canada Ltd.*, supra, at p. 318; *Re Amirault Fish Co.*, 32 C.B.R. 186, [1951] 4 D.L.R. 203 (N.S. T.D.) at pp. 187-188 (C.B.R.).

8 It strikes me that each of the applicants in this case has a realistic possibility of being able to continue operating, although each is currently unable to meet all of its expenses albeit on a reduced scale. This is precisely the sort of circumstance in which all of the creditors are likely to benefit from the application of the CCAA and in which it is appropriate to grant an order staying proceedings so as to allow the applicant to finalize preparation of and file a plan of compromise and arrangement.

9 Let me now review the aspect of the stay of proceedings. Section 11 of the CCAA provides as follows:

11. Notwithstanding anything in the *Bankruptcy Act* or the *Winding-up Act*, whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,

(a) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy Act* and the *Winding-up Act* or either of them;

(b) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and

(c) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

10 The power to grant a stay of proceeding should be construed broadly in order to permit the CCAA to accomplish its legislative purpose and in particular to enable continuance of the company seeking CCAA protection. The power to grant a stay therefore extends to a stay which affected the position not only of the company's secured and unsecured creditors, but also all non-creditors and other parties who could potentially jeopardize the success of the plan and thereby the continuance of the company. See *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*, supra, at pp. 12-17 (C.B.R.) and *Quintette Coal Ltd. v. Nippon Steel Corp.*, supra, at pp. 296-298 (B.C. S.C.) and pp. 312-314 (B.C. C.A.) and *Meridian Developments Inc. v. Toronto Dominion Bank*, supra, at pp. 219 ff. Further the court has the power to order a stay that is effective in respect of the rights arising in favour of secured creditors under all forms of commercial security: see *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*, supra, at p. 320 where Gibbs J.A. for the court stated:

The trend which emerges from this sampling will be given effect here by holding that where the word "security" occurs in the C.C.A.A., it includes s. 178 security and, where the word creditor occurs, it includes a bank holding s. 178 security. To the extent that there may be conflict between the two statutes, therefore, the broad scope of the C.C.A.A. prevails.

11 The power to grant a stay may also extend to preventing persons seeking to terminate or cancel executory contracts, including, without limitation agreements with the applying companies for the supply of goods or services, from doing so: see *Gaz Métropolitain v. Wynden Canada Inc.* (1982), 44 C.B.R. (N.S.) 285 (C.S. Que.) at pp. 290-291 and *Quintette Coal Ltd. v. Nippon Steel Corp.*, supra, at pp. 311-312 (B.C. C.A.). The stay may also extend to prevent a mortgagee from proceeding with foreclosure proceedings (see *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 141 (B.C. S.C.) or to prevent landlords from terminating leases, or otherwise enforcing their rights thereunder (see *Feifer v. Frame Manufacturing Corp.* (1947), 28 C.B.R. 124 (C.A. Que.)). Amounts owing to landlords in respect of arrears of rent or unpaid rent for the unexpired portion of lease terms are properly dealt with in a plan of compromise or arrangement: see *Sklar-Pepler Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) especially at p. 318. The jurisdiction of the court to make orders under the CCAA in the interest of protecting the debtor company so as to enable it to prepare and file a plan is effective notwithstanding the terms of any contract or instrument to which the debtor company is a party. Section 8 of the CCAA provides:

8. This Act extends and does not limit the provisions of any instrument now or hereafter existing that governs the rights of creditors or any class of them and has full force and effect notwithstanding anything to the contrary contained in that instrument.

The power to grant a stay may also extend to prevent persons from exercising any right of set off in respect of the amounts owed by such a person to the debtor company, irrespective of whether the debtor company has commenced any action in respect of which the defense of set off might be formally asserted: see *Quintette Coal Ltd. v. Nippon Steel Corp.*, supra, at pp. 312-314 (B.C. C.A.).

12 It was submitted by the applicants that the power to grant a stay of proceedings may also extend to a stay of proceedings against non-applicants who are not companies and accordingly do not come within the express provisions of the CCAA. In support thereof they cited a CCAA order which was granted staying proceedings against individuals who guaranteed the obligations of a debtor-applicant which was a qualifying company under the terms of the CCAA: see *Re Slavik*, unreported, [1992] B.C.J. No. 341 [now reported at 12 C.B.R. (3d) 157 (B.C. S.C.)]. However in the *Slavik* situation the individual guarantors were officers and shareholders of two companies which had sought and obtained

CCAA protection. Vickers J. in that case indicated that the facts of that case included the following unexplained and unamplified fact [at p. 159]:

5. The order provided further that all creditors of Norvik Timber Inc. be enjoined from making demand for payment upon that firm or upon any guarantor of an obligation of the firm until further order of the court.

The CCAA reorganization plan involved an assignment of the claims of the creditors to "Newco" in exchange for cash and shares. However the basis of the stay order originally granted was not set forth in this decision.

13 It appears to me that Dickson J. in *International Donut Corp. v. 050863 N.D. Ltd.*, unreported, [1992] N.B.J. No. 339 (N.B. Q.B.) [now reported at 127 N.B.R. (2d) 290, 319 A.P.R. 290] was focusing only on the stay arrangements of the CCAA when concerning a limited partnership situation he indicated [at p. 295 N.B.R.]:

In August 1991 the limited partnership, through its general partner the plaintiff, applied to the Court under the *Companies' Creditors Arrangement Act*, R.S.C., c. C-36 for an order delaying the assertion of claims by creditors until an opportunity could be gained to work out with the numerous and sizable creditors a compromise of their claims. An order was obtained but it in due course expired without success having been achieved in arranging with creditors a compromise. *That effort may have been wasted, because it seems questionable that the federal Act could have any application to a limited partnership in circumstances such as these.* (Emphasis added.)

14 I am not persuaded that the words of s. 11 which are quite specific as relating as to a *company* can be enlarged to encompass something other than that. However it appears to me that Blair J. was clearly in the right channel in his analysis in *Campeau v. Olympia & York Developments Ltd.* unreported, [1992] O.J. No. 1946 [now reported at 14 C.B.R. (3d) 303 (Ont. Gen. Div.)] at pp. 4-7 [at pp. 308-310 C.B.R.].

#### **The Power to Stay**

The court has always had an inherent jurisdiction to grant a stay of proceedings whenever it is just and convenient to do so, in order to control its process or prevent an abuse of that process: see *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance Co.* (1982), 29 C.P.C. 60, 137 D.L.R. (3d) 287 (Ont. H.C.), and cases referred to therein. In the civil context, this general power is also embodied in the very broad terms of s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, which provides as follows:

106. A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

Recently, Mr. Justice O'Connell has observed that this discretionary power is "highly dependent on the facts of each particular case": *Arab Monetary Fund v. Hashim* (unreported) [(June 25, 1992), Doc. 24127/88 (Ont. Gen. Div.)], [1992] O.J. No. 1330.

Apart from this inherent and general jurisdiction to stay proceedings, there are many instances where the court is specifically granted the power to stay in a particular context, by virtue of statute or under the *Rules of Civil Procedure*. The authority to prevent multiplicity of proceedings in the same court, under r. 6.01(1), is an example of the latter. The power to stay judicial and extra-judicial proceedings under s. 11 of the C.C.A.A., is an example of the former. Section 11 of the C.C.A.A. provides as follows.

#### **The Power to Stay in the Context of C.C.A.A. Proceedings**

By its formal title the C.C.A.A. is known as "An Act to facilitate compromises and arrangements between companies and their creditors". To ensure the effective nature of such a "facilitative" process it is essential that the debtor company be afforded a respite from the litigious and other rights being exercised by creditors, while it attempts to carry on as a going concern and to negotiate an acceptable corporate restructuring arrangement with such creditors.



In this respect it has been observed that the C.C.A.A. is "to be used as a practical and effective way of restructuring corporate indebtedness": see the case comment following the report of *Norcen Energy Resources Ltd. v. Oakwood Petroleum Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B.), and the approval of that remark as "a perceptive observation about the attitude of the courts" by Gibbs J.A. in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105 (C.A.) at p. 113 [B.C.L.R.].

Gibbs J.A. continued with this comment:

To the extent that a general principle can be extracted from the few cases directly on point, and the others in which there is persuasive obiter, it would appear to be that the courts have concluded that under s. 11 there is a *discretionary power to restrain judicial or extra-judicial conduct* against the debtor company *the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period*.

(emphasis added)

I agree with those sentiments and would simply add that, in my view, the restraining power extends as well to conduct which could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement. [In this respect, see also *Sairex GmbH v. Prudential Steel Ltd.* (1991), 8 C.B.R. (3d) 62 (Ont. Gen. Div.) at p. 77.]

I must have regard to these foregoing factors while I consider, as well, the general principles which have historically governed the court's exercise of its power to stay proceedings. These principles were reviewed by Mr. Justice Montgomery in *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance*, supra (a "Mississauga Derailment" case), at pp. 65-66 [C.P.C.]. The balance of convenience must weigh significantly in favour of granting the stay, as a party's right to have access to the courts must not be lightly interfered with. The court must be satisfied that a continuance of the proceeding would serve as an injustice to the party seeking the stay, in the sense that it would be oppressive or vexatious or an abuse of the process of the court in some other way. The stay must not cause an injustice to the plaintiff.

It is quite clear from *Empire-Universal Films Limited v. Rank*, [1947] O.R. 775 (H.C.) that McRuer C.J.H.C. considered that *The Judicature Act* [R.S.O. 1937, c. 100] then [and now the CJA] merely confirmed a statutory right that previously had been considered inherent in the jurisdiction of the court with respect to its authority to grant a stay of proceedings. See also *McCordic v. Bosanquet* (1974), 5 O.R. (2d) 53 (H.C.) and *Canada Systems Group (EST) Ltd. v. Allen-Dale Mutual Insurance Co.* (1982), 29 C.P.C. 60 (H.C.) at pp. 65-66.

15 Montgomery J. in *Canada Systems*, supra, at pp. 65-66 indicated:

Goodman J. (as he then was) in *McCordic v. Bosanquet* (1974), 5 O.R. (2d) 53 in granting a stay reviewed the authorities and concluded that the inherent jurisdiction of the Court to grant a stay of proceedings may be made whenever it is just and reasonable to do so. "This court has ample jurisdiction to grant a stay whenever it is just and reasonable to do so." (Per Lord Denning M.R. in *Edmeades v. Thames Board Mills Ltd.*, [1969] 2 Q.B. 67 at 71, [1969] 2 All E.R. 127 (C.A.)). Lord Denning's decision in *Edmeades* was approved by Lord Justice Davies in *Lane v. Willis; Lane v. Beach (Executor of Estate of George William Willis)*, [1972] 1 All E.R. 430, (sub nom. *Lane v. Willis; Lane v. Beach*) [1972] 1 W.L.R. 326 (C.A.).

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In *Weight Watchers Int. Inc. v. Weight Watchers of Ont. Ltd.* (1972), 25 D.L.R. (3d) 419, 5 C.P.R. (2d) 122, appeal allowed by consent without costs (sub nom. *Weight Watchers of Ont. Ltd. v. Weight Watchers Inc. Inc.*) 42 D.L.R. (3d) 320n, 10 C.P.R. (2d) 96n (Fed. C.A.), Mr. Justice Heald on an application for stay said at p. 426 [25 D.L.R.]:

The principles which must govern in these matters are clearly stated in the case of *Empire Universal Films Ltd. et al. v. Rank et al.*, [1947] O.R. 775 at p. 779, as follows [quoting *St. Pierre et al. v. South American Stores (Gath & Chaves), Ltd. et al.*, [1936] 1 K.B. 382 at p. 398]:

(1.) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused. (2.) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant.

16 Thus it appears to me that the inherent power of this court to grant stays can be used to supplement s. 11 of the CCAA when it is just and reasonable to do so. Is it appropriate to do so in the circumstances? Clearly there is jurisdiction under s. 11 of the CCAA to grant a stay in respect of any of the applicants which are all companies which fit the criteria of the CCAA. However the stay requested also involved the limited partnerships to some degree either (i) with respect to the applicants acting on behalf of the Limited Partnerships or (ii) the stays being effective vis-à-vis any proceedings taken by any party against the property assets and undertaking of the Limited Partnerships in respect of which they hold a direct interest (collectively the "Property") as set out in the terms of the stay provisions of the order paragraphs 4 through 18 inclusive attached as an appendix to these reasons. [Appendix omitted.] I believe that an analysis of the operations of a limited partnership in this context would be beneficial to an understanding of how there is a close inter-relationship to the applicants involved in this CCAA proceedings and how the Limited Partnerships and their Property are an integral part of the operations previously conducted and the proposed restructuring.

17 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. I would note here that the limited partnership provisions of the Alberta PA are roughly equivalent to those found in the Ontario LPA with the interesting side aspect that the Alberta legislation in s. 75 does allow for judgment against a limited partner to be charged against the limited partner's interest in the limited partnership. 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.

18 A general partner is responsible to defend proceedings against the limited partnership in the firm name, so in procedural law and in practical effect, a proceeding against a limited partnership is a proceeding against the general partner. See Ontario *Rules of Civil Procedure*, O. Reg. 560/84, Rules 8.01 and 8.02.

19 It appears that the preponderance of case law supports the contention that a partnership including a limited partnership is not a separate legal entity. See *Lindley on Partnership*, 15th ed. (London: Sweet & Maxwell,

1984), at pp. 33-35; *Seven Mile Dam Contractors v. R.* (1979), 13 B.C.L.R. 137 (S.C.), affirmed (1980), 25 B.C.L.R. 183 (C.A.) and "Extra-Provincial Liability of the Limited Partner", Brad A. Milne, (1985) 23 Alta. L. Rev. 345, at pp. 350-351. Milne in that article made the following observations:

The preponderance of case law therefore supports the contention that a limited partnership is not a separate legal entity. It appears, nevertheless, that the distinction made in *Re Thorne* between partnerships and trade unions could not be applied to limited partnerships which, like trade unions, must rely on statute for their validity. The mere fact that limited partnerships owe their existence to the statutory provision is probably not sufficient to endow the limited partnership with the attribute of legal personality as suggested in *Ruzicks* unless it appeared that the Legislature clearly intended that the limited partnership should have a separate legal existence. A review of the various provincial statutes does not reveal any procedural advantages, rights or powers that are fundamentally different from those advantages enjoyed by ordinary partnerships. The legislation does not contain any provision resembling section 15 of the *Canada Business Corporation Act* [S.C. 1974-75, c. 33, as am.] which expressly states that a corporation has the capacity, both in and outside of Canada, of a natural person. It is therefore difficult to imagine that the Legislature intended to create a new category of legal entity.

20 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). For a lively discussion of the question of "control" in a limited partnership as contrasted with shareholders in a corporation, see R. Flannigan, "The Control Test of Investor Liability in Limited Partnerships" (1983) 21 Alta. L. Rev. 303; E. Apps, "Limited Partnerships and the 'Control' Prohibition: Assessing the Liability of Limited Partners" (1991) 70 Can. Bar Rev. 611; R. Flannigan, "Limited Partner Liability: A Response" (1992) 71 Can. Bar Rev. 552. 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. It seems to me that there must be afforded a protection of the whole since the applicants' individual interest therein cannot be segregated without in effect dissolving the partnership arrangement. The limited partners have two courses of action to take if they are dissatisfied with the general partner or the operation of the limited partnership as carried on by the general partner — the limited partners can vote to (a) remove the general partner and replace it with another or (b) dissolve the limited partnership. However Flannigan strongly argues that an unfettered right to remove the general partner would attach general liability for the limited partners (and especially as to the question of continued enjoyment of favourable tax deductions) so that it is prudent to provide this as a conditional right: *Control Test*, (1992), supra, at pp. 524-525. Since the applicants are being afforded the protection of a stay of proceedings in respect to allowing them time to advance a reorganization plan and complete it if the plan finds favour, there should be a stay of proceedings (vis-à-vis any action which the limited partners may wish to take as to replacement or dissolution) through the period of allowing the limited partners to vote on the reorganization plan itself.

21 It seems to me that using the inherent jurisdiction of this court to supplement the statutory stay provisions of s. 11 of the CCAA would be appropriate in the circumstances; it would be just and reasonable to do so. The business operations of the applicants are so intertwined with the limited partnerships that it would be impossible for relief as to a stay to be granted to the applicants which would affect their business without at the same time extending that stay to the undivided interests of the limited partners in such. It also appears that the applicants are well on their way to presenting a reorganization plan for consideration and a vote; this is scheduled to happen within the month so there would not appear to be any significant time inconvenience to any person interested in pursuing proceedings. While it is true that the provisions of the CCAA allow for a cramdown of a creditor's claim (as well as an interest of any other person), those who wish to be able to initiate or continue proceedings against the applicants may utilize the comeback clause in the order to persuade the court that it would not be just and reasonable to maintain that particular stay. It seems to me that in such a comeback motion the onus would be upon the applicants to show that in the circumstances it was appropriate to continue the stay.

22 The order is therefore granted as to the relief requested including the proposed stay provisions.

*Application allowed.*

Footnotes

\* As amended by the court.

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End of Document

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**TAB 15**

*Indexed as:*

**Newfoundland and Labrador v. AbitibiBowater Inc.**

**Her Majesty The Queen in Right of the Province of Newfoundland  
and Labrador, Appellant;**

**v.**

**AbitibiBowater Inc., Abitibi-Consolidated Inc., Bowater  
Canadian Holdings Inc., Ad Hoc Committee of Bondholders, Ad  
Hoc Committee of Senior Secured Noteholders and U.S. Bank  
National Association (Indenture Trustee for the Senior Secured  
Noteholders), Respondents, and  
Attorney General of Canada, Attorney General of Ontario,  
Attorney General of British Columbia, Attorney General of  
Alberta, Her Majesty The Queen in Right of British Columbia,  
Ernst & Young Inc., as Monitor, and Friends of the Earth  
Canada, Intervenors.**

[2012] 3 S.C.R. 443

[2012] 3 R.C.S. 443

[2012] S.C.J. No. 67

[2012] A.C.S. no 67

2012 SCC 67

File No.: 33797.

Supreme Court of Canada

Heard: November 16, 2011;  
Judgment: December 7, 2012.

**Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella,  
Rothstein, Cromwell, Moldaver and Karakatsanis JJ.**

(102 paras.)

**Appeal From:**

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

*Catchwords:*

*Bankruptcy and Insolvency -- Provable claims -- Contingent claims -- Corporation filing for insolvency protection -- Province issuing environmental protection orders against corporation and seeking declaration that orders not "claims" under Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA"), and not subject to claims procedure order -- Whether environmental protection orders are monetary claims that [page444] can be compromised in corporate restructuring under CCAA -- Whether CCAA is ultra vires or constitutionally inapplicable by permitting court to determine whether environmental order is a monetary claim.*

**Summary:**

A was involved in industrial activity in Newfoundland and Labrador (the "Province"). In a period of general financial distress, it ended its last operation there, filed for insolvency protection in the United States and obtained a stay of proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). The Province subsequently issued five orders under the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2, requiring A to submit remediation action plans for five industrial sites it had occupied, three of which had been expropriated by the Province, and to complete the remediation actions. The Province also brought a motion for a declaration that a claims procedure order issued under the *CCAA* in relation to A's proposed reorganization did not bar the Province from enforcing the environmental protection orders. The Province argued that the environmental protection orders were not "claims" under the *CCAA* and therefore could not be stayed and subject to a claims procedure order. It further argued that Parliament lacked the constitutional competence under its power to make laws in relation to bankruptcy and insolvency to stay orders that were validly made in the exercise of a provincial power. A contested the motion, arguing that the orders were monetary in nature and hence fell within the definition of the word "claim" in the claims procedure order. The *CCAA* court dismissed the Province's motion. The Court of Appeal denied the Province leave to appeal.

*Held* (McLachlin C.J. and LeBel J. dissenting): The appeal should be dismissed.

*Per* Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.: 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 [page445] at the outset of the proceedings. 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. In such a case, the relevant question is not simply whether the body has formally exercised its power to claim a debt. A *CCAA*

court does not assess claims or orders on the basis of form alone. If the order is not framed in monetary terms, the *CCAA* court must determine, in light of the factual matrix and the applicable statutory framework, whether it is a claim that will be subject to the claims process.

There are three requirements orders must meet in order to be considered claims that may be subject to the insolvency process in a case such as the one at bar. First, there must be a debt, a liability or an obligation to a creditor. In this case, the first criterion was met because the Province had identified itself as a creditor by resorting to environmental protection enforcement mechanisms. Second, the debt, liability or obligation must be incurred as of a specific time. This requirement was also met since the environmental damage had occurred before the time of the *CCAA* proceedings. Third, it must be possible to attach a monetary value to the debt, liability or obligation. The present case turns on this third requirement, and the question is whether orders that are not expressed in monetary terms can be translated into such terms.

A claim may be asserted in insolvency proceedings even if it is contingent on an event that has not yet occurred. The criterion used by courts to determine whether a contingent claim will be included in the insolvency process is whether the event that has not yet occurred is too remote or speculative. In the context of an environmental protection order, this means that there must be sufficient indications that the regulatory body that triggered the enforcement mechanism will ultimately perform remediation work and assert a monetary claim. If there is sufficient certainty in this regard, the court will conclude that the order can be subject to the insolvency process.

[page446]

Certain indicators can guide the *CCAA* court in this assessment, including whether the activities are ongoing, whether the debtor is in control of the property, and whether the debtor has the means to comply with the order. The court may also consider the effect that requiring the debtor to comply with the order would have on the insolvency process. The analysis is grounded in the facts of each case. In this case, the *CCAA* court's assessment of the facts, particularly its finding that the orders were the first step towards performance of the remediation work by the Province, leads to no conclusion other than that it was sufficiently certain that the Province would perform remediation work and therefore fall within the definition of a creditor with a monetary claim.

Subjecting such orders to the claims process does not extinguish the debtor's environmental obligations any more than subjecting any creditor's claim to that process extinguishes the debtor's obligation to pay a debt. It merely ensures that the Province's claim will be paid in accordance with insolvency legislation. Full compliance with orders that are found to be monetary in nature would shift the costs of remediation to third party creditors and replace the polluter-pay principle with a "third-party-pay" principle. Moreover, to subject environmental protection orders to the claims process is not to invite corporations to restructure in order to rid themselves of their environmental liabilities. Reorganization made necessary by insolvency is hardly ever a deliberate choice, and



when the risks corporations engage in materialize, the dire costs are borne by almost all stakeholders.

Because the provisions on the assessment of claims in insolvency matters relate directly to Parliament's jurisdiction, the ancillary powers doctrine is not relevant to this case. The interjurisdictional immunity doctrine is also inapplicable, because a finding that a claim of an environmental creditor is monetary in nature does not interfere in any way with the creditor's activities; its claim is simply subject to the insolvency process.

*Per McLachlin C.J. (dissenting):* Remediation orders made under a province's environmental protection [page447] legislation impose ongoing regulatory obligations on the corporation required to clean up the pollution. They may only be reduced to monetary claims which can be compromised under *CCAA* proceedings in narrow circumstances where a province has done the remediation work, or where it is "sufficiently certain" that it will do the work. This last situation is regulated by the provisions of the *CCAA* for contingent or future claims. The test is whether there is a likelihood approaching certainty that the province will do the work. "Likelihood approaching certainty" recognizes that the government's decision is discretionary and may be influenced by competing political and social considerations, which are not normally subject to judicial consideration. Insofar as this determination touches on the division of powers, I am in substantial agreement with Deschamps J.

Apart from the orders related to the work done or tendered for on the Buchans property, the orders for remediation in this case are not claims that can be compromised. The *CCAA* maintains the fundamental distinction between regulatory obligations under the general law aimed at the protection of the public and monetary claims that can be compromised in *CCAA* restructuring or bankruptcy. The *CCAA* judge never asked himself the critical question of whether it was "sufficiently certain" that the Province would do the work itself. His failure to consider that question requires this Court to answer it in his stead. There is nothing on the record to support the view that the Province will move to remediate the properties. It has not been shown that the contamination poses immediate health risks which must be addressed without delay. It has not been shown that the Province has taken any steps to do any work. And it has not been shown that the Province has set aside or even contemplated setting aside money for this work. The Province retained a number of options, including leaving the sites contaminated, or calling on Abitibi to remediate following its emergence from restructuring. There is nothing in the record that makes it more probable, much less establishes "sufficient certainty", that the Province will opt to do the work itself.

[page448]

*Per LeBel J. (dissenting):* The test proposed by the Chief Justice according to which the evidence must show that there is a "likelihood approaching certainty" that the Province would remediate the contamination itself is not the established test for determining where and how a contingent claim

can be liquidated in bankruptcy and insolvency law. The test of "sufficient certainty" described by Deschamps J. best reflects how both the common law and the civil law view and deal with contingent claims. Applying that test, the appeal should be allowed on the basis that there is no evidence that the Province intends to perform the remedial work itself.

### Cases Cited

By Deschamps J.

**Distinguished:** *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45; **referred to:** *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Canada v. McLarty*, 2008 SCC 26, [2008] 2 S.C.R. 79; *Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75; *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, 2003 SCC 58, [2003] 2 S.C.R. 624.

By McLachlin C.J. (dissenting)

*Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45; *Lamford Forest Products Ltd. (Re)* (1991), 86 D.L.R. (4) 534; *Shirley (Re)* (1995), 129 D.L.R. (4) 105; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Air Canada, Re [Regulators' motions]* (2003), 28 C.B.R. (5) 52; *General Chemical Canada Ltd., Re*, 2007 ONCA 600, 228 O.A.C. 385; *Strathcona (County) v. PriceWaterhouseCoopers Inc.*, 2005 ABQB 559, 47 Alta. L.R. (4) 138; *Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75; *Anvil Range Mining Corp., Re* (2001), 25 C.B.R. (4) 1; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

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*Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof*, S.C. 1992, c. 27, s. 9.

*Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act*, S.C. 1997, c. 12.

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*Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada*, 2005, S.C. 2007, c. 36, s. 65.

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, ss. 2 "claim provable in bankruptcy",

"creditor", 14.06(8), 121(1), (2), 135(1.1).

*Civil Code of Québec*, S.Q. 1991, c. 64, arts. 1497, 1508, 1513.

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ss. 2(1) "claim", 11, 11.1, 11.8(5), (7), (8), (9), 12(1), (2).

*Environmental Protection Act*, S.N.L. 2002, c. E-14.2, ss. 99, 102(3).

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### **History and Disposition:**

APPEAL from a judgment of the Quebec Court of Appeal (Chamberland J.A.), 2010 QCCA 965, 68 *C.B.R.* (5) 57, 52 *C.E.L.R.* (3d) 1, [2010] Q.J. No. 4579 (QL), 2010 *CarswellQue* 4782, dismissing the appellant's motion for leave to appeal a decision of Gascon J., 2010 QCCS 1261, 68 *C.B.R.* (5) 1, 52 *C.E.L.R.* (3d) 17, [2010] Q.J. No. 4006 (QL), 2010 *CarswellQue* 2812. Appeal dismissed, McLachlin C.J. and LeBel J. dissenting.

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*Roderick Wiltshire*, for the intervener the Attorney General of Alberta.

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*Robert I. Thornton, John T. Porter and Rachelle F. Moncur*, for the intervener Ernst & Young Inc., as Monitor.

*William A. Amos, Anastasia M. Lintner, Hugh S. Wilkins and R. Graham Phoenix*, for the intervener the Friends of the Earth Canada.

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The judgment of Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ. was delivered by

**1 DESCHAMPS J.:**-- The question in this appeal is whether orders issued by a regulatory body with respect to environmental remediation work can be treated as monetary claims under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA").

**2** 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 [page451] makes an environmental order that explicitly asserts a monetary claim.

**3** In other circumstances, it is less clear whether an order can be treated as a monetary claim. The appellant and a number of interveners posit that an order issued by an environmental body is not a claim under the *CCAA* if the order does not require the debtor to make a payment. I agree 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 proceeding. 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. In such a case, the relevant

question is not simply whether the body has formally exercised its power to claim a debt. A *CCAA* court does not assess claims - or orders - on the basis of form alone. If the order is not framed in monetary terms, the court must determine, in light of the factual matrix and the applicable statutory framework, whether it is a claim that will be subject to the claims process.

4 The case at bar concerns contamination that occurred, prior to the *CCAA* proceedings, on property that is largely no longer under the debtor's possession and control. The *CCAA* court found on the facts of this case that the orders issued by Her Majesty the Queen in right of the Province of Newfoundland and Labrador ("Province") were simply a first step towards remediating the contaminated property and asserting a claim for the resulting costs. In the words of the *CCAA* court, "the intended, practical and realistic effect of the EPA Orders was to establish a basis for the Province to [page452] recover amounts of money to be eventually used for the remediation of the properties in question" (2010 QCCS 1261, 68 C.B.R. (5th) 1, at para. 211). As a result, the *CCAA* court found that the orders were clearly monetary in nature. I see no error of law and no reason to interfere with this finding of fact. I would dismiss the appeal with costs.

#### I. Facts and Procedural History

5 For over 100 years, AbitibiBowater Inc. and its affiliated or predecessor companies (together, "Abitibi") were involved in industrial activity in Newfoundland and Labrador. In 2008, Abitibi announced the closure of a mill that was its last operation in that province.

6 Within two weeks of the announcement, the Province passed the *Abitibi-Consolidated Rights and Assets Act*, S.N.L. 2008, c. A-1.01 ("*Abitibi Act*"), which immediately transferred most of Abitibi's property in Newfoundland and Labrador to the Province and denied Abitibi any legal remedy for this expropriation.

7 The closure of its mill in Newfoundland and Labrador was one of many decisions Abitibi made in a period of general financial distress affecting its activities both in the United States and in Canada. It filed for insolvency protection in the United States on April 16, 2009. It also sought a stay of proceedings under the *CCAA* in the Superior Court of Quebec, as its Canadian head office was located in Montréal. The *CCAA* stay was ordered on April 17, 2009.

8 In the same month, Abitibi also filed a notice of intent to submit a claim to arbitration under NAFTA (the *North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, [page453] Can. T.S. 1994 No. 2) for losses resulting from the *Abitibi Act*, which, according to Abitibi, exceeded \$300 million.

9 On November 12, 2009, the Province's Minister of Environment and Conservation ("Minister") issued five orders (the "*EPA Orders*") under s. 99 of the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2 ("*EPA*"). The *EPA Orders* required Abitibi to submit remediation action plans to the Minister for five industrial sites, three of which had been expropriated, and to complete the

approved remediation actions. The *CCAA* judge estimated the cost of implementing these plans to be from "the mid-to-high eight figures" to "several times higher" (para. 81).

**10** On the day it issued the *EPA* Orders, the Province brought a motion for a declaration that a claims procedure order issued under the *CCAA* in relation to Abitibi's proposed reorganization did not bar the Province from enforcing the *EPA* Orders. The Province argued - and still argues - that non-monetary statutory obligations are not "claims" under the *CCAA* and hence cannot be stayed and be subject to a claims procedure order. It further submits that Parliament lacks the constitutional competence under its power to make laws in relation to bankruptcy and insolvency to stay orders that are validly made in the exercise of a provincial power.

**11** Abitibi contested the motion and sought a declaration that the *EPA* Orders were stayed and that they were subject to the claims procedure order. It argued that the *EPA* Orders were monetary in nature and hence fell within the definition of the word "claim" in the claims procedure order.

[page454]

**12** Gascon J. of the Quebec Superior Court, sitting as a *CCAA* court, dismissed the Province's motion. He found that he had the authority to characterize the orders as "claims" if the underlying regulatory obligations "remain[ed], in a particular fact pattern, truly financial and monetary in nature" (para. 148). He declared that the *EPA* Orders were stayed by the initial stay order and were not subject to the exception found in that order. He also declared that the filing by the Province of any claim based on the *EPA* Orders was subject to the claims procedure order, and reserved to the Province the right to request an extension of time to assert a claim under the claims procedure order and to Abitibi the right to contest such a request.

**13** In the Court of Appeal, Chamberland J.A. denied the Province leave to appeal (2010 QCCA 965, 68 C.B.R. (5th) 57). In his view, the appeal had no reasonable chance of success, because Gascon J. had found as a fact that the *EPA* Orders were financial or monetary in nature. Chamberland J.A. also found that no constitutional issue arose, given that the Superior Court judge had merely characterized the orders in the context of the restructuring process; the judgment did not "'immunise' Abitibi from compliance with the *EPA* Orders" (para. 33). Finally, he noted that Gascon J. had reserved the Province's right to request an extension of time to file a claim in the *CCAA* process.

## II. Positions of the Parties

**14** The Province argues that the *CCAA* court erred in interpreting the relevant *CCAA* provisions in a way that nullified the *EPA*, and that the interpretation is inconsistent with both the ancillary powers doctrine and the doctrine of interjurisdictional immunity. The Province further submits [page455] that, in any event, the *EPA* Orders are not "claims" within the meaning of the *CCAA*. It

takes the position that "any plan of compromise and arrangement that Abitibi might submit for court approval must make provision for compliance with the *EPA Orders*" (A.F., at para. 32).

**15** Abitibi contends that the factual record does not provide a basis for applying the constitutional doctrines. It relies on the *CCAA* court's findings of fact, particularly the finding that the Province's intent was to establish the basis for a monetary claim. Abitibi submits that the true issue is whether a province that has a monetary claim against an insolvent company can obtain a preference against other unsecured creditors by exercising its regulatory power.

### III. Constitutional Questions

**16** At the Province's request, the Chief Justice stated the following constitutional questions:

1. Is the definition of "claim" in s. 2(1) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, *ultra vires* the Parliament of Canada or constitutionally inapplicable to the extent this definition includes statutory duties to which the debtor is subject pursuant to s. 99 of the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2?
2. Is s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, *ultra vires* the Parliament of Canada or constitutionally inapplicable to the extent this section gives courts jurisdiction to bar or extinguish statutory duties to which the debtor is subject pursuant to s. 99 of the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2?
3. Is s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, *ultra vires* the Parliament of Canada or constitutionally inapplicable to the extent this section gives courts jurisdiction to [page456] review the exercise of ministerial discretion under s. 99 of the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2?

**17** I note that the question whether a *CCAA* court has constitutional jurisdiction to stay a provincial order that is *not* a monetary claim does not arise here, because the stay order in this case did not affect non-monetary orders. However, the question may arise in other cases. In 2007, Parliament expressly gave *CCAA* courts the power to stay regulatory orders that are not monetary claims by amending the *CCAA* to include the current version of s. 11.1(3) (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36, s. 65) (the "2007 amendments"). Thus, future cases may give courts the opportunity to consider the question raised by the Province in an appropriate factual context. The only constitutional question that needs to be answered in this case concerns the jurisdiction of a *CCAA* court to determine whether an environmental order that is not framed in monetary terms is in fact a monetary claim.

**18** Processing creditors' claims against an insolvent debtor in an equitable and orderly manner is at the heart of insolvency legislation, which falls under a head of power attributed to Parliament.

Rules concerning the assessment of creditors' claims, such as the determination of whether a creditor has a monetary claim, relate directly to the equitable and orderly treatment of creditors in an insolvency process. There is no need to perform a detailed analysis of the pith and substance of the provisions on the assessment of claims in insolvency matters to conclude that the federal legislation governing the characterization of an order as a monetary claim is valid. Because the provisions relate directly to Parliament's jurisdiction, [page457] the ancillary powers doctrine is not relevant to this case. I also find that the interjurisdictional immunity doctrine is not applicable. A finding that a claim of an environmental creditor is monetary in nature does not interfere in any way with the creditor's activities. Its claim is simply subjected to the insolvency process.

**19** What the Province is actually arguing is that courts should consider the form of an order rather than its substance. I see no reason why the Province's choice of order should not be scrutinized to determine whether the form chosen is consistent with the order's true purpose as revealed by the Province's own actions. If the Province's actions indicate that, in substance, it is asserting a provable claim within the meaning of federal legislation, then that claim can be subjected to the insolvency process. Environmental claims do not have a higher priority than is provided for in the *CCAA*. Considering substance over form prevents a regulatory body from artificially creating a priority higher than the one conferred on the claim by federal legislation. This Court recognized long ago that a province cannot disturb the priority scheme established by the federal insolvency legislation (*Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453). Environmental claims are given a specific, and limited, priority under the *CCAA*. To exempt orders which are in fact monetary claims from the *CCAA* proceedings would amount to conferring upon provinces a priority higher than the one provided for in the *CCAA*.

#### IV. Claims Under the CCAA

**20** Several provisions of the *CCAA* have been amended since Abitibi filed for insolvency [page458] protection. Except where otherwise indicated, the provisions I refer to are those that were in force when the stay was ordered.

**21** One of the central features of the *CCAA* scheme is the single proceeding model, which ensures that most claims against a debtor are entertained in a single forum. Under this model, the court can stay the enforcement of most claims against the debtor's assets in order to maintain the *status quo* during negotiations with the creditors. When such negotiations are successful, the creditors typically accept less than the full amounts of their claims. Claims have not necessarily accrued or been liquidated at the outset of the insolvency proceeding, and they sometimes have to be assessed in order to determine the monetary value that will be subject to compromise.

**22** Section 12 of the *CCAA* establishes the basic rules for ascertaining whether an order is a claim that may be subjected to the insolvency process:

**12.** (1) [Definition of "claim"] For the purposes of this Act, "claim" means any indebtedness, liability or obligation of any kind that, if unsecured, would be



a debt provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*.

(2) [Determination of amount of claim] For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor shall be determined as follows:

(a) the amount of an unsecured claim shall be the amount

...

(iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is not admitted by the company, the amount shall be determined by the court on summary application by the company or by the creditor; ...

[page459]

23 Section 12 of the *CCAA* refers to the rules of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). Section 2 of the *BIA* defines a claim provable in bankruptcy:

"claim provable in bankruptcy", "provable claim" or "claim provable" includes any claim or liability provable in proceedings under this Act by a creditor;

24 This definition is completed by s. 121(1) of the *BIA*:

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

25 Sections 121(2) and 135(1.1) of the *BIA* offer additional guidance for the determination of whether an order is a provable claim:

121... .

(2) The determination whether a contingent or unliquidated claim is a

provable claim and the valuation of such a claim shall be made in accordance with section 135.

**135... .**

(1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

**26** These provisions highlight three requirements that are relevant to the case at bar. First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation. I will examine each of these requirements in turn.

[page460]

**27** The *BIA*'s definition of a provable claim, which is incorporated by reference into the *CCAA*, requires the identification of a creditor. Environmental statutes generally provide for the creation of regulatory bodies that are empowered to enforce the obligations the statutes impose. Most environmental regulatory bodies can be creditors in respect of monetary or non-monetary obligations imposed by the relevant statutes. At this first stage of determining whether the regulatory body is a creditor, the question whether the obligation can be translated into monetary terms is not yet relevant. This issue will be broached later. The only determination that has to be made at this point is whether the regulatory body has exercised its enforcement power against a debtor. When it does so, it identifies itself as a creditor, and the requirement of this stage of the analysis is satisfied.

**28** The enquiry into the second requirement is based on s. 121(1) of the *BIA*, which imposes a time limit on claims. A claim must be founded on an obligation that was "incurred before the day on which the bankrupt becomes bankrupt". Because the date when environmental damage occurs is often difficult to ascertain, s. 11.8(9) of the *CCAA* provides more temporal flexibility for environmental claims:

**11.8 ...**

(9) A claim against a debtor company for costs of remedying any environmental condition or environmental damage affecting real property of the

company shall be a claim under this Act, whether the condition arose or the damage occurred before or after the date on which proceedings under this Act were commenced.

**29** The creditor's claim will be exempt from the single proceeding requirement if the debtor's corresponding obligation has not arisen as of the time limit for inclusion in the insolvency process. This could apply, for example, to a debtor's statutory obligations relating to polluting activities that continue after the reorganization, because in such cases, [page461] the damage continues to be sustained after the reorganization has been completed.

**30** With respect to the third requirement, that it be possible to attach a monetary value to the obligation, the question is whether orders that are not expressed in monetary terms can be translated into such terms. I note that when a regulatory body claims an amount that is owed at the relevant date, that is, when it frames its order in monetary terms, the court does not need to make this determination, because what is being claimed is an "indebtedness" and therefore clearly falls within the meaning of "claim" as defined in s. 12(1) of the *CCAA*.

**31** However, orders, which are used to address various types of environmental challenges, may come in many forms, including stop, control, preventative, and clean-up orders (D. Saxe, "Trustees' and Receivers' Environmental Liability Update" (1998), 49 C.B.R. (3d) 138, at p. 141). When considering an order that is not framed in monetary terms, courts must look at its substance and apply the rules for the assessment of claims.

**32** Parliament recognized that regulatory bodies sometimes have to perform remediation work (see House of Commons, *Evidence of the Standing Committee on Industry*, No. 16, 2nd Sess., 35th Parl., June 11, 1996). When one does so, its claim with respect to remediation costs is subject to the insolvency process, but the claim is secured by a charge on the contaminated real property and certain other related property and benefits from a priority (s. 11.8(8) *CCAA*). Thus, Parliament struck a balance between the public's interest in enforcing environmental regulations and the interest of third-party creditors in being treated equitably.

[page462]

**33** If Parliament had intended that the debtor always satisfy all remediation costs, it would have granted the Crown a priority with respect to the totality of the debtor's assets. In light of the legislative history and the purpose of the reorganization process, the fact that the Crown's priority under s. 11.8(8) of the *CCAA* is limited to the contaminated property and certain related property leads me to conclude that to exempt environmental orders would be inconsistent with the insolvency legislation. As deferential as courts may be to regulatory bodies' actions, they must apply the general rules.

34 Unlike in proceedings governed by the common law or the civil law, a claim may be asserted in insolvency proceedings even if it is contingent on an event that has not yet occurred (for the common law, see *Canada v. McLarty*, 2008 SCC 26, [2008] 2 S.C.R. 79, at paras. 17-18; for the civil law, see arts. 1497, 1508 and 1513 of the *Civil Code of Québec*, S.Q. 1991, c. 64). Thus, the broad definition of "claim" in the *BIA* includes *contingent* and *future* claims that would be unenforceable at common law or in the civil law. As for unliquidated claims, a *CCAA* court has the same power to assess their amounts as would a court hearing a case in a common law or civil law context.

35 The reason the *BIA* and the *CCAA* include a broad range of claims is to ensure fairness between creditors and finality in the insolvency proceeding for the debtor. In a corporate liquidation process, it is more equitable to allow as many creditors as possible to participate in the process and share in the liquidation proceeds. This makes it possible to include creditors whose claims have not yet matured when the corporate debtor files for bankruptcy, and thus avert a situation in which they would be faced with an inactive debtor that cannot satisfy a judgment. The rationale is slightly different in the context of a corporate proposal or reorganization. In such cases, the broad approach serves not only to [page463] ensure fairness between creditors, but also to allow the debtor to make as fresh a start as possible after a proposal or an arrangement is approved.

36 The criterion used by courts to determine whether a contingent claim will be included in the insolvency process is whether the event that has not yet occurred is too remote or speculative (*Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75). In the context of an environmental order, this means that there must be sufficient indications that the regulatory body that triggered the enforcement mechanism will ultimately perform remediation work and assert a monetary claim to have its costs reimbursed. If there is sufficient certainty in this regard, the court will conclude that the order can be subjected to the insolvency process.

37 The exercise by the *CCAA* court of its jurisdiction to determine whether an order is a provable claim entails a certain scrutiny of the regulatory body's actions. This scrutiny is in some ways similar to judicial review. There is a distinction, however, and it lies in the object of the assessment that the *CCAA* court must make. The *CCAA* court does not review the regulatory body's exercise of discretion. Rather, it inquires into whether the facts indicate that the conditions for inclusion in the claims process are met. For example, if activities at issue are ongoing, the *CCAA* court may well conclude that the order cannot be included in the insolvency process because the activities and resulting damages will continue after the reorganization is completed and hence exceed the time limit for a claim. If, on the other hand, the regulatory body, having no realistic alternative but to perform the remediation work itself, simply delays framing the order as a claim in order to improve its position in relation to other creditors, the *CCAA* court may conclude [page464] that this course of action is inconsistent with the insolvency scheme and decide that the order has to be subject to the claims process. Similarly, if the property is not under the debtor's control and the debtor does not, and realistically will not, have the means to perform the remediation work, the *CCAA* court may conclude that it is sufficiently certain that the regulatory body will have to perform the work.

38 Certain indicators can thus be identified from the text and the context of the provisions to guide the CCAA court in determining whether an order is a provable claim, including whether the activities are ongoing, whether the debtor is in control of the property, and whether the debtor has the means to comply with the order. The CCAA court may also consider the effect that requiring the debtor to comply with the order would have on the insolvency process. Since the appropriate analysis is grounded in the facts of each case, these indicators need not all apply, and others may also be relevant.

39 Having highlighted three requirements for finding a claim to be provable in a CCAA process that need to be considered in the case at bar, I must now discuss certain policy arguments raised by the Province and some of the interveners.

40 These parties argue that treating a regulatory order as a claim in an insolvency proceeding extinguishes the debtor's environmental obligations, thereby undermining the polluter-pay principle discussed by this Court in *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, 2003 SCC 58, [2003] 2 S.C.R. 624, at para. 24. This objection [page465] demonstrates a misunderstanding of the nature of insolvency proceedings. Subjecting an order to the claims process does not extinguish the debtor's environmental obligations any more than subjecting any creditor's claim to that process extinguishes the debtor's obligation to pay its debts. It merely ensures that the creditor's claim will be paid in accordance with insolvency legislation. Moreover, full compliance with orders that are found to be monetary in nature would shift the costs of remediation to third-party creditors, including involuntary creditors, such as those whose claims lie in tort or in the law of extra-contractual liability. In the insolvency context, the Province's position would result not only in a super-priority, but in the acceptance of a "third-party-pay" principle in place of the polluter-pay principle.

41 Nor does subjecting the orders to the insolvency process amount to issuing a licence to pollute, since insolvency proceedings do not concern the debtor's future conduct. A debtor that is reorganized must comply with all environmental regulations going forward in the same way as any other person. To quote the colourful analogy of two American scholars, "Debtors in bankruptcy have - and should have - no greater license to pollute in violation of a statute than they have to sell cocaine in violation of a statute" (D. G. Baird and T. H. Jackson, "Comment: *Kovacs* and Toxic Wastes in Bankruptcy" (1984), 36 *Stan. L. Rev.* 1199, at p. 1200).

42 Furthermore, corporations may engage in activities that carry risks. No matter what risks are at issue, reorganization made necessary by insolvency is hardly ever a deliberate choice. When the risks materialize, the dire costs are borne by almost all stakeholders. To subject orders to the claims process is not to invite corporations to restructure [page466] in order to rid themselves of their environmental liabilities.

43 And the power to determine whether an order is a provable claim does not mean that the court will necessarily conclude that the order before it will be subject to the CCAA process. In fact, the

CCAA court in the case at bar recognized that orders relating to the environment may or may not be considered provable claims. It stayed only those orders that were monetary in nature.

44 The Province also argues that courts have in the past held that environmental orders cannot be interpreted as claims when the regulatory body has not yet exercised its power to assert a claim framed in monetary terms. The Province relies in particular on *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45 (C.A.), and its progeny. In *Panamericana*, the Alberta Court of Appeal held that a receiver was personally liable for work under a remediation order and that the order was not a claim in insolvency proceedings. The court found that the duty to undertake remediation work is owed to the public at large until the regulator exercises its power to assert a monetary claim.

45 The first answer to the Province's argument is that courts have never shied away from putting substance ahead of form. They can determine whether the order is in substance monetary.

46 The second answer is that the provisions relating to the assessment of claims, particularly those governing contingent claims, contemplate instances in which the quantum is not yet established when the claims are filed. Whether, in the [page467] regulatory context, an obligation always entails the existence of a correlative right has been discussed by a number of scholars. Various theories of rights have been put forward (see W. N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (new ed. 2001); D. N. MacCormick, "Rights in Legislation", in P. M. S. Hacker and J. Raz, eds., *Law, Morality, and Society: Essays in Honour of H. L. A. Hart* (1977), 189). However, because the Province issued the orders in this case, it would be recognized as a creditor in respect of a right no matter which of these theories was applied. As interesting as the discussion may be, therefore, I do not need to consider which theory should prevail. The real question is not to whom the obligation is owed, as this question is answered by the statute, which determines who can require that it be discharged. Rather, the question is whether it is sufficiently certain that the regulatory body will perform the remediation work and, as a result, have a monetary claim.

47 The third answer to the Province's argument is that insolvency legislation has evolved considerably over the two decades since *Panamericana*. At the time of *Panamericana*, none of the provisions relating to environmental liabilities were in force. Indeed, some of those provisions were enacted very soon after, and seemingly in response to, that case. In 1992, Parliament shielded trustees from the very liability imposed on the receiver in *Panamericana* (*An Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof*, S.C. 1992, c. 27, s. 9, amending s. 14 of the *BIA*). The 1997 amendments provided additional protection to trustees and monitors (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act*, S.C. 1997, c. 12). The 2007 amendments made it clear that a CCAA court has the power to determine that a regulatory order may be a claim and also provided criteria for staying regulatory orders (s. 65, amending the CCAA to include the current version of s. 11.1). The purpose of these amendments was to balance the creditor's [page468] need

for fairness against the debtor's need to make a fresh start.

**48** Whether the regulatory body has a contingent claim is a determination that must be grounded in the facts of each case. Generally, a regulatory body has discretion under environmental legislation to decide how best to ensure that regulatory obligations are met. Although the court should take care to avoid interfering with that discretion, the action of a regulatory body is nevertheless subject to scrutiny in insolvency proceedings.

#### V. Application

**49** I now turn to the application of the principles discussed above to the case at bar. This case does not turn on whether the Province is the creditor of an obligation or whether damage had occurred as of the relevant date. Those requirements are easily satisfied, since the Province had identified itself as a creditor by resorting to *EPA* enforcement mechanisms and since the damage had occurred before the time of the *CCAA* proceedings. Rather, the issue centres on the third requirement: that the orders meet the criterion for admission as a pecuniary claim. The claim was contingent to the extent that the Province had not yet formally exercised its power to ask for the payment of money. The question is whether it was sufficiently certain that the orders would eventually result in a monetary claim. To the *CCAA* judge, there was no doubt that the answer was yes.

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**50** The Province's exercise of its legislative powers in enacting the *Abitibi Act* created a unique set of facts that led to the orders being issued. The seizure of Abitibi's assets by the Province, the cancellation of all outstanding water and hydroelectric contracts between Abitibi and the Province, the cancellation of pending legal proceedings by Abitibi in which it sought the reimbursement of several hundreds of thousands of dollars, and the denial of any compensation for the seized assets and of legal redress are inescapable background facts in the judge's review of the *EPA* Orders.

**51** The *CCAA* judge did not elaborate on whether it was sufficiently certain that the Minister would perform the remediation work and therefore make a monetary claim. However, most of his findings clearly rest on a positive answer to this question. For example, his finding that "[i]n all likelihood, the pith and substance of the *EPA* Orders is an attempt by the Province to lay the groundwork for monetary claims against Abitibi, to be used most probably as an offset in connection with Abitibi's own *NAFTA* claims for compensation" (para. 178), is necessarily based on the premise that the Province would most likely perform the remediation work. Indeed, since monetary claims must, both at common law and in civil law, be mutual for set-off or compensation to operate, the Province had to have incurred costs in doing the work in order to have a claim that could be set off against Abitibi's claims.

52 That the judge relied on an implicit finding that the Province would most likely perform the work and make a claim to offset its costs is also shown by the confirmation he found in the declaration by the Premier that the Province was attempting to assess the cost of doing remediation work Abitibi had allegedly left undone and that in the Province's assessment, "at this point in [page470] time, there would not be a net payment to Abitibi" (para. 181).

53 The *CCAA* judge's reasons not only rest on an implicit finding that the Province would most likely perform the work, but refer explicitly to facts that support this finding. To reach his conclusion that the *EPA* Orders were monetary in nature, the *CCAA* judge relied on the fact that Abitibi's operations were funded through debtor-in-possession financing and its access to funds was limited to ongoing operations. Given that the *EPA* Orders targeted sites that were, for the most part, no longer in Abitibi's possession, this meant that Abitibi had no means to perform the remediation work during the reorganization process.

54 In addition, because Abitibi lacked funds and no longer controlled the properties, the timetable set by the Province in the *EPA* Orders suggested that the Province never truly intended that Abitibi was to perform the remediation work required by the orders. The timetable was also unrealistic. For example, the orders were issued on November 12, 2009 and set a deadline of January 15, 2010 to perform a particular act, but the evidence revealed that compliance with this requirement would have taken close to a year.

55 Furthermore, the judge relied on the fact that Abitibi was not simply designated a "person responsible" under the *EPA*, but was intentionally targeted by the Province. The finding that the Province had targeted Abitibi was drawn not only from the timing of the *EPA* Orders, but also from the fact that Abitibi was the only person designated in them, whereas others also appeared to be responsible - in some cases, primarily responsible - for the contamination. For example, Abitibi was ordered to do remediation work on a site it had surrendered more than 50 years before the orders were issued; the expert report upon which the orders were based made no distinction between Abitibi's activities on the property, on which its source of power had been horse power, and subsequent activities by others who had used fuel-powered vehicles [page471] there. In the judge's opinion, this finding of fact went to the Province's intent to establish a basis for performing the work itself and asserting a claim against Abitibi.

56 These reasons - and others - led the *CCAA* judge to conclude that the Province had not expected Abitibi to perform the remediation work and that the "intended, practical and realistic effect of the *EPA* Orders was to establish a basis for the Province to recover amounts of money to be eventually used for the remediation of the properties in question" (para. 211). He found that the Province appeared to have in fact taken some steps to liquidate the claims arising out of the *EPA* Orders.

57 In the end, the judge found that there was definitely a claim that "might" be filed, and that it was not left to "the subjective choice of the creditor to hold the claim in its pocket for tactical



reasons" (para. 227). In his words, the situation did not involve a "detached regulator or public enforcer issuing [an] order for the public good" (para. 175), and it was "the hat of a creditor that best fi[t] the Province, not that of a disinterested regulator" (para. 176).

**58** In sum, although the analytical framework used by Gascon J. was driven by the facts of the case, he reviewed all the legal principles and facts that needed to be considered in order to make the determination in the case at bar. He did at times rely on indicators that are unique and that do not appear in the analytical framework I propose above, but he did so because of the exceptional facts of this case. Yet, had he formulated the question in the same way as I have, his conclusion, based on his objective findings of fact, would have been the same. Earmarking money may be a strong indicator that a province will perform remediation work, and actually commencing the work is the first step towards the creation of a debt, but these are not the [page472] only considerations that can lead to a finding that a creditor has a monetary claim. The *CCAA* judge's assessment of the facts, particularly his finding that the *EPA* Orders were the first step towards performance of the remediation work by the Province, leads to no conclusion other than that it was sufficiently certain that the Province would perform remediation work and therefore fall within the definition of a creditor with a monetary claim.

#### VI. Conclusion

**59** In sum, I agree with the Chief Justice that, as a general proposition, an environmental order issued by a regulatory body can be treated as a contingent claim, and that such a claim can be included in the claims process if it is sufficiently certain that the regulatory body will make a monetary claim against the debtor. Our difference of views lies mainly in the applicable threshold for including contingent claims and in our understanding of the *CCAA* judge's findings of fact.

**60** With respect to the law, the Chief Justice would craft a standard specific to the context of environmental orders by requiring a "likelihood approaching certainty" that the regulatory body will perform the remediation work. She finds that this threshold is justified because "remediation may cost a great deal of money" (para. 86). I acknowledge that remediating pollution is often costly, but I am of the view that Parliament has borne this consideration in mind in enacting provisions specific to environmental claims. Moreover, I recall that in this case, the Premier announced that the remediation work would be performed at no net cost to the Province. It was clear to him that the *Abitibi Act* would make it possible to offset all the related costs.

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**61** Thus, I prefer to take the approach generally taken for all contingent claims. In my view, the *CCAA* court is entitled to take all relevant facts into consideration in making the relevant determination. Under this approach, the contingency to be assessed in a case such as this is whether it is sufficiently certain that the regulatory body will perform remediation work and be in a position

to assert a monetary claim.

62 Finally, the Chief Justice would review the *CCAA* court's findings of fact. I would instead defer to them. On those findings, applying any legal standard, be it the one proposed by the Chief Justice or the one I propose, the Province's claim is monetary in nature and its motion for a declaration exempting the *EPA* Orders from the claims procedure order was properly dismissed.

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

The following are the reasons delivered by

McLACHLIN C.J.(dissenting):--

1. Overview

64 The issue in this case is whether orders made under the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2 ("*EPA*"), by the Newfoundland and Labrador Minister of Environment and Conservation ("Minister") requiring a polluter to clean up sites (the "*EPA* Orders") are monetary claims that can be compromised in corporate restructuring under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). If they are not claims that can be compromised in restructuring, the Abitibi respondents ("Abitibi") will still have a legal obligation to clean up the sites following their emergence from restructuring. If they are such claims, Abitibi will have emerged from restructuring free of the obligation, able to recommence business without remediating the [page474] properties it polluted, the cost of which will fall on the Newfoundland and Labrador public.

65 Remediation orders made under a province's environmental protection legislation impose ongoing regulatory obligations on the corporation required to clean up the pollution. They are not monetary claims. In narrow circumstances, specified by the *CCAA*, these ongoing regulatory obligations may be reduced to monetary claims, which can be compromised under *CCAA* proceedings. This occurs where a province has done the work, or where it is "sufficiently certain" that it will do the work. In these circumstances, the regulatory obligation would be extinguished and the province would have a monetary claim for the cost of remediation in the *CCAA* proceedings. Otherwise, the regulatory obligation survives the restructuring.

66 In my view, the orders for remediation in this case, with a minor exception, are not claims that can be compromised in restructuring. On one of the properties, the Minister did emergency remedial work and put other work out to tender. These costs can be claimed in the *CCAA* proceedings. However, with respect to the other properties, on the evidence before us, the Minister has neither done the clean-up work, nor is it sufficiently certain that he or she will do so. The Province of Newfoundland and Labrador ("Province") retained a number of options, including requiring Abitibi

to perform the remediation if it successfully emerged from the *CCAA* restructuring.

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67 I would therefore allow the appeal and grant the Province the declaration it seeks that Abitibi is still subject to its obligations under the *EPA* following its emergence from restructuring, except for work done or tendered for on the Buchans site.

## 2. The Proceedings Below

68 The *CCAA* judge took the view that the Province issued the *EPA* Orders, not in order to make Abitibi remediate, but as part of a money grab. He therefore concluded that the orders were monetary and financial in nature and should be considered claims that could be compromised under the *CCAA* (2010 QCCS 1261, 68 C.B.R. (5th) 1). The Quebec Court of Appeal denied leave to appeal on the ground that this "factual" conclusion could not be disturbed (2010 QCCA 965, 68 C.B.R. (5th) 57).

69 The *CCAA* judge's stark view that an *EPA* obligation can be considered a monetary claim capable of being compromised simply because (as he saw it) the Province's motive was money, is no longer pressed. Whether an *EPA* order is a claim under the *CCAA* depends on whether it meets the requirements for a claim under that statute. That is the only issue to be resolved. Insofar as this determination touches on the division of powers, I am in substantial agreement with my colleague Deschamps J., at paras. 18-19.

## 3. The Distinction Between Regulatory Obligations and Claims Under the *CCAA*

70 Orders to clean up polluted property under provincial environmental protection legislation are regulatory orders. They remain in effect until the [page476] property has been cleaned up or the matter otherwise resolved.

71 It is not unusual for corporations seeking to restructure under the *CCAA* to be subject to a variety of ongoing regulatory orders arising from statutory schemes governing matters like employment, energy conservation and the environment. The corporation remains subject to these obligations as it continues to carry on business during the restructuring period, and remains subject to them when it emerges from restructuring unless they have been compromised or liquidated.

72 The *CCAA*, like the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), draws a fundamental distinction between ongoing regulatory obligations owed to the public, which generally survive the restructuring, and monetary claims that can be compromised.

73 This distinction is also recognized in the jurisprudence, which has held that regulatory duties

owed to the public are not "claims" under the *BIA*, nor, by extension, under the *CCAA*. In *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45, the Alberta Court of Appeal held that a receiver in bankruptcy must comply with an order from the Energy Resources Conservation Board to comply with well abandonment requirements. Writing for the court, Laycraft C.J.A. said the question was whether the *Bankruptcy Act* "requires that the assets in the estate of an insolvent well licensee should be distributed to creditors leaving behind the duties respecting environmental safety ... as a charge to the public" (para. 29). He answered the question in the negative:

The duty is owed as a public duty by all the citizens of the community to their fellow citizens. When the [page477] citizen subject to the order complies, the result is not the recovery of money by the peace officer or public authority, or of a judgment for money, nor is that the object of the whole process. Rather, it is simply the enforcement of the general law. The enforcing authority does not become a "creditor" of the citizen on whom the duty is imposed. [Emphasis added; para. 33.]

74 The distinction between regulatory obligations under the general law aimed at the protection of the public and monetary claims that can be compromised in *CCAA* restructuring or bankruptcy is a fundamental plank of Canadian corporate law. It has been repeatedly acknowledged: *Lamford Forest Products Ltd. (Re)* (1991), 86 D.L.R. (4th) 534 (B.C.S.C.); *Shirley (Re)* (1995), 129 D.L.R. (4th) 105 (Ont. Ct. (Gen. Div.)), at p. 109; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at para. 146, *per* Iacobucci J. (dissenting). As Farley J. succinctly put it in *Air Canada, Re [Regulators' motions]* (2003), 28 C.B.R. (5th) 52 (Ont. S.C.J.), at para. 18: "Once [the company] emerges from these *CCAA* proceedings (successfully one would hope), then it will have to deal with each and every then unresolved [regulatory] matter."

75 Recent amendments to the *CCAA* confirm this distinction. Section 11.1(2) now explicitly provides that, except to the extent a regulator is enforcing a payment obligation, a general stay does not affect a regulatory body's authority in relation to a corporation going through restructuring. The *CCAA* court may only stay specific actions or suits brought by a regulatory body, and only if such action is necessary for a viable compromise to be reached and it would not be contrary to the public interest to make such an order (s. 11.1(3)).

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76 Abitibi argues that another amendment to the *CCAA*, s. 11.8(9), treats ongoing regulatory duties owed to the public as claims, and erases the distinction between the two types of obligation: see *General Chemical Canada Ltd., Re*, 2007 ONCA 600, 228 O.A.C. 385, *per* Goudge J.A., relying on s. 14.06(8) of the *BIA* (the equivalent of s. 11.8(9) of the *CCAA*). With respect, this reads

too much into the provision. Section 11.8(9) of the *CCAA* refers only to the situation where a government has performed remediation, and provides that the *costs of the remediation* become a claim in the restructuring process even where the environmental damage arose after *CCAA* proceedings have begun. As stated in *Strathcona (County) v. PriceWaterhouseCoopers Inc.*, 2005 ABQB 559, 47 Alta. L.R. (4th) 138, *per* Burrows J., the section "does not convert a statutorily imposed obligation owed to the public at large into a liability owed to the public body charged with enforcing it" (para. 42).

#### 4. When Does a Regulatory Obligation Become a Claim Under the CCAA?

77 This brings us to the heart of the question before us: When does a regulatory obligation imposed on a corporation under environmental protection legislation become a "claim" provable and compromisable under the *CCAA*?

78 Regulatory obligations are, as a general proposition, not compromisable claims. Only financial or monetary claims provable by a "creditor" fall within the definition of "claim" under the *CCAA*. A "creditor" is defined as "a person having a claim": s. 2, *BIA*. Thus, the identification of a "creditor" hangs on the existence of a "claim". Section 12(1) of the *CCAA* defines "claim" as "any indebtedness, liability or obligation ... that ... would be a debt provable in bankruptcy", which is [page479] accepted as confined to obligations of a financial or monetary nature.

79 The *CCAA* does not depart from the proposition that a claim must be financial or monetary. However, it contains a scheme to deal with disputes over whether an obligation is a monetary obligation as opposed to some other kind of obligation.

80 Such a dispute may arise with respect to environmental obligations of the corporation. The *CCAA* recognizes three situations that may arise when a corporation enters restructuring.

81 The first situation is where the remedial work has not been done (and there is no "sufficient certainty" that the work will be done, unlike the third situation described below). In this situation, the government cannot claim the cost of remediation: see s. 102(3) of the *EPA*. The obligation of compliance falls in principle on the monitor who takes over the corporation's assets and operations. If the monitor remediates the property, he can claim the costs as costs of administration. If he does not wish to do so, he may obtain a court order staying the remediation obligation or abandon the property: s. 11.8(5) *CCAA* (in which case costs of remediation shall not rank as costs of administration: s. 11.8(7)). In this situation, the obligation cannot be compromised.

82 The second situation is where the government that has issued the environmental protection order moves to clean up the pollution, as the legislation entitles it to do. In this situation, the government has a claim for the cost of remediation that is compromisable in the *CCAA* proceedings. This is because the government, by moving to clean up the pollution, has changed the outstanding regulatory [page480] obligation owed to the public into a financial or monetary obligation owed by the corporation to the government. Section 11.8(9), already discussed, makes it clear that this

applies to damage after the *CCAA* proceedings commenced, which might otherwise not be claimable as a matter of timing.

**83** A third situation may arise: the government has not yet performed the remediation at the time of restructuring, but there is "sufficient certainty" that it will do so. This situation is regulated by the provisions of the *CCAA* for contingent or future claims. Under the *CCAA*, a debt or liability that is contingent on a future event may be compromised.

**84** It is clear that a mere possibility that work will be done does not suffice to make a regulatory obligation a contingent claim under the *CCAA*. Rather, there must be "sufficient certainty" that the obligation will be converted into a financial or monetary claim to permit this. The impact of the obligation on the insolvency process is irrelevant to the analysis of contingency. The future liabilities must not be "so remote and speculative in nature that they could not properly be considered contingent claims": *Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75, at para. 4.

**85** Where environmental obligations are concerned, courts to date have relied on a high degree of probability verging on certainty that the government will in fact step in and remediate the property. In *Anvil Range Mining Corp., Re* (2001), 25 C.B.R. (4th) 1 (Ont. S.C.J.), Farley J. concluded that a contingent claim was established where the money had already been earmarked in the budget for the remediation project. He observed that [page481] "there appears to be every likelihood to a certainty that every dollar in the budget for the year ending March 31, 2002 earmarked for reclamation will be spent" (para. 15 (emphasis added)). Similarly, in *Shirley (Re)*, Kennedy J. relied on the fact that the Ontario Minister of the Environment had already entered the property at issue and commenced remediation activities to conclude that "[a]ny doubt about the resolve of the [Ministry's] intent to realize upon its authority ended when it began to incur expense from operations" (p. 110).

**86** There is good reason why "sufficient certainty" should be interpreted as requiring "likelihood approaching certainty" when the issue is whether ongoing environmental obligations owed to the public should be converted to contingent claims that can be expunged or compromised in the restructuring process. Courts should not overlook the obstacles governments may encounter in deciding to remediate environmental damage a corporation has caused. To begin with, the government's decision is discretionary and may be influenced by any number of competing political and social considerations. Furthermore, remediation may cost a great deal of money. For example, in this case, the *CCAA* court found that at a minimum the remediation would cost in the "mid-to-high eight figures", and could indeed cost several times that (para. 81). In concrete terms, the remediation at issue in this case may be expected to meet or exceed the entire budget of the Minister (\$65 million) for 2009. Not only would this be a massive expenditure, but it would also likely require the specific approval of the legislature and thereby be subject to political uncertainties. To assess these factors and determine whether all this will occur would embroil the *CCAA* judge in social, economic and political considerations - matters which are not normally subject to judicial consideration: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3

S.C.R. 45, at para. 74. It is small wonder, then, that courts assessing whether it is "sufficiently certain" that a government will clean up pollution created [page482] by a corporation have insisted on proof of likelihood approaching certainty.

**87** In this case, as will be seen, apart from the Buchans property, the record is devoid of any evidence capable of establishing that it is "sufficiently certain" that the Province will itself remediate the properties. Even on a more relaxed standard than the one adopted in similar cases to date, the evidence in this case would fail to establish that remediation is "sufficiently certain".

#### 5. The Result in This Case

**88** Five different sites are at issue in this case. The question in each case is whether the Minister has already remediated the property (making it to that extent an actual claim), or if not, whether it is "sufficiently certain" that he or she will remediate the property, permitting it to be considered a contingent claim.

**89** The Buchans site posed immediate risks to human health as a consequence of high levels of lead and other contaminants in the soil, groundwater, surface water and sediment. There was a risk that the wind would disperse the contamination, posing a threat to the surrounding population. Lead has been found in residential areas of Buchans and adults tested in the town had elevated levels of lead in their blood. In addition, a structurally unsound dam at the Buchans site raised the risk of contaminating silt entering the Exploits and Buchans rivers.

**90** The Minister quickly moved to address the immediate concern of the unsound dam and put [page483] out a request for tenders for other measures that required immediate action at the Buchans site. Money expended is clearly a claim under the *CCAA*. I am also of the view that the work for which the request for tenders was put out meets the "sufficiently certain" standard and constitutes a contingent claim.

**91** Beyond this, it has not been shown that it is "sufficiently certain" that the Province will do the remediation work to permit Abitibi's ongoing regulatory obligations under the *EPA* Orders to be considered contingent debts. The same applies to the other properties, on which no work has been done and no requests for tender to do the work initiated.

**92** Far from being "sufficiently certain", there is simply nothing on the record to support the view that the Province will move to remediate the remaining properties. It has not been shown that the contamination poses immediate health risks, which must be addressed without delay. It has not been shown that the Province has taken any steps to do any work. And it has not been shown that the Province has set aside or even contemplated setting aside money for this work. Abitibi relies on a statement by the then-Premier in discussing the possibility that the Province would be obliged to compensate Abitibi for expropriation of some of the properties, to the effect that "there would not be a net payment to Abitibi": R.F., at para. 12. Apart from the fact that the Premier was not purporting to state government policy, the statement simply does not say that the Province would do

the remediation. The Premier may have simply been suggesting that outstanding environmental liabilities made the properties worth little or nothing, obviating any net payment to Abitibi.

93 My colleague Deschamps J. concludes that the findings of the *CCAA* court establish that it was [page484] "sufficiently certain" that the Province would remediate the land, converting Abitibi's regulatory obligations under the *EPA* Orders to contingent claims that can be compromised under the *CCAA*. With respect, I find myself unable to agree.

94 The *CCAA* judge never asked himself the critical question of whether it was "sufficiently certain" that the Province would do the work itself. Essentially, he proceeded on the basis that the *EPA* Orders had not been put forward in a sincere effort to obtain remediation, but were simply a money grab. The *CCAA* judge buttressed his view that the Province's regulatory orders were not sincere by opining that the orders were unenforceable (which if true would not prevent new *EPA* orders) and by suggesting that the Province did not want to assert a contingent claim, since this might attract a counterclaim by Abitibi for the expropriation of the properties (something that may be impossible due to Abitibi's decision to take the expropriation issue to NAFTA (the *North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, Can. T.S. 1994 No. 2), excluding Canadian courts). In any event, it is clear that the *CCAA* judge, on the reasoning he adopted, never considered the question of whether it was "sufficiently certain" that the Province would remediate the properties. It follows that the *CCAA* judge's conclusions cannot support the view that the outstanding obligations are contingent claims under the *CCAA*.

95 My colleague concludes:

[The *CCAA* judge] did at times rely on indicators that are unique and that do not appear in the analytical framework I propose above, but he did so because of the exceptional facts of this case. Yet, had he formulated the [page485] question in the same way as I have, his conclusion, based on his objective findings of fact, would have been the same... . The *CCAA* judge's assessment of the facts ... leads to no conclusion other than that it was sufficiently certain that the Province would perform remediation work and therefore fall within the definition of a creditor with a monetary claim. [Emphasis added; para. 58.]

96 I must respectfully confess to a less sanguine view. First, I find myself unable to decide the case on what I think the *CCAA* judge would have done had he gotten the law right and considered the central question. In my view, his failure to consider that question requires this Court to answer it in his stead on the record before us: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 35. But more to the point, I see no objective facts that support, much less compel, the conclusion that it is "sufficiently certain" that the Province will move to itself remediate any or all of the pollution Abitibi caused. The mood of the regulator in issuing remediation orders, be it disinterested or otherwise, has no bearing on the likelihood that the Province will undertake such a



massive project itself. The Province has options. It could, to be sure, opt to do the work. Or it could await the result of Abitibi's restructuring and call on it to remediate once it resumed operations. It could even choose to leave the sites contaminated. There is nothing in the record that makes the first option more probable than the others, much less establishes "sufficient certainty" that the Province will itself clean up the pollution, converting it to a debt.

97 I would allow the appeal and issue a declaration that Abitibi's remediation obligations under the *EPA Orders* do not constitute claims compromisable under the *CCAA*, except for work done or tendered for on the Buchans site.

[page486]

The following are the reasons delivered by

98 LeBEL J. (dissenting):-- I have read the reasons of the Chief Justice and Deschamps J. They agree that a court overseeing a proposed arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), cannot relieve debtors of their regulatory obligations. The only regulatory orders that can be subject to compromise are those which are monetary in nature. My colleagues also accept that contingent environmental claims can be liquidated and compromised if it is established that the regulatory body would remediate the environmental contamination itself, and hence turn the regulatory order into a monetary claim.

99 At this point, my colleagues disagree on the proper evidentiary test with respect to whether the government would remediate the contamination. In the Chief Justice's opinion, the evidence must show that there is a "likelihood approaching certainty" that the province would remediate the contamination itself (para. 86). In my respectful opinion, this is not the established test for determining where and how a contingent claim can be liquidated in bankruptcy and insolvency law. The test of "sufficient certainty" described by Deschamps J., which does not look very different from the general civil standard of probability, better reflects how both the common law and the civil law view and deal with contingent claims. On the basis of the test Deschamps J. proposes, I must agree with the Chief Justice and would allow the appeal.

100 First, no matter how I read the *CCAA* court's judgment (2010 QCCS 1261, 68 C.B.R. (5th) 1), I find no support for a conclusion that it is consistent with the principle that the *CCAA* does not apply to purely regulatory obligations, or that the court had evidence that would satisfy the test of "sufficient certainty" that the province of Newfoundland and [page487] Labrador ("Province") would perform the remedial work itself.

101 In my view, the *CCAA* court was concerned that the arrangement would fail if the Abitibi respondents ("Abitibi") were not released from their regulatory obligations in respect of pollution.

The CCAA court wanted to eliminate the uncertainty that would have clouded the reorganized corporations' future. Moreover, its decision appears to have been driven by an opinion that the Province had acted in bad faith in its dealings with Abitibi both during and after the termination of its operations in the Province. I agree with the Chief Justice that there is no evidence that the Province intends to perform the remedial work itself. In the absence of any other evidence, an offhand comment made in the legislature by a member of the government hardly satisfies the "sufficient certainty" test. Even if the evidentiary test proposed by my colleague Deschamps J. is applied, this Court can legitimately disregard the CCAA court's finding as the Chief Justice proposes, since it did not rest on a sufficient factual foundation.

**102** For these reasons, I would concur with the disposition proposed by the Chief Justice.

*Appeal dismissed with costs, McLACHLIN C.J. and LeBEL J. dissenting.*

**Solicitors:**

*Solicitors for the appellant: WeirFoulds, Toronto; Attorney General of Newfoundland and Labrador, St. John's.*

*Solicitors for the respondents AbitibiBowater Inc., Abitibi-Consolidated Inc. and Bowater Canadian Holdings Inc.: Stikeman Elliott, Toronto.*

*Solicitors for the respondent the Ad Hoc Committee of Bondholders: Goodmans, Toronto.*

*Solicitors for the respondents the Ad Hoc Committee of Senior Secured Noteholders and the U.S. Bank National Association (Indenture Trustee [page488] for the Senior Secured Noteholders): Borden Ladner Gervais, Toronto.*

*Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.*

*Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.*

*Solicitor for the interveners the Attorney General of British Columbia and Her Majesty The Queen in Right of British Columbia: Attorney General of British Columbia, Victoria.*

*Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.*

*Solicitors for the intervener Ernst & Young Inc., as Monitor: Thornton Grout Finnigan, Toronto.*

*Solicitors for the intervener the Friends of the Earth Canada: Ecojustice, University of Ottawa, Ottawa; Fasken Martineau DuMoulin, Toronto.*

**TAB 16**

2009 CarswellOnt 1330  
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2009 CarswellOnt 1330, [2009] O.J. No. 1044, 175 A.C.W.S. (3d) 965

**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 Nortel Networks Corporation,  
Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks  
International Corporation and Nortel Networks Technology Corporation (the "Applicants")

Application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

Morawetz J.

Heard: March 6, 2009

Judgment: March 12, 2009

Docket: 09-CL-7950, 09-CL-7951

Counsel: Derrick Tay, Jennifer Stam for Nortel Networks Corporation, et al  
J. Pasquariello for Monitor, Ernst & Young Inc.  
Jonathan Bell for Informal Group of Nortel Networks Noteholders  
R. Moncur, M. Barrack for Flextronics  
M. Starnino for Pension Benefits Guarantee Fund  
Harvey Chaiton for IBM  
D. Ullman for Verizon Communications Inc.  
Harvey Garman for U.K. Protection Fund, Nortel Networks UK Pension Trust Limited  
Demtrios iokaris for Certain Former Salaried Employees of Nortel Networks  
Alex MacFarlane for U.S. Unsecured Creditors' Committee

Subject: Insolvency; Corporate and Commercial

**Related Abridgment Classifications**

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

**Bankruptcy and insolvency**

XIX Companies' Creditors Arrangement Act

XIX.3 Arrangements

XIX.3.b Approval by court

XIX.3.b.iv Miscellaneous

**Headnote**

**Bankruptcy and insolvency --- Proposal --- Companies' Creditors Arrangement Act --- Arrangements --- Approval by court --- "Fair and reasonable"**

**Table of Authorities**

Cases considered by *Morawetz J.*:

*Sierra Club of Canada v. Canada (Minister of Finance)* (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed

**Statutes considered:**

*Bankruptcy Code*, 11 U.S.C.  
Generally — referred to

**Morawetz J.:**

- 1 This motion was heard on March 6, 2009 and the requested relief was granted, with brief reasons to follow.
- 2 At the outset of the Nortel proceedings on January 14, 2009, Mr. Tay, on behalf of Nortel Networks Corporation (the "Applicants or Nortel"), indicated that the Applicants would be seeking approval of a Key Employee Incentive Plan ("KEIP") and a Key Employee Retention Plan ("KERP"). Such approval was sought on this motion, together with a request to approve the Calgary Retention Plan (the "Calgary Retention Plan") providing for retention bonus payments promised to employees in connection with the closing of the Westwinds facility.
- 3 This motion was not opposed.
- 4 The record establishes that the commitment and retention of key employees will be essential to the execution of a restructuring of Nortel and the completion of a plan of arrangement.
- 5 The KEIP applies to certain executives of the Senior Leadership Team ("SLTs") and the Executive Leadership Team ("ELTs") and the KERP applies to certain other key employees.
- 6 The Monitor reports that these plans have been developed to incent those employees who are:
  - (i) absolutely key to the success of the restructuring; and
  - (ii) to remain with the Applicants and U.S. Debtors through to the completion of the Canadian and U.S. proceedings
- 7 In designing the plans, Nortel obtained independent advice from Mercer (U.S.) Inc. ("Mercer") which included benchmarking total direct compensation levels against industry standards in comparing other key employee incentive plans approved by the courts in recent comparable North American restructurings. In addition, the Monitor reports that Nortel's financial advisor, Lezard Frères & Co., as well as the Monitor were consulted by Nortel throughout the development process with respect to the plans and have provided Nortel with appropriate input.
- 8 A total of 972 employees are eligible for the plans. This represents approximately 5% of Nortel's global workforce (excluding employees of the EMEA Filed Entities and the joint venturers). The KEIP covers 92 participants, of which, 29 are employed by the Applicants. The potential dollar value to be paid out under the KEIP is approximately \$23 million, of which \$6.8 million is allocated to the Canadian Applicants. With respect to the KERP, this plan covers 880 participants, of which 294 are employed by the Canadian Applicants. The total potential dollar value to be paid out under the KERP is approximately \$22 million, of which \$6.2 million is allocated to the Canadian Applicants.
- 9 The awards under both the KEIP and the KERP will vest based on the achievement of three milestones, namely, achievement of North American objectives; achievement of certain parameters that will result in a leaner and more focussed organization; and court-approved confirmation of a plan of restructuring.

10 The Unsecured Creditors' Committee ("UCC") in the Chapter 11 proceedings has indicated that it supports the plans, although such support with respect to the KEIP for the SLTs is conditional upon the delivery to the UCC of Nortel's 2009 financial projections.

11 Counsel to the Applicants advised that the U.S. Bankruptcy Court has approved the KEIP (except as it relates to the SLTs) and the KERP.

12 In order to maintain consistency between Canada and the U.S., the Applicants' motion to approve the KEIP excludes the SLTs. The Monitor reports that the Applicants have advised that they intend to request approval of the KEIP for the SLTs at a future date.

13 With respect to the Calgary Retention Plan, a decision was made in July 2008 to close the Westwinds facility and transfer R & D and global operations to other facilities over a period of 12 months. In July 2008, Nortel developed the Calgary Retention Plan that provided for retention payments to be made to those Westwinds facility employees who Nortel determined were critical to the successful shutdown of the facility. The Applicants have indicated that the maximum cost of the Calgary Retention Plan is estimated to be approximately \$727,000 to be paid to 45 employees at the time the employees have completed their portion of the project.

14 I am satisfied that the record establishes that the employees who are covered by the KEIP, the KERP and the Calgary Retention Plan are key to the operations of Nortel and are sought after by competitors, even given current market conditions.

15 The Monitor has reviewed the details of the Applicants proposed plans and Mercer's analysis and believes that the proposed plans provide reasonable compensation in the current situation.

16 Full details with respect to the plans are contained in the Confidential Report. I have reviewed this Report and agree with the submissions of both the Applicants and the Monitor that the Report contains sensitive commercial information that would be harmful to the Applicants if it were disclosed in the marketplace. In addition, the Confidential Report contains sensitive personal information relating to Nortel's employees, the disclosure of which, in my view, would be harmful.

17 The Applicants and the Monitor request that the Confidential Report be sealed, pending further order of the court. I am satisfied that the test for sealing the Confidential Report, as set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (S.C.C.) has been satisfied and it is appropriate to grant the sealing order.

18 I have been satisfied that it is appropriate to approve the plans in question.

19 An order shall therefore issue approving:

- (i) the KEIP except as it relates to the Applicants' employees whose are designated members of the SLT;
- (ii) the KERP; and
- (iii) the Calgary Retention Plan

20 An order shall issue sealing the Confidential Report pending further order of this court.

**TAB 17**

2014 ONSC 5274  
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2014 CarswellOnt 11369, 2014 ONSC 5274, 244 A.C.W.S. (3d) 10

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

In the Matter of a Plan of Compromise or Arrangement of Nortel Networks  
Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel  
Networks International Corporation and Nortel Networks Technology Corporation

Newbould J.

Heard: July 25, 2014

Judgment: September 11, 2014

Docket: 09-CL-7950

Counsel: Benjamin Zarnett, Graham Smith, for Monitor and Canadian Debtors

Ken Rosenberg, for Canadian Creditors' Committee

Michael Barrack, D.J. Miller, Michael Shakra, for UK Pension Claimants

Tracy Wynne, for EMEA Debtors

Kenneth Kraft, for Wilmington Trust, National Association

Richard Swan, Gavin Finlayson, Kevin Zych, for Ad Hoc Group of Bondholders

Shayne Kukulowicz, for US Unsecured Creditors' Committee

John D. Marshall, for Law Debenture Trust Company of New York

Brett Harrison, for Bank of New York Mellon

Andrew Gray, Scott Bomhof, for US Debtors

Subject: Insolvency

**Related Abridgment Classifications**

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

**Bankruptcy and insolvency**

XIX Companies' Creditors Arrangement Act

XIX.1 General principles

XIX.1.c Application of Act

XIX.1.c.i Relationship between Act and Bankruptcy and Insolvency Act

**Bankruptcy and insolvency**

XIX Companies' Creditors Arrangement Act

XIX.5 Miscellaneous

**Headnote**

**Bankruptcy and insolvency — Companies' Creditors Arrangement Act — General principles — Application of Act —  
Relationship between Act and Bankruptcy and Insolvency Act**



Canadian debtor and its US affiliates (collectively N Co.) issued unsecured pari passu notes under three separate bond indentures — All notes were payable by entities of N Co. in both Canada and US, either as maker or guarantor — Canadian debtor filed for and was granted protection under Companies' Creditors Arrangement Act (CCAA) — Proceedings were "liquidating CCAA" proceedings in that debtor was for all intents and purposes liquidated — Bondholders brought claim against debtor for principal and pre-filing interest under terms of bonds — Bondholders also brought claim for post-filing interest — Aside from bondholders, main claimants against debtor were pensioners who, unlike bondholders, had no contractual right to interest — Claim for post-filing interest dismissed — There was no provision in CCAA that would not permit application of common law "interest stops rule" in CCAA proceedings, and there were policy reasons in favour of applying it — To permit some creditors' claims to grow disproportionately to others during stay would not maintain status quo — Moreover, this would encourage creditors whose interests were being disadvantaged to immediately initiate bankruptcy proceedings, thereby threatening objectives of CCAA — Bankruptcy and Insolvency Act (BIA) and CCAA are parts of integrated insolvency scheme, and courts will avoid interpretations of such acts that give creditors incentives to prefer BIA processes.

#### **Bankruptcy and insolvency — Companies' Creditors Arrangement Act — Miscellaneous**

Canadian debtor and its US affiliates (collectively N Co.) issued unsecured pari passu notes under three separate bond indentures — All notes were payable by entities of N Co. in both Canada and US, either as maker or guarantor — Canadian debtor filed for and was granted protection under Companies' Creditors Arrangement Act (CCAA) — Proceedings were "liquidating CCAA" proceedings in that debtor was for all intents and purposes liquidated — Bondholders brought claim against debtor for principal and pre-filing interest under terms of bonds — Bondholders also brought claim for post-filing interest — Aside from bondholders, main claimants against debtor were pensioners who, unlike bondholders, had no contractual right to interest — Claim for post-filing interest dismissed — There was no provision in CCAA that would not permit application of common law "interest stops rule" in CCAA proceedings, and there were policy reasons in favour of applying it — To permit some creditors' claims to grow disproportionately to others during stay would not maintain status quo — Moreover, this would encourage creditors whose interests were being disadvantaged to immediately initiate bankruptcy proceedings, thereby threatening objectives of CCAA — Bankruptcy and Insolvency Act (BIA) and CCAA are parts of integrated insolvency scheme, and courts will avoid interpretations of such acts that give creditors incentives to prefer BIA processes.

#### **Table of Authorities**

##### **Cases considered by *Newbould J.*:**

*Abacus Cities Ltd. (Trustee of) v. AMIC Mortgage Investment Corp.* (1992), [1992] 4 W.W.R. 309, 125 A.R. 45, 14 W.A.C. 45, 1 Alta. L.R. (3d) 257, 89 D.L.R. (4th) 84, 11 C.B.R. (3d) 193, 1992 CarswellAlta 281 (Alta. C.A.) — considered

*AbitibiBowater Inc., Re* (2009), 2009 CarswellQue 14224, 2009 QCCS 6461 (C.S. Que.) — considered

*Canada (Attorney General) v. Confederation Life Insurance Co.* (2001), [2001] O.T.C. 486, 2001 CarswellOnt 2299 (Ont. S.C.J. [Commercial List]) — considered

*Humber Ironworks & Shipbuilding Co., Re* (1869), 4 Ch. App. 643 (Eng. Ch. Div.) — considered

*Indalex Ltd., Re* (2009), 2009 CarswellOnt 4465, 55 C.B.R. (5th) 64, 79 C.C.P.B. 104 (Ont. S.C.J. [Commercial List]) — referred to

*Indalex Ltd., Re* (2013), 2013 SCC 6, 2013 CarswellOnt 733, 2013 CarswellOnt 734, 354 D.L.R. (4th) 581, 2 C.C.P.B. (2nd) 1, 96 C.B.R. (5th) 171, (sub nom. *Sun Indalex Finance LLC v. United Steelworkers*) [2013] 1 S.C.R. 271, 20 P.P.S.A.C. (3d) 1, 439 N.R. 235, D.T.E. 2013T-97, 301 O.A.C. 1, 8 B.L.R. (5th) 1 (S.C.C.) — followed

*Ivaco Inc., Re* (2006), 2006 C.E.B. & P.G.R. 8218, 25 C.B.R. (5th) 176, 83 O.R. (3d) 108, 275 D.L.R. (4th) 132, 2006 CarswellOnt 6292, 56 C.C.P.B. 1, 26 B.L.R. (4th) 43 (Ont. C.A.) — referred to

*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — considered

*NAV Canada c. Wilmington Trust Co.* (2006), 2006 CarswellQue 4890, 2006 CarswellQue 4891, 2006 SCC 24, (sub nom. *Greater Toronto Airports Authority v. International Lease Finance Corp.*) 80 O.R. (3d) 558 (note), (sub nom. *Canada 3000 Inc., (Bankrupt), Re*) 349 N.R. 1, (sub nom. *Canada 3000 Inc., Re*) [2006] 1 S.C.R. 865, 10 P.P.S.A.C. (3d) 66, 20 C.B.R. (5th) 1, (sub nom. *Canada 3000 Inc. (Bankrupt), Re*) 212 O.A.C. 338, (sub nom. *Canada 3000 Inc., Re*) 269 D.L.R. (4th) 79 (S.C.C.) — followed

*Nortel Networks Corp., Re* (2012), 88 C.B.R. (5th) 111, 2012 CarswellOnt 3153, 2012 ONSC 1213, 66 C.E.L.R. (3d) 310 (Ont. S.C.J. [Commercial List]) — considered

*Savin, Re* (1872), 7 Ch. App. 760 (Eng. Ch. Div.) — considered

*Shoppers Trust Co. (Liquidator of) v. Shoppers Trust Co.* (2005), 74 O.R. (3d) 652, 2005 CarswellOnt 1071, (sub nom. *Shoppers Trust Co. (Liquidation), Re*) 195 O.A.C. 331, 10 C.B.R. (5th) 93, 251 D.L.R. (4th) 315 (Ont. C.A.) — followed

*Stelco Inc., Re* (2007), 2007 ONCA 483, 2007 CarswellOnt 4108, 35 C.B.R. (5th) 174, 32 B.L.R. (4th) 77, 226 O.A.C. 72 (Ont. C.A.) — distinguished

*Ted Leroy Trucking Ltd., Re* (2010), (sub nom. *Century Services Inc. v. Canada (A.G.)*) [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 G.T.C. 2006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 D.T.C. 5006 (Eng.), (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 503 W.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 296 B.C.A.C. 1, 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re*) 326 D.L.R. (4th) 577, 72 C.B.R. (5th) 170, [2011] 2 W.W.R. 383 (S.C.C.) — followed

*Thibodeau v. Thibodeau* (2011), 87 C.C.P.B. 1, 73 C.B.R. (5th) 173, 331 D.L.R. (4th) 606, 2011 CarswellOnt 686, 2011 ONCA 110, 104 O.R. (3d) 161, 277 O.A.C. 359, 5 R.F.L. (7th) 16 (Ont. C.A.) — referred to

*Timminco Ltd., Re* (2014), 14 C.B.R. (6th) 113, 2014 ONSC 3393, 2014 CarswellOnt 9328 (Ont. S.C.J.) — considered

**Statutes considered:**

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

Generally — referred to

s. 2 "claim provable in bankruptcy", "provable claim" or "claim provable" — referred to

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

Generally — referred to

s. 11(1) — considered

*Excise Tax Act*, R.S.C. 1985, c. E-15

Generally — referred to

*Winding-up Act*, R.S.C. 1970, c. W-10

Generally — referred to

CLAIM by bondholders for post-filing interest against an insolvent estate under *Companies' Creditors Arrangement Act*.

***Newbould J.:***

1 Nortel Networks Corporation ("NNC") and other Canadian debtors filed for and were granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. c-36, ("CCAA") on January 14, 2009. On the same date, Nortel Network Inc. ("NNI") and other US debtors filed petitions in Delaware under the United States Bankruptcy Code, 11 U.S.C., Chapter 11.

2 Beginning in 1996, unsecured *pari passu* notes were issued under three separate bond indentures, first by a US Nortel corporation guaranteed by Nortel Networks Limited ("NNL"), a Canadian corporation, and then by NNL in several tranches jointly and severally guaranteed by NNC and NNI (the "crossover bonds"). Thus all of the notes are payable by Nortel entities in both Canada and the US, either as the maker or guarantor. Under claims procedures in both the Canadian and US proceedings, claims by bondholders for principal and pre-filing interest in the amount of US \$4.092 billion have been made against each of the Canadian and US estates. The bondholders also claim to be entitled to post-filing interest and related claims under the terms of the bonds which, as of December 31, 2013, amounted to approximately US\$1.6 billion.

3 The total assets realized on the sale of Nortel assets worldwide which are the subject of the allocation proceedings amongst the Canadian, US, and European, Middle East and African estates ("EMEA") are approximately US\$7.3 billion, and thus the post-filing bond interest claims of now more than US\$1.6 billion represent a substantial portion of the total assets available to all three estates. While the post-filing bond interest grows at various compounded rates under the terms of the bonds, the US\$7.3 billion is apparently not growing at any appreciable rate because of the very conservative nature of the investments made with it pending the outcome of the insolvency proceedings. Apart from the bondholders, the main claimants against the Canadian debtors are Nortel disabled employees, former employees and retirees.

4 The bond claims in the Canadian proceedings have been filed pursuant to a claims procedure order in the CCAA proceedings dated July 30, 2009. The order contemplated that the claims filed under it would be finally determined in accordance with further procedures to be authorized, including by a further claims resolution order. By order dated September 16, 2010, a further order was made in the CCAA proceedings that authorized procedures to determine claims for all purposes.

5 By direction of June 24, 2014, it was ordered that the following issues be argued:

- (a) whether the holders of the crossover bond claims are legally entitled in each jurisdiction to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest (namely, above and beyond US\$4.092 billion); and

(b) if it is determined that the crossover bondholders are so entitled, what additional amounts are such holders entitled to so claim and receive.

6 The hearing in the US Bankruptcy Court was scheduled to proceed at the same time as the hearing in this Court but was adjourned due to an apparent settlement between the US Debtors and certain bondholders.

7 The Monitor and Canadian debtors, supported by the Canadian Creditors' Committee, the UK Pension Claimants, the EMEA debtors, and the Wilmington Trust take the position that in a liquidating CCAA proceeding such as this, post-filing interest is not legally payable on the crossover bonds as a result of the "interest stops" rule. The Ad Hoc Group of Bondholders, supported by the US Unsecured Creditors' Committee, Law Debenture Trust Company of New York and Bank of New York Mellon take the position that there is no "interest stops" rule in CCAA proceedings and that the right to interest on the crossover bonds is not lost on the filing of CCAA proceedings and can be the subject of negotiations regarding a CCAA plan of reorganization. They take the position that no distribution of Nortel's sale proceeds that fails to recognize the full amount of the crossover bondholders' claims, including post-filing interest, can be ordered under the CCAA except under a negotiated CCAA plan duly approved by the requisite majorities of creditors and sanctioned by the court.

8 For the reasons that follow, I accept the position and hold that post-filing interest is not legally payable on the crossover bonds in this case.

#### **The interest stops rule**

9 In this case, the bondholders have a contractual right to interest. The other major claimants, being pensioners, do not. The Canadian debtors contend that the reason for the interest stops rule is one of fundamental fairness and that the rule should apply in this case.

10 The Canadian debtors contend that the interest-stops rule is a common law rule corollary to the *pari passu* rule governing rateable payments of an insolvent's debts and that while the CCAA is silent as to the right to post-filing interest, it does not rule out the interest-stops rule.

11 The bondholders contend that to deny them the right to post-filing interest would amount to a confiscation of a property right to interest and that absent express statutory authority the court has no ability to interfere with their contractual entitlement to interest. I do not see their claim to interest as being a property right, as the bonds are unsecured. See *Thibodeau v. Thibodeau* (2011), 104 O.R. (3d) 161 (Ont. C.A.), at para. 43. However, the question remains as to whether their contractual rights should prevail.

12 It is a fundamental tenet of insolvency law that all debts shall be paid *pari passu* and all unsecured creditors receive equal treatment. See *Shoppers Trust Co. (Liquidator of) v. Shoppers Trust Co.* (2005), 74 O.R. (3d) 652 (Ont. C.A.) at para. 25, per Blair J.A. and *Indalex Ltd., Re* (2009), 55 C.B.R. (5th) 64 (Ont. S.C.J. [Commercial List]), at para. 16 per Morawetz J. This common law principle has led to the development of the interest stops rule. In *Canada (Attorney General) v. Confederation Life Insurance Co.*, [2001] O.J. No. 2610 (Ont. S.C.J. [Commercial List]), Blair J. (as he then was) stated the following:

20 One of the governing principles of insolvency law - including proceedings in a winding-up - is that the assets of the insolvent debtor are to be distributed amongst classes of creditors rateably and equally, as those assets are found at the date of the insolvency. This principle has led to the development of the "interest stops rule", i.e., that no interest is payable on a debt from the date of the winding-up or bankruptcy. As Lord Justice James put it, colourfully, in *Re Savin* (1872), L.R. 7 Ch. 760 (C.A.), at p. 764:

I believe, however, that if the question now arose for the first time I should agree with the rule [i.e. the "interest stops rule"], seeing that the theory in bankruptcy is to stop all things at the date of the bankruptcy, and to divide the wreck of the man's property as it stood at that time.

13 This rule is "judge-made" law. See *Humber Ironworks & Shipbuilding Co., Re* (1869), 4 Ch. App. 643 (Eng. Ch. Div.), at 647, per Sir G. M. Giffard, L.J.

14 In *Shoppers Trust*, Blair J.A. referred to *pari passu* principles in the context of the interest stops rule and the common law understanding of those rules in liquidation proceedings. He stated:

25. The rationale underlying this approach rests on a fundamental principle of insolvency law, namely, that "in the case of an insolvent estate, all the money being realized as speedily as possible, should be applied equally and rateably in payment of the debts as they existed at the date of the winding-up": *Humber Ironworks, supra*, at p. 646 Ch. App. Unless this is the case, the principle of *pari passu* distribution cannot be honoured. See also *Re McDougall*, [1883] O.J. No. 63, 8 O.A.R. 309, at paras. 13-15; *Principal Savings & Trust Co. v. Principal Group Ltd. (Trustee of)* (1993), 109 D.L.R. (4th) 390, 14 Alta. L.R. (3d) 442 (C.A.), at paras. 12-16; and *Canada (Attorney General) v. Confederation Trust Co.* (2003), 65 O.R. (3d) 519, [2003] O.J. No. 2754 (S.C.J.), at p. 525 [O.R.] While these cases were decided in the context of what is known as the "interest stops" rule, they are all premised on the common law understanding that claims for principal and interest are provable in liquidation proceedings to the date of the winding-up.

15 The interest stops rule has been applied in winding-up cases in spite of the fact that the legislation did not provide for it. In *Shoppers Trust*, Blair J.A. stated:

26. Thus, it was of little moment that the provisions of the *Winding-up Act* in force at the time of the March 10, 1993 order did not contain any such term. The 1996 amendment to s. 71(1) of the *Winding-up and Restructuring Act*, establishing that claims against the insolvent estate are to be calculated as at the date of the winding-up, merely clarified and codified the position as it already existed in insolvency law.

16 In *Abacus Cities Ltd. (Trustee of) v. AMIC Mortgage Investment Corp.* (1992), 11 C.B.R. (3d) 193 (Alta. C.A.), Kerans J.A. applied the interest stops rule in a bankruptcy proceeding under the BIA even although, in his view, the BIA assumed that interest was not payable after bankruptcy but did not expressly forbid it. He did so on the basis of the common law rule enunciated in *Savin, Re* [(1872), 7 Ch. App. 760 (Eng. Ch. Div.)], quoted by Blair J. in *Confederation Life*. Kerans J.A. stated:

19. ... I accept that *Savin* expresses the law in Canada today: claims provable in bankruptcy cannot include interest after bankruptcy.

17 In *Confederation Life*, Blair J. was of the view that the Winding-Up Act and the BIA could be interpreted to permit post-filing interest. Yet he held that the common law insolvency interest stops rule applied. He stated:

22 This common law principle has been applied consistently in Canadian bankruptcy and winding-up proceedings. This is so notwithstanding the language of subsection 71(1) of the Winding-Up Act and section 121 of the BIA, which might be read to the contrary, in my view....

23 Yet the "interest stops" principle has always applied to the payment of post-insolvency interest, and the provisions of subsection 71(1) have never been interpreted to trump the common law insolvency "interest stops rule".

18 Thus I see no reason to not apply the interest stops rule to a CCAA proceeding because the CCAA does not expressly provide for its application. The issue is whether the rule should apply to this CCAA proceeding.

#### Nature of the CCAA proceeding

19 When the Nortel entities filed for CCAA protection on January 14, 2009, and filed on the same date in the US and the UK, the stated purpose was to stabilize the Nortel business to maximize the chances of preserving all or a portion of the enterprise. However that hope quickly evaporated and on June 19, 2009 Nortel issued a news release announcing it had sold its CMDA business and LTE Access assets and that it was pursuing the sale of its other business interests. Liquidation followed, first by a sale of Nortel's eight business lines in 2009-2011 for US\$2.8 billion and second by the sale of its residual patent portfolio under a stalking-horse bid process in June 2011 for US\$4.5 billion. The sale of the CMDA and LTE assets was approved on June 29, 2009.

20 The Canadian debtors contend that this CCAA proceeding is a liquidating proceeding, and thus in substance the same as a bankruptcy under the BIA. The bondholders contend that there is no definition of a "liquidating" CCAA proceeding and no distinct legal category of a liquidating CCAA, essentially arguing that like beauty, it is in the eyes of the beholder.

21 In this case, I think there is little doubt that this is a liquidating CCAA process and has been since June, 2009, notwithstanding that there was some consideration given to monetizing the residual intellectual property in a new company to be formed (referred to as IPCO) before it was decided to sell the residual intellectual property that resulted in the sale to the Rockstar consortium for US\$4.5 billion. In *Nortel Networks Corp., Re*, 2012 ONSC 1213, 88 C.B.R. (5th) 111 (Ont. S.C.J. [Commercial List]), Morawetz J. referred to his recognizing in his June 29, 2009 Nortel decision approving the sale of the CMDA and LTE assets that the CCAA can be applied in "a liquidating insolvency". See also Dr. Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed. (Toronto: Carswell, 2013) at p. 167, in which she states "increasingly, there are 'liquidating CCAA' proceedings, whereby the debtor corporation is for all intents and purposes liquidated".

22 In *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), Farley J. recognized in para. 7 that a CCAA proceeding might involve liquidation. He stated:

It appears to me that the purpose of the CCAA is also to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company ... provided the same is proposed in the best interests of the creditors generally.

23 It is quite common now for there to be liquidating CCAA proceedings in which there is no successful restructuring of the business but rather a sale of the assets and a distribution of the proceeds to the creditors of the business. Nortel is unfortunately one of such CCAA proceedings.

**Can the interest stops rule apply in a CCAA proceeding?**

24 There is no controlling authority in Canada in a case such as this in which there is a contested claim being made by bondholders for post-filing interest against an insolvent estate under the CCAA, let alone under a liquidating CCAA process, or in which the other creditors are mainly pensioners with no contractual right to post-filing interest. Accordingly, it is necessary to deal with first principles and with various cases raised by the parties.

25 The Canadian debtors contend that the rationale for the interest stops rule is equally applicable to a liquidating CCAA proceeding as it is in a BIA or Winding-Up proceeding. They assert that the reason for the interest stops rule is one of fundamental fairness. An insolvency filing under the CCAA stays creditor enforcement. Accordingly, it is unfair to permit the bondholders with a contractual right to receive a payment on account of interest, and thus compensation for the delay in receipt of payment, while other creditors such as the pension claimants, who have been equally delayed in payment by virtue of the insolvency, receive no compensation. They cite Sir G. M. Giffard, L.J. in *Humber Ironworks*:

I do not see with what justice interest can be computed in favour of creditors whose debts carry interest, while creditors whose debts do not carry interest are stayed from recovering judgment, and so obtaining a right to interest.

26 In *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.) [hereinafter *Century Services*], Deschamps J. reaffirmed that the purpose of a CCAA stay of proceedings is to preserve the *status quo*. She stated at para. 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.

27 If post-filing interest is available to one set of creditors while the other creditors are prevented from asserting their rights and obtaining post-judgment interest, the Canadian Creditors' Committee contend that the *status quo* has not been preserved.

28 It has long been recognized that the federal insolvency regime includes the CCAA and the BIA and that the two statutes create a complimentary and interrelated scheme for dealing with the property of insolvent companies. See *Ivaco Inc., Re* (2006), 83 O.R. (3d) 108 (Ont. C.A.), at paras. 62 and 64, per Laskin J.A.

29 Recently the Supreme Court of Canada analysed the CCAA and indicated that the BIA and CCAA are to be considered parts of an integrated insolvency scheme, the court will favour interpretations that give creditors analogous entitlements under the CCAA and BIA, and the court will avoid interpretations that give creditors incentives to prefer BIA processes.

30 In *Century Services*, Deschamps J. enunciated guiding principles for interpreting the CCAA. Deschamps J. also stated that the case was the first time that the Supreme Court was called upon to directly interpret the provisions of the CCAA. The case involved competing interpretations of the federal *Excise Tax Act* ("ETA") and the CCAA in considering a deemed trust for GST collections. The ETA expressly excluded the provisions in the BIA rendering deemed trusts ineffective, but did not exclude similar provisions in the CCAA. In holding in favour of a stay under the CCAA, Deschamps J. was guided in her interpretation of the relevant CCAA provision by the desire to have similar results under the BIA and CCAA.

31 In her analysis, Deschamps J. made a number of statements, including

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. (para. 23)

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. (para. 24)

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. (para. 47)

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... (para. 54)

The CCAA and BIA 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 lost in bankruptcy. (para. 78)



32 In *Indalex Ltd., Re*, [2013] 1 S.C.R. 271 (S.C.C.), a case involving a competition between a deemed trust under provincial pension legislation and the right of a lender to security granted under the DIP lending provisions of the CCAA, Deschamps J. had occasion to refer to the *Century Services* case and her statement in *Century Services* in para 23 referred to above. She then stated:

In order to avoid a race to liquidation under the BIA, courts will favour an interpretation of the CCAA that affords creditors analogous entitlements.

33 Thus it is a fair comment taken the direction of the Supreme Court in *Century Services* and *Indalex* regarding the aims of insolvency law in Canada to say that if the common law principle of the interest stops rule was applicable to proceedings under the BIA and *Winding-Up Act* before legislative amendments to those statutes were made, (or if the comments of Blair J. in *Confederation Life* are accepted that the BIA still might be read to prevent its application but does not trump the application of the rule), there is no reason not to apply the interest stops rule in liquidating CCAA proceedings. I accept this and note that there is no provision in the CCAA that would not permit the application of the rule.

34 There are also policy reasons for this result, and they flow from *Century Services* and *Indalex*. I accept the argument of the Canadian Creditors' Committee that to permit some creditors' claims to grow disproportionately to others during the stay period would not maintain the *status quo* and would encourage creditors whose interests are being disadvantaged to immediately initiate bankruptcy proceedings, threatening the objectives of the CCAA.

35 In my view, there is no need for there to be a "liquidating" CCAA proceeding in order for the interest stops rule to apply to a CCAA proceeding. The reasoning for the application of the common law insolvency rule, being the desire to prevent a stay of proceedings from militating against one group of unsecured creditors over another in violation of the *pari passu* rule, is equally applicable to a CCAA proceeding that is not a liquidating proceeding. In such a proceeding, the parties would of course be free to include post-filing interest payments in a plan of arrangement, as is sometimes done.

36 The bondholders contend, however, that *Stelco Inc., Re*, 2007 ONCA 483, 32 B.L.R. (4th) 77 (Ont. C.A.) is binding authority that the interest stops rule does not apply in any CCAA proceeding. I do not agree. The facts of the case were quite different and did not involve a claim for post-filing interest against the debtor. Stelco was successfully restructured under the CCAA by a plan of compromise and arrangement approved by the creditors. The sanctioned plan did not provide for payment of post-petition interest. As among senior unsecured debenture holders, subordinated (junior) debenture holders and ordinary unsecured creditors, the plan treated all in the same class and *pro rata* distributions were calculated on the basis that no post-filing interest was allowed. That result was not challenged.

37 The relevant pre-filing indenture in *Stelco* provided that in the event of any insolvency, the holders of all senior debt would first be entitled to receive payment in full of the principal and interest due thereon, before the junior debenture holders would be entitled to receive any payment or distribution of any kind which might otherwise be payable in respect of their debentures. While the plan cancelled all Stelco debentures, subject to section 6.01(2) of the plan, that section provided that the rights between the debenture holders were preserved. The plan was agreed to by the junior debenture holders. After the plan had been sanctioned, the junior debenture holders challenged the senior debt holders' right to receive the subordinated payments towards their outstanding interest.

38 Wilton-Siegel J. rejected the argument, holding that the subordination agreement continued to operate independently of the sanctioned plan and was not affected by it. While it is not clear why, the junior Noteholders contended that interest stopped accruing in respect of the claims of the senior debenture holders against Stelco after the CCAA filing. There was no issue about a claim against Stelco for post-filing interest, as no such claim had ever been made. The issue was a contest between the two levels of debenture holders. However, Wilton-Siegel J. stated that in situations in which there was value to the equity, a CCAA plan could include post-filing interest. I take this statement to be *obiter*, but in any event, it is not the situation in Nortel as there is no equity at all. At the Court of Appeal, O'Connor



A.C.J.O, Goudge and Blair JJ.A. agreed that the interest stops rule did not preclude the continuation of interest to the senior note holders from the subordinated payments to be made by the junior note holders under the binding inter-creditor arrangements.

39 In the course of its reasons, the Court of Appeal stated that there was no persuasive authority that supports an interest stops rule in a CCAA proceeding, and referred to statements of Binnie J. in *NAV Canada c. Wilmington Trust Co.*, 2006 SCC 24, [2006] 1 S.C.R. 865 (S.C.C.), [*NAV Canada*]. A number of comments can be made.

40 First, *Stelco* did not involve proceeding or claims against the debtor for post-filing interest. Second, the decision in *Stelco* was derived from the terms of negotiated inter-creditor agreements in the note indenture that were protected by plan. There was nothing about the common law interest stops rule that precluded one creditor from being held to its agreement to subordinate its realization to that of another creditor including foregoing its right to payment until the creditor with priority received principal and interest. That is what the Court of Appeal concluded by stating "We do not accept that there is a 'Interest Stops Rule' that precludes such a result". Third, the general statements made in *Stelco* and *NAV Canada* must now be considered in light of the later direction in *Century Services* and *Indalex*. I now turn to *NAV Canada*.

41 In *NAV Canada*, Canada 3000 Airlines filed for protection under the CCAA. Three days later the Monitor filed an assignment in bankruptcy on its behalf. Federal legislation gave the airport authorities a right to apply to the court authorizing the seizure of aircraft for outstanding payments owed by an airline for using an airport. The contest in the case was between the airport authorities and the owners/lessors of the aircraft as to the extent that the owners/lessors were liable for those payments and whether a seizure order could be made against the aircraft leased to the airline. It was ultimately held that the owners/lessors were not liable for the outstanding payments owed by the airline but that the aircraft could be seized.

42 Interest on the arrears was raised in the first instance before Ground J. He held that the airport authorities were entitled as against the bankrupt airline to detain the aircraft until all amounts with interest were paid in full or security for such payment was posted under the provisions of the legislation, i.e. interest continued to accrue and be payable after bankruptcy. The Court of Appeal did not deal with interest as in their view it was relevant only if the airport authorities had a claim against the owners/lessors of the aircraft, which the court held they did not.

43 In the Supreme Court, which also dealt with an appeal from Quebec which dealt with the same issues, nearly the entire reasons of Binnie J. dealt with the issues as to whether the owners/lessors of the aircraft were liable for the outstanding charges and whether the aircraft could be seized by the airport authorities. It was held that the owners/lessors were not directly liable for the charges owed by the airline but that the aircraft could be seized until the charges were paid.

44 At the end of his reasons, Binnie J. dealt with interest and held that it continued to run until the earlier of payment, the posting of security, or bankruptcy. The bondholders rely on the last two sentences of the following paragraph from the reasons of Binnie J. which refer to the running of interest under the CCAA:

96 Given the authority to charge interest, my view is that interest continues to run to the first of the date of payment, the posting of security or bankruptcy. If interest were to stop accruing before payment has been made, then the airport authorities and NAV Canada would not recover the full amount owed to them in real terms. Once the owner, operator or titleholder has provided security, the interest stops accruing. The legal titleholder is then incurring the cost of the security and losing the time value of money. It should not have to pay twice. While a CCAA filing does not stop the accrual of interest, the unpaid charges remain an unsecured claim provable against the bankrupt airline. The claim does not accrue interest after the bankruptcy: ss. 121 and 122 of the *Bankruptcy and Insolvency Act*.

45 The Quebec airline in question had first filed to make a proposal under the BIA and when that proposal was rejected by its creditors, it was deemed to have made an assignment in bankruptcy as of the date its proposal was filed. Thus the comments of Binnie J. regarding the CCAA could not have related to the Quebec airline, but only to Canada 3000, which

had been under the CCAA for only three days before it was assigned into bankruptcy. It is by no means clear how much effort, if any, was spent in argument on the three days' interest issue. Binnie J. did not refer to any argument on the point.

46 There was no discussion of the common law interest stops rule and whether it could apply during the three day period in question or whether it should apply to a liquidating CCAA proceeding. Nor was there any discussion of the definition of claim in the CCAA, being a claim provable within the meaning of the BIA, and how that might impact a claim for post-filing interest under the CCAA. The statement regarding interest under the CCAA was simply conclusory. It may be fair to say that the statement of Binnie J. was *per incuriam*.

47 In my view, the statement of Binnie J. should not be taken as a blanket statement that interest always accrues in a CCAA proceeding, regardless of whether or not it is a liquidating proceeding. The circumstances in *NAV Canada* were far different from Nortel involving several years of compound interest in excess of US\$1.6 billion out of a total world-wide asset base of US\$7.3 billion. The statement of Binnie J. should now be construed in light of *Century Services* and *Indalex*.

#### Need for a CCAA plan

48 The bondholders contend that there is no authority under the CCAA to effect a distribution of a debtor's assets absent a plan of arrangement or compromise that must be negotiated by the debtor with its creditors, and that as a plan can include payment of post-filing interest, it is not possible for a court to conclude that the bondholders have no right to post-filing interest. They assert that there is no jurisdiction for a court to compromise a creditor's claim in a CCAA proceeding except in the context of approving a plan approved by the creditors. They also assert that plan negotiations cannot meaningfully take place "in earnest" until the allocation decision as to how much of the US\$7.3 billion is to be allocated to each of the Canadian, US, or EMEA estates.

49 One may ask what is left over in this case to negotiate. The assets have long been sold and what is left is to determine the claims against the Canadian estate and, once the amount of the assets in the Canadian estate are known, distribute the assets on a *pari passu* basis. This is not a case in which equity is exchanged for debt in a reorganization of a business such as *Stelco*.

50 However, even if there were things to negotiate, they would involve creditors compromising some right, and bargaining against those rights. What those rights are need to be determined, and often are in CCAA proceedings.

51 In this case, compensation claims procedure orders were made by Morawetz J. The order covering claims by bondholders is dated July 30, 2009. It was made without any objection by the bondholders. That order provides for a claim to be proven for the purposes of voting and distribution under a plan. The claims resolution order of Morawetz J. dated September 16, 2010 provides for a proven claim to be for all purposes, including for the purposes of voting and distribution under any plan. The determination now regarding the bondholders claim for post-filing interest is consistent with the process of determining whether these claims by the bondholders are finally proven. Contrary to the contention of the bondholders, it is not a process in which the court is being asked to compromise the bondholders' claim for post-filing interest. It is rather a determination of whether they have a right to such interest.

52 It is perhaps not necessary to determine at this stage how the assets will be distributed and whether a plan, or what type of plan, will be necessary. However, in light of the argument advanced on behalf of the bondholders, I will deal with this issue.

53 I first note that the CCAA makes no provision as to how money is to be distributed to creditors. This is not surprising taken that plans of reorganization do not necessarily provide for payments to creditors and taken that the CCAA does not expressly provide for a liquidating CCAA process. There is no provision that requires distributions to be made under a plan of arrangement.

54 A court has wide powers in a CCAA proceeding to do what is just in the circumstances. Section 11(1) provides that a court may make any order it considers appropriate in the circumstances. Although this section was provided

by an amendment that came into force after Nortel filed under the CCAA, and therefore by the amendment the new section does not apply to Nortel, it has been held that the provision merely reflects past jurisdiction. In *Century Services*, Deschamps J. stated:

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).

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 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. (underlining added)

55 I note also that payments to creditors without plans of arrangement or compromises are often ordered. In *Timminco Ltd.*, Re, 2014 ONSC 3393 (Ont. S.C.J.), Morawetz J. noted at para. 38 that the assets of Timminco had been sold and distributions made to secured creditors without any plan and with no intention to advance a plan. In that case, there was a shortfall to the secured creditors and no assets available to the unsecured creditors. The fact that the distributions went to the secured creditors rather than to an unsecured creditor makes no difference to the jurisdiction under the CCAA to do so.

56 In *AbitibiBowater Inc.*, Re, 2009 QCCS 6461 (C.S. Que.), Gascon J.C.S. (as he then was) granted a large interim distribution from the proceeds of a sale transaction to senior secured noteholders ("SSNs"). The bondholders opposed the distribution on the same grounds as advanced by the bondholders in this case:

56 The Bondholders claim that the proposed distribution violates the CCAA. From their perspective, nothing in the statute authorizes a distribution of cash to a creditor group prior to approval of a plan of arrangement by the requisite majorities of creditors and the Court. They maintain that the SSNs are subject to the stay of proceedings like all other creditors.

57 By proposing a distribution to one class of creditors, the Bondholders contend that the other classes of creditors are denied the ability to negotiate a compromise with the SSNs. Instead of bringing forward their proposed plan and creating options for the creditors for negotiation and voting purposes, the Abitibi Petitioners are thus eliminating bargaining options and confiscating the other creditors' leverage and voting rights.

58 Accordingly, the Bondholders conclude that the proposed distribution should not be considered until after the creditors have had an opportunity to negotiate a plan of arrangement or a compromise with the SSNs.

57 Justice Gascon did not accept this argument. He stated:

71 Despite what the Bondholders argue, it is neither unusual nor unheard of to proceed with an interim distribution of net proceeds in the context of a sale of assets in a CCAA reorganization. Nothing in the CCAA prevents similar interim distribution of monies. There are several examples of such distributions having been authorized by Courts in Canada. (underlining added)

58 Justice Gascon was persuaded that the distribution should be made as it was part and parcel of a DIP loan arrangement that he approved. Whatever the particular circumstances were that led to the exercise of his discretion, he did not question that he had jurisdiction to make an order distributing proceeds without a plan of arrangement. I see no difference between an interim distribution, as in the case of *AbitibiBowater*, or a final distribution, as in the case of *Timminco*, or a distribution to an unsecured or secured creditor, so far as a jurisdiction to make the order is concerned without any plan of arrangement.

59 There is a comment by Laskin J.A. in *Ivaco Inc., Re* (2006), 83 O.R. (3d) 108 (Ont. C.A.) that questions the right of a judge to order payment out of funds realized on the sale of assets under a CCAA process, in that case to pension plan administrators for funding deficiencies. He stated:

[I]n my view, absent an agreement, I doubt that the CCAA even authorized the motions judge to order this payment. Once restructuring was not possible and the CCAA proceedings were spent, as the motions judge found and all parties acknowledged, I question whether the court had any authority to order a distribution of the sale proceeds.

60 This was an *obiter* statement. But in any event Justice Laskin was discussing a situation in which all parties agreed that the CCAA proceedings "were spent". That is, there was effectively no CCAA proceeding any more. This is not the situation with Nortel and I do not see the *obiter* statement as being applicable. As stated by Justice Gascon, distribution orders without a plan are common in Canada.

61 While it need not be decided, I am not persuaded that it would not be possible for a court to make an order distributing the proceeds of the Nortel sale without a plan of arrangement or compromise.

#### **Conclusion**

62 I hold and declare that holders of the crossover bond claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest (namely, above and beyond US\$4.092 billion).

63 Those seeking costs may make cost submissions in writing within 10 days and responding submissions may be made in writing within a further 10 days. Submissions are to be brief and include a proper cost outline for costs sought.

*Claim dismissed.*

**TAB 18**

1995 CarswellOnt 340  
Ontario Court of Justice (General Division), Commercial List

Olympia & York Developments Ltd., Re

1995 CarswellOnt 340, [1995] O.J. No. 2658, 34 C.B.R. (3d) 93, 57 A.C.W.S. (3d) 706

**Re BANKRUPTCY OF OLYMPIA & YORK DEVELOPMENTS LIMITED**

Farley J.

Heard: April 18, 1995

Judgment: September 1, 1995

Docket: Docs. 31-204546T, 31-204573T and 31-204574T

Counsel: *Patricia D.S. Jackson*, for moving party, Bank of Nova Scotia.  
*Arnie Herschorn*, for Institute for Advanced Talmudic Study.

Subject: Corporate and Commercial; Insolvency; Property; Estates and Trusts

**Related Abridgment Classifications**

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

**Bankruptcy and insolvency**

VIII Property of bankrupt

VIII.19 Miscellaneous

**Bankruptcy and insolvency**

XIV Administration of estate

XIV.3 Trustee's possession of assets

XIV.3.d Miscellaneous

**Bankruptcy and insolvency**

XIX Companies' Creditors Arrangement Act

XIX.1 General principles

XIX.1.c Application of Act

XIX.1.c.i Relationship between Act and Bankruptcy and Insolvency Act

**Headnote**

**Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement**

**Bankruptcy --- Property of bankrupt**

**Bankruptcy --- Administration of estate — Trustee's possession of assets**

Receiving orders — Annuling, reviewing and rescinding order — Receiving order vesting only part of debtor's assets in trustee and not including assets previously alienated by debtor in bona fide fashion — Creditor's motion to annul bankruptcy or rescind receiving order dismissed.

A bank brought a motion for an order pursuant to s. 181 of the *Bankruptcy and Insolvency Act* annulling the bankruptcy of O&Y created by a receiving order in conjunction with two other orders, or, in the alternative, an order pursuant to s. 187(5) of the Act reviewing and rescinding the orders. The receiving order had been advanced by the petitioning creditors in accordance with the procedure set out in the *Companies' Creditors Arrangement Act* ("CCAA") plan approved by the creditors and sanctioned by the court.

The bank argued that the orders were contrary to the *Bankruptcy and Insolvency Act* for the following reasons: they created a partial and entirely voidable bankruptcy, apparently for the purpose of avoiding significant adverse tax consequences associated with a "proper" bankruptcy; they vested only a portion of the assets of O&Y that the Act requires to be vested in the trustee; they limited the powers and duties that the Act requires of a trustee in bankruptcy; they required the administrator to act contrary to the Act; and they allowed for the use of certain sections of the Act in respect of certain preferences and settlements while at the same time limiting the trustee's power to review and challenge other potential preferences, settlements, and reviewable transactions that the trustee would examine in a "proper" bankruptcy. It was intended that these faults would be corrected when the orders were annulled, when the utility of those parts of the *Bankruptcy and Insolvency Act* sought to be relied on had been exhausted. The bank also argued that the orders had been granted on an ex parte basis so that the parties affected by them, such as the bank, had not been allowed to participate.

The administrator and the trustee argued that the bank was trying to use the motion to obtain relief that would have the effect of shielding the bank from an action being continued by the trustee to set aside alleged preferential transactions that benefited the bank, to the prejudice of other unsecured creditors of O&Y.

**Held:**

The motion was dismissed.

The court has an inherent jurisdiction to give purpose and meaning to the *Bankruptcy and Insolvency Act* or to supplement what is permitted by the legislation. A strict and technical approach to the Act would defeat the purpose of the legislation, which is the appropriate distribution of the bankrupt's property among the bankrupt's creditors. Where a bankrupt has entered into bona fide contractual arrangements regarding certain of its assets, those assets will not form part of the property of the bankrupt. In this case, the receiving order would have the effect of having all property of the bankrupt devolve upon the trustee, except that property previously alienated in a bona fide fashion.

Section 6(b) of the CCAA provides that a court-sanctioned plan under the CCAA is binding upon a trustee in bankruptcy already in existence; therefore, the rights and obligations of a subsequently appointed trustee will be subject to a pre-existing sanctioned CCAA plan. Implicit in s. 16(3) of the *Bankruptcy and Insolvency Act*, which provides that the trustee will take possession of all the bankrupt's property, is the concept of property that is capable of devolving upon the trustee. In this case, the preference action was the only asset comprising the property of O&Y that was capable of devolving upon the trustee.

It is contrary to the general philosophy of the *Bankruptcy and Insolvency Act* to require that the trustee actually take possession of certain assets when that action would subject the trustee to greater liability than there would be value in the asset.

**Table of Authorities**

**Cases considered:**

*A. & F. Baillargeon Express Inc., Re* (1993), 27 C.B.R. (3d) 36 (C.S. Que.) — referred to

*Amirault Fish Co., Re*, 32 C.B.R. 186, [1951] 4 D.L.R. 203 (N.S. T.D.) — referred to

*Associated Investors of Canada Ltd., Re* (1987), 67 C.B.R. (N.S.) 237, 56 Alta. L.R. (2d) 259, [1988] 2 W.W.R. 211, 38 B.L.R. 148, (sub nom. *First Investors Corp., Re*) 46 D.L.R. (4th) 669 (Q.B.), reversed (1988), 71 C.B.R. (N.S.) 71, 60 Alta. L.R. (2d) 242, 89 A.R. 344 (C.A.) — referred to

*Bakermaster Foods Ltd., Re* (1985), 56 C.B.R. (N.S.) 314 (Ont. S.C.) — referred to

*Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.* (1994), 27 C.B.R. (3d) 148, 119 D.L.R. (4th) 176 (Ont. Gen. Div.) [Commercial List] — distinguished

*Cheerio Toys & Games Ltd., Re*, 15 C.B.R. (N.S.) 77, [1971] 3 O.R. 721, 21 D.L.R. (3d) 533 (S.C.), affirmed [1972] 2 O.R. 845 (C.A.) — referred to

*Develox Industries Ltd., Re*, 14 C.B.R. (N.S.) 132, [1970] 3 O.R. 199, 12 D.L.R. (3d) 579 (S.C.) — considered

*Erin Features #1 Ltd., Re* (1991), 8 C.B.R. (3d) 205 (B.C. S.C.) — referred to

*Fine's Flowers Ltd. v. Fine's Flowers Ltd. (Creditors of)* (1993), 22 C.B.R. (3d) 1, 108 D.L.R. (4th) 765, 14 B.L.R. (2d) 178, (sub nom. *Ontario v. Fine's Flowers Ltd.*) 65 O.A.C. 316, (sub nom. *Fine's Flowers Ltd. v. Creditors of Fine's Flowers Ltd.*) 16 O.R. (3d) 315 (C.A.) — referred to

*Four Twenty-Seven Investments Ltd., Re; Re 495487 Ontario Ltd.* (1985), 55 C.B.R. (N.S.) 183 (Ont. S.C.), affirmed (1985), 58 C.B.R. (N.S.) 266 (Ont. C.A.) — referred to

*Gasthof Schnitzel House Ltd. v. Sanderson*, 27 C.B.R. (N.S.) 75, [1978] 2 W.W.R. 756 (B.C. S.C.) — referred to

*J.P. Capital Corp., Re* (1995), 31 C.B.R. (3d) 102 (Ont. Bkcty.) — referred to

*Knechtel Furniture Ltd., Re* (1985), 56 C.B.R. (N.S.) 258, 8 C.C.E.L. 193, 20 E.T.R. 217 (Ont. S.C.) — considered

*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275 (Ont. Gen. Div.) — referred to

*Loxtave Buildings of Canada Ltd., Re* (1943), 25 C.B.R. 22 (Sask. K.B.) — referred to

*Maple City Ford Sales (1986) Ltd., Re* (1992), 14 C.B.R. (3d) 188 (Ont. Bkcty.) referred to

*McNamara v. Pagecorp Inc.* (1989), 76 C.B.R. (N.S.) 97, 38 C.P.C. (2d) 117 (Ont. C.A.) — referred to

*Montreal Trust Co. v. Churchill Forest Industries (Manitoba) Inc.*, [1971] 4 W.W.R. 542, 21 D.L.R. (3d) 75 (Man. Q.B.) — referred to

*N.T.W. Management Group Ltd., Re* (1994), 29 C.B.R. (3d) 139 (Ont. Bkcty.) — referred to



*Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1, (sub nom. *Olympia & York Developments Ltd., Re*) 12 O.R. (3d) 500 (Gen. Div.) — *considered*

*R. v. McIntosh*, [1995] S.C.J. No. 16 — *referred to*

*Stead Lumber Co. v. Lewis (No. 2)* (1957), 37 C.B.R. 24, 40 M.P.R. 363, 13 D.L.R. (2d) 34 (Nfld. T.D.) — *referred to*

*Thustie, Re* (1923), 3 C.B.R. 654, 23 O.W.N. 622 (S.C.) — *referred to*

*Westar Mining Ltd., Re*, 14 C.B.R. (3d) 88, 70 B.C.L.R. (2d) 6, [1992] 6 W.W.R. 331 (S.C.) — *referred to*

*Woodward's Ltd., Re* (1993), 17 C.B.R. (3d) 236, 79 B.C.L.R. (2d) 257 (S.C.) — *referred to*

*676915 Ontario Ltd., Re* (1989), 76 C.B.R. (N.S.) 164 (Ont. S.C.) — *referred to*

**Statutes considered:**

Assignments and Preferences Act, R.S.O. 1990, c. A.33.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 —

s. 2 "property"

s. 16(3)

s. 30(1)

s. 46

s. 66(2)

s. 67(1)

s. 71(2)

s. 158(a)

s. 181

s. 181(1)

s. 187(5)

Business Corporations Act, R.S.O. 1990, c. B.16 —

s. 248 [am. S.O. 1994, c. 27, s. 71(33)]

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 —

s. 6(b) [am. S.C. 1992, c. 27, s. 90]

Fraudulent Conveyances Act, R.S.O. 1990, c. F.29.

**Forms considered:**

Bankruptcy and Insolvency Rules,

C.R.C. 1978, c. 368 —

Sched. III,

re-en. SOR/92-579, s. 31]

Motion under s. 181 of *Bankruptcy and Insolvency Act* for order annulling bankruptcy or rescinding receiving orders.

**Jarley J.:**

1 The Bank of Nova Scotia ("BNS") moved for an order pursuant to s. 181 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"), annulling the bankruptcy of Olympia & York Developments Limited ("OYDL") created by a receiving order dated December 20, 1994 ("receiving order") in combination with two other orders of the same date (conjunctively the "December orders"), or, in the alternative, an order pursuant to s. 187(5) of BIA reviewing and rescinding the December orders. BNS was supported in this regard by various other parties (Martin Orbach, Lewis Gestetner, and HRF Fund Holdings Inc.; the Institute for Advanced Talmudic Study; and Yeshiva Yesodei Hatora), which, subsequent to the hearing but prior to the release of my decision, have entered into settlement agreements with the respondents Coopers & Lybrand OYDL Inc., the administrator ("administrator") pursuant to the OYDL *Companies Creditors' Arrangement Act* (R.S.C. 1985, c. C-36 — "CCAA") plan, and Coopers & Lybrand Limited, the trustee in bankruptcy of OYDL ("trustee"), pursuant to the receiving order. The OYDL Creditors' Monitoring Committee supported the position of the administrator and trustee.

2 On May 20, 1992, petitions in bankruptcy were issued against OYDL by 976910 Ontario Inc., Credit Lyonnais, and the HongKong and Shanghai Banking Corporation Limited. The subject receiving order made against OYDL was advanced by the petitioners in accordance with the procedure set out in s. 10.7 of the OYDL CCAA plan, which was approved by the creditors of OYDL under the CCAA and sanctioned by the court on February 5, 1993. I granted the receiving order on December 20, 1994, together with two other orders, administrative in nature, which are individually referred to as the BIA admin order and the CCAA admin order.

3 BNS submits that the December orders are contrary to BIA in that they:

- (a) create a partial and entirely voidable bankruptcy of OYDL, for the apparent purpose of avoiding significant adverse tax consequences associated with a "proper" bankruptcy of OYDL;
- (b) vest only a portion of the assets of OYDL which BIA requires to be vested in the trustee;
- (c) limit the powers and duties which BIA requires of a trustee in bankruptcy such as the trustee;
- (d) require the administrator to act contrary to BIA; and
- (e) allow for the use of certain sections of BIA in respect of certain preferences and settlements while at the same time limiting the trustee's power to review and challenge other potential preferences, settlements, and reviewable transactions which the trustee would examine under a "proper" bankruptcy of OYDL,

but all in contemplation that the December orders would be annulled in the future (and hence, in the language of BIA, "ought never to have been made") when the utility of those portions of BIA sought to be relied on has been exhausted. BNS also complains that the December orders were made on an ex parte basis without the participation of those, such as

BNS, whose rights would be affected by them. The administrator and trustee countered by saying that BNS is attempting to use this motion to obtain relief which would have the effect of shielding itself from an action being continued by the trustee to set aside certain alleged preferential transactions which were for the benefit of BNS, to the prejudice of the other unsecured creditors of OYDL.

4 The two sections of BIA which were specified by BNS were:

181. (1) Where, in the opinion of the court, a receiving order ought not to have been made ... the court may by order annul the bankruptcy.

187(5) Every court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.

5 In the proceedings under CCAA, the creditors of OYDL negotiated and voted on the OYDL CCAA Plan; 27 of 35 classes of creditors voted in favour, the remaining 8 voted against the plan. The claims of BNS with respect to the swap transactions (defined infra) were included in Class 33A, which class voted against the plan. The February 5, 1993, sanction order appointed the administrator as the administrator of OYDL; in s. 16(b) the order provided that, in exercising its power and authority pursuant to the plan, the administrator was the agent of OYDL and not the agent of the creditors of OYDL.

6 On June 10, 1993, the administrator commenced an action ("preference action") which sought to set aside and declare void certain transactions between OYDL, Olympia & York CC Limited ("OYCC"), Baden Real Estate Corp., and BNS ("swap transactions") on the basis that:

(a) the swap transactions were entered into with the intention and effect of giving BNS an improper preference over the other creditors of OYDL and of defeating, hindering, delaying, prejudicing, or defrauding OYDL's creditors contrary to the Ontario *Fraudulent Conveyances Act*, the Ontario *Assignments and Preferences Act*, and BIA;

(b) they constituted settlements pursuant to BIA; and

(c) they were oppressive, unfairly prejudicial to, or unfairly disregarded the interests of OYDL, OYCC, and the security holders and creditors thereof, contrary to s. 248 of the Ontario *Business Corporations Act*.

In its statement of defence, BNS stated:

(a) Class 33A was specifically excluded from those classes of creditors which approved the plan and, accordingly, none of the terms of the plan apply to BNS in its capacity as a creditor in respect of the swap transaction; and

(b) the administrator, which was appointed by the sanction order and which derives all its authority from the sanction order in the plan, therefore has no standing to assert any of the claims set forth in the statement of claim in the preference action.

BNS then moved to dismiss the preference action on the foregoing basis.

7 On December 20, 1994, counsel for the administrator representing OYDL and for each of the petitioning creditors attended upon me regarding the December orders. There had been some discussions two weeks earlier between counsel for the administrator and for BNS concerning the possibility of the receiving order motion and on December 19, 1994, counsel for the administrator advised counsel for BNS that the administrator intended to proceed within the next day with the bankruptcy of OYDL as contemplated in s. 10.7 of the plan. In the affidavit of Paul Currie, an employee of the administrator, it was set out that one of the principal reasons for seeking the December orders was the pending BNS motion. Another factor considered was the position of the federal and provincial Crowns under the CCAA plan. The Ontario Court of Appeal in *Fine's Flowers Ltd. v. Fine's Flowers Ltd. (Creditors of)* (1993), 22 C.B.R. (3d) 1, has now ruled subsequent to the approval of the subject plan that the Crown is not bound by CCAA proceedings. Further, Mr. Currie indicated that "[a] bankruptcy under section 10.7 will enable the Administrator to effectively deal with the

remaining assets of OYDL, creditors who are affected by the Plan and creditors who are not affected by the Plan." The receiving order was issued in the general form of Form 28 of Schedule 111 of BIA.

8 The administrator was appointed in the CCAA proceedings and is charged with the responsibility of implementing the plan. In pursuing the BIA proceedings the administrator is required to follow the provisions of s. 10.7 of the CCAA plan. The provisions of the plan and of the December orders do not restrict the court from utilizing its discretion at the hearing of any motion to annul the receiving order.

9 The administrator points out that, in addition to having claims under Class 33A (swap transactions), BNS is a substantial creditor of OYDL in the Class 28 unsecured creditors as to \$540 million of unsecured claims. While creditors of Class 28 voted in favour of the plan and are bound by it, they are only bound by it, in my view, qua their condition of being a Class 28 creditor — and not in their condition, if such were the case, under a class which did not vote in favour of the plan.

10 In accordance with the receiving order the provisions of BIA and s. 10.7 of the plan, it is the position of the administrator and trustee that the preference action was vested in the trustee. On January 30, 1995, the administrator issued its annual report to the creditors of OYDL; it stated, at pp. 17-8, that:

A fundamental objective in making the [bankruptcy] filing was to ensure that OYDL and the Administrator could utilize the sections of the Plan available to continue the preference action. As you will recall the Plan provided for a section 10.7 "limited bankruptcy" of OYDL if defendants to preference actions sought to have preference actions dismissed on jurisdictional grounds. Certain creditors have sought this remedy and after considering the consequences of such action the Administrator decided to utilize section 10.7 of the Plan.

**Effect of 10.7(L) Bankruptcy**

Counsel has advised that the effect of 10.7(L) is as follows:

- \* OYDL is in bankruptcy;
- \* the vesting of assets to the Trustee is limited to the preference action; and
- \* the Plan continues to be binding on OYDL.

11 BNS asserts that the fact that the bankruptcy was so limited was not clear from the December orders or from the affidavit of Mr. Currie since the receiving order merely appoints Coopers & Lybrand Limited as the trustee in bankruptcy of the estate of OYDL (not a portion of the estate) and there is nothing contained therein to suggest that the apparent objective of this "limited" vesting of assets in the trustee was an attempt to avoid the potential negative tax consequences associated with the possible change in control of all of the assets of OYDL being vested in the trustee.

12 Section 10.7(L) of the plan provides:

(L) Notwithstanding the granting of a receiving order pursuant to this Section 10.7, the Plan as sanctioned shall continue to be binding upon all Creditors and shall be binding upon the trustee in bankruptcy of the Relevant Applicant and the Relevant Applicant. Such receiving order shall, accordingly, vest all Preference Claims in the trustee but shall not vest any other assets nor require any administration save as contemplated hereby or ordered by the Court. Without limiting the foregoing, the powers of the Administrator with respect to OYDL and its property shall not be diminished or modified by the terms of this Section 10.7 or any deemed vesting of title in a trustee in bankruptcy of OYDL. When all Recourses [proceedings taken to enforce Preference Claims] in respect of a Relevant Applicant have been completed, whether by withdrawal of the Recourses, settlement thereof, final judgment in respect thereof or otherwise, and any required administration of the bankrupt estate completed, *the Relevant Applicant shall, in the case of OYDL, and may, in the case of the other Relevant Applicants, apply for the annulment of the receiving order pursuant to Section 181 and Subsection 187(5) of the Bankruptcy Act, and the*

*Administrator and the Creditors of the Relevant Applicant shall not oppose such annulment unless it adversely affects the exercise of a Recourse, any judgment rendered in respect of a Recourse or any settlement made between a Moving Party and a Respondent. (Emphasis added.)*

13 Section 10.7(M) of the plan provides:

(M) The application for annulment provided for in Section 10.7(L) may be made earlier than therein contemplated with the consent of the relevant Moving Party and the trustee in bankruptcy of the Relevant Applicant on such terms as the relevant Moving Party may, in its discretion, agree to accept.

14 It appears to me that the issue in this motion is whether the court should either annul the receiving order or rescind the December orders either because there was no jurisdiction in the court to have granted these orders on December 20, 1994, or that BNS, as supported by the other parties, has shown additional information as to why this court's discretion should be so exercised.

15 If BIA does not allow for such a receiving order in the sense that the legislation does not permit a receiving order of the nature granted, then clearly I cannot impose my views of what is an appropriate regime to operate under regarding bankruptcy matters and disregard what is the express will of Parliament: see *R. v. McIntosh*, [1995] S.C.J. No.16, at pp. 39-40. This, of course, should be contrasted with the aspect of the inherent jurisdiction of this court to deal with the vacuum which is required to be filled so as to give purpose and meaning to the legislation or to supplement what is permitted by the legislation so that there is a firm foundation on which to build, as opposed to a partial base of sand. In this regard see the views of Chadwick J. in his unreported decision *Re J.P. Capital Corp.*, released February 28, 1995 [reported at (1995), 31 C.B.R. (3d) 102 (Ont. Bkcty.)] (especially at p. 4 [p. 104 C.B.R.] where he comments on *Re A. & F. Baillargeon Express Inc.* (1993), 27 C.B.R. (3d) 36 (C.S. Que.); *Montreal Trust Co. v. Churchill Forest Industries (Manitoba) Inc.* (1971), 21 D.L.R. (3d) 75 (Man. Q.B.); in *Re Thustie* (1923), 3 C.B.R. 654 (Ont. S.C.); *Re Loxtave Buildings of Canada Ltd.* (1943), 25 C.B.R. 22 (Sask. K.B.); *Re Cheerio Toys & Games Ltd.* (1971), 15 C.B.R. (N.S.) 77 (Ont. S.C.), affirmed [1972] 2 O.R. 845 (C.A.); *Re Westar Mining Ltd.* (1992), 14 C.B.R. (3d) 88 (B.C. S.C.); *Re Woodward's Ltd.* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.); *Re Lehndorff General Partner Ltd.* (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div.). It should, however, be recognized that in the present situation there is no such general enabling language present, as was the case in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.* (1994), 27 C.B.R. (3d) 148 (Ont. Gen. Div.) [Commercial List], where "takes such other action as the court [deems] advisable" was in place. As Chadwick J. said at p. 143 of *Re N.T.W. Management Group Ltd.* (1994), 29 C.B.R. (3d) 139 (Ont. Bkcty.):

Courts have recognized in dealing with the bankruptcy and insolvency legislation a technical or stringent interpretation should not be applied. The Act has to be flexible to deal with the numerous situations and variations which arise from time to time. To take a technical approach to the Act would in my view defeat the whole purpose of the legislation.

Clearly, it would be undesirable for the general working of the bankruptcy and insolvency regime (be it pursuant to BIA or CCAA or a combination thereof since there must be a meshing of these two pieces of legislation) for some party to escape the scrutiny (and if found wanting, the rectification) of a preference review merely through a technical device. However, it must be acknowledged that the prevailing legislation may not always be perfect so as to preclude such a result; it may be that a party may be able to take advantage of such an imperfection until such is cured by amendment.

16 BNS submits that the December orders create a partial and entirely voidable bankruptcy in which only certain preference claims of OYDL and no other assets vest in the trustee, which limited vesting of assets would be contrary to s. 71(2) of BIA, which provides:

71(2) On a receiving order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, subject to this Act and to the rights of secured creditors, forthwith pass to and vest in the trustee named in the receiving order or assignment, and in

any case of change of trustee the property shall pass from trustee to trustee without any conveyance, assignment or transfer.

"Property" for the purpose of BIA has been broadly defined in s. 2 as:

2. In this Act,

... "property" includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, and whether situated in Canada or elsewhere, and includes obligations, easements and every description of estate, interest and profit, present or future, vested or contingent in, arising out of or incident to property ....

BNS then submits that s. 67(1) of BIA reinforces the aspect that a bankruptcy must involve *all* the bankrupt's property (but implicitly this must mean *all* property of *value* since it would be inappropriate to distribute "excess" liabilities).

67. (1) The property of a bankrupt divisible among his creditors shall not comprise

(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 the laws of the province within which the property is situated and within which the bankrupt resides,

*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. (Emphasis added.)

It must be recognized that one of the fundamental purposes of the bankruptcy legislation is the appropriate distribution of the bankrupt's property amongst its creditors. See L.W. Houlden and C.H. Morawetz, *Bankruptcy and Insolvency Law of Canada*, 3d ed., looseleaf (Scarborough, Ont.: Carswell, 1995). It would seem to me that "shall" should be read in the imperative sense and that "all property" cannot be modified to provide that it should be part of the property: see *Cheerios*, supra, at p. 81. That s. 46 of BIA provides for the appointment of an interim receiver over "any part" of the property of a debtor does not seem to me to imply that BIA also provides by implication that a trustee can be appointed over "part" of the bankrupt's estate. However, of course, it should be noted that the property does not include all assets which are legally but not beneficially held by the bankrupt. In this regard it would seem to me that where the bankrupt has entered into bona fide contractual arrangements as to certain of its assets, then these assets would by implication not form part of the property of the bankrupt in the Frankian jurisprudential sense that certain of the bundle of rights (and reciprocal obligations) of those assets which have been dealt with have been alienated; however, that would not thereby "disqualify" those remaining rights (and obligations) from forming part of the bankrupt's property. It would seem that it is clear that the preference action is an asset which is appropriately property capable of devolving upon the trustee; similarly, if the preference action is successful, then the security which the BNS claims in relation to the swap transactions will be void and thus there is the appropriate devolution to the trustee of this (inchoate) right to the property forming the security for the BNS swap transaction as of the receiving order.

17 It seems to me that the receiving order would have the effect of having all property of the bankrupt devolve upon the trustee. However, as discussed immediately above, this would not include any aspect of assets which have been otherwise alienated in a bona fide fashion. It would appear that the concern of BNS as to whether or not all (appropriate) property has so devolved upon the trustee lies as to para.4 of the BIA admin order of December 20, 1994, which states:

This Court Orders that, notwithstanding the granting of the Receiving Order pursuant to section 10.7 of the Plan, the Plan as sanctioned shall continue to be binding on the trustee in bankruptcy OYDL and OYDL.

Section 66(2) of BIA provides that "Nothing in this Act [BIA] shall be deemed to affect the operation of [CCAA]." It would seem to me that the sanctioned plan can be taken into account in the situation of determining what property is to devolve unto the trustee. As Blair J. said in his reasons in sanctioning the plan on February 5, 1993 (over two years ago) [reported as *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.), at p. 19]:

From this perspective it could be said that the parties are merely being held to — or allowed to follow — their contractual arrangement. There is, indeed, authority to suggest that a Plan of compromise or arrangement is simply a contract between the debtor and its creditors, sanctioned by the court, and that the parties should be entitled to put anything into such a Plan that could be lawfully incorporated into any contract: see *Re Canadian Vinyl Industries Inc.* (1978), 29 C.B.R. (N.S.) 12 (C.S. Que.), at p. 18; L.W. Houlden & C.H. Morawetz, *Bankruptcy Law of Canada*, vol. 1 (Toronto: Carswell, 1984) pp. E-6 and E-7.

18 Thus, if one takes into account the sanctioned plan (which, by implication, Blair J. determined was a bona fide contract), then it appears that the only property which was not burdened by the contractual relations of the plan was the preference action and the related asset to it. If there were other assets not so dealt with in the plan, then they would also have to be dealt with in the sense that they would devolve unto the trustee. If there are in fact other assets not so dealt with but which would have to be in accordance with this perspective, it may be entirely possible that the administrator and trustee may wish to revisit the question, especially if there would be severe adverse tax consequences. I note that CCAA need not be employed to revitalize a corporation but can also involve a liquidation scenario: See *Lehdorff*, supra, at p. 284 [B.L.R.], relying on *Re Associated Investors of Canada Ltd.* (1987), 67 C.B.R. (N.S.) 237 (Alta. Q.B.), at p. 318, reversed on other grounds (1988), 71 C.B.R. (N.S.) 71 (C.A.), and *Re Amirault Fish Co.*, 32 C.B.R. 186, [1951] 4 D.L.R. 203 (N.S. T.D.), at pp. 187-188 (C.B.R.). In this regard I believe it fair and reasonable to categorize the Olympia & York CCAA plan as being more of the liquidation scenario as opposed to the revitalization one; those classes which did not vote in favour of the plan were allowed, in effect, to exercise and realize upon their security with the attendant "disappearance" of those assets from the scene. No one has appealed the sanction order of February 5, 1993, which approved the plan which contains s. 10.7(L) and (M). Section 6(b) of CCAA provides that a court sanctioned plan under CCAA is binding upon a trustee in bankruptcy already in existence; a fortiori, it would seem that the rights and obligations of a subsequently appointed trustee would be subject to a pre-existing sanctioned CCAA plan.

19 I do not see this type of situation, namely, an open bona fide arrangement which has been approved in accordance with the provisions of CCAA, as being contrary to public policy, as was the concern in *Re Knechtel Furniture Ltd.* (1985), 56 C.B.R. (N.S.) 258 (Ont. S.C.), where the "private" arrangement was designed to keep certain assets out of the hands of creditors (with no quid pro quo). Similarly, there does not appear to be any material risk of abuse, as would be the case where an undischarged bankrupt tried to deal with his property despite having no status (see *McNamara v. Pagecorp Inc.* (1989), 76 C.B.R. (N.S.) 97 (Ont. C.A.)), since in the present case the administrator appointed pursuant to the plan sanctioned by the court would be dealing with matters in accordance with that plan and would always be under the general supervisory jurisdiction of the court.

20 It would seem to me that implicit in s. 16(3) of BIA requiring the trustee to take "possession of ... all property of the bankrupt" is the concept, as discussed above, that if the property which is capable of devolving upon the trustee in that it has not otherwise been appropriately alienated. The same philosophy would also deal with the concerns of BNS as to s. 158(a). It would also appear contrary to the general philosophy of the bankruptcy legislation to require an actual taking of possession of certain assets when that action would subject the trustee in the estate to greater liability than there would be value in the asset (e.g., the possession of leased premises with attendant exposure to occupation rent or the possession of hazardous property with the exposure to environmental liability). It would also appear that the plan which was sanctioned has otherwise dealt with the other potential preference settlements and related matters.

21 It does not seem to me that BNS has made out a case that the obtaining of the December orders was an abusive process if the preference action is truly the only asset which comprises the property of OYDL when one looks at what is capable of devolving upon the trustee. It is not, of course, improper to use BIA for specific purposes aside from the division of the bankrupt's assets amongst creditors, including being able to employ remedies which would not be available outside the bankruptcy: see *Re Maple City Ford Sales (1986) Ltd.* (1992), 14 C.B.R. (3d) 188 (Ont. Bkcty.); *Re Four Twenty-Seven Investments Ltd.*; *Re 495487 Ontario Ltd.* (1985), 55 C.B.R. (N.S.) 183 (Ont. S.C.), affirmed (1985), 58 C.B.R. (N.S.) 266 (Ont. C.A.); *Re 676915 Ontario Ltd.* (1989), 76 C.B.R. (N.S.) 164 (Ont. S.C.); *Gasthof Schnitzel House Ltd. v. Sanderson* (1978), 27 C.B.R. (N.S.) 75 (B.C. S.C.).

22 I would observe that I do not feel that s. 30(1) of BIA advances the cause of the administrator and trustee since that section clearly contemplates that a trustee in bankruptcy would have had devolved onto him the rights of the bankrupt tenant vis-à-vis the lease. That section only allows the trustee to otherwise deal with that property. It would seem to me that *Stead Lumber Company v. Lewis (No. 2)* (1957), 37 C.B.R. 24 (Nfld. T.D.); *Re Erin Features #1 Ltd.* (1991), 8 C.B.R. (3d) 205 (B.C. S.C.); *Re Bakermaster Foods Ltd.* (1985), 56 C.B.R. (N.S.) 314 (Ont. S.C.), should be viewed in the same light vis-à-vis the trustee's ability to disclaim or abandon "improvident contracts."

23 I would also note as to the status of BNS to bring this motion that the obiter views of Houlden J. in *Re Develox Industries Ltd.* (1970), 14 C.B.R. (N.S.) 132 (Ont. S.C.), at p. 133, were not exhaustive when he said:

In view of the disposition which I propose to make of this application, I do not have to give a definite answer to this question. However, it would seem to me that the application to rescind or annul a receiving order should be by the debtor, the petitioning creditor or the trustee. In my view, to permit any creditor to bring such an application would be an abuse to the process of the court. For the purpose of this application I will assume that the landlord has the necessary status to ask that the receiving order be annulled or rescinded.

It would not seem that he was attempting to be definitive in all circumstances, but rather that he was giving rather valuable guidance as to the question in a general sense. Thus, it would appear that where there are unusual circumstances this general rule would not and should not be applied rigidly and unthinkingly. It would seem to me that a lack of jurisdiction proposal by a creditor would be an unusual circumstance worthy of giving that creditor status. However, I would also be of the view that motions of this nature would be truly infrequent and that if creditors were to inappropriately bring such a motion, they should be made an example for others by severe costs awards or other suitable sanction.

24 The motion of BNS is dismissed. BNS is to pay the administrator and trustee jointly \$10,000 costs. This is not a severe costs award.

*Motion dismissed.*



**TAB 19**

2009 CarswellOnt 391  
Ontario Superior Court of Justice [Commercial List]

Smurfit-Stone Container Canada Inc., Re

2009 CarswellOnt 391, [2009] O.J. No. 349, 174 A.C.W.S. (3d) 933, 50 C.B.R. (5th) 71

**In the Matter of a Plan of Compromise or Arrangement  
of Smurfit-Stone Container Canada Inc. and others**

Pepall J.

Judgment: January 27, 2009

Docket: CV-09-7966-00CL

Counsel: Sean F. Dunphy, Alexander D. Rose for Applicants  
Robert J. Chadwick, Christopher G. Armstrong for Proposed Monitor  
Susan Grundy for DIP Lenders

Subject: Insolvency

**Related Abridgment Classifications**

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

**Bankruptcy and insolvency**

XIX Companies' Creditors Arrangement Act

XIX.2 Initial application

XIX.2.h Miscellaneous

**Headnote**

**Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues**

American parent entities of debtor companies commenced Chapter 11 proceedings — Debtor companies were principal Canadian operating entities of American parent companies — Debtor companies brought application for relief under CCAA and requested that terms of initial CCAA order apply to two Canadian partnerships ("CCAA entities") affiliated with applicants — Application granted — Applicants were insolvent, had indebtedness in excess of \$5 million and qualified pursuant to CCAA — Proposed outline for plan included continuing process of selling and realizing value in respect of closed and discontinued operations and coordinating with US entities to achieve balance sheet restructuring — Due to Chapter 11 filing, pre-filing secured credit facility was not available and as such, absent some additional facility CCAA entities would be required to repay amounts owing under pre-filing credit agreement — CCAA entities would also no longer have access to operating credits, would not longer be able to benefit from accounts receivable securitization program, would be unable to operate in ordinary course or satisfy ongoing obligations — Extensive process was undertaken to obtain new debt financing — Proposed monitor was of view that restructuring and continuation of debtor companies and CCAA entities as going concern was best option available — Successful restructuring of CCAA entities appeared to be intertwined with successful restructuring of American entities in Chapter 11 proceeding — In order to continue day-to-day operations and facilitate restructuring, debtor companies required access to significant funding.

**Table of Authorities**

**Cases considered by *Pepall J.*:**

*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

**Statutes considered:**

*Bankruptcy Code*, 11 U.S.C. 1982  
Chapter 11 — referred to

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36  
Generally — referred to

APPLICATION by debtor companies for relief under *Companies' Creditor Arrangement Act* and order for extension of terms of initial CCAA order to two affiliated partnerships.

***Pepall J.:***

1 Smurfit-Stone Container Canada Inc. ("SSC Canada"), Stone Container Finance Company of Canada II, MBI Limited, 3083527 Nova Scotia Company, BC Shipper Supplies Ltd., Specialty Containers Inc., 639647 British Columbia Limited, 605681 N.B. Inc. Canada, and Francobec Company (the "Applicants") seek relief under the CCAA. They also request that the terms of the Initial CCAA order apply to two Canadian partnerships affiliated with the Applicants, namely Smurfit-MBI and SLP Finance General Partnership (the "CCAA Entities"). Each of these CCAA Entities has filed for Chapter 11 protection in the U.S. Deloitte and Touche Inc. has consented to act as Monitor in the CCAA proceedings.

2 On January 26, 2009, Smurfit-Stone Container Corporation ("Smurfit-Stone") and certain of its affiliates including SSC Canada commenced Chapter 11 proceedings in the U.S. Smurfit-Stone is based in St. Louis, Missouri and in Chicago, Illinois. It is a leading North American producer of paperboard products, market pulp, corrugated containers and other specialty packaging products. It is also one of the world's biggest recyclers of paper. It currently holds approximately 18% of the North American container board market. Its operations have been negatively affected by the global economic downturn, the decrease in consumer spending, the manufacturing exodus from North America, a rise in costs, and a general market shift away from paper-based packaging. It has numerous direct and indirect subsidiaries.

3 SSC Canada and Smurfit-MBI, an Ontario limited partnership, are its principal Canadian operating entities. SSC Canada operates mills and plants producing liner board, corrugating medium and food board. Smurfit-MBI is a converting operation that produces corrugated containers using liner board from the mills. Its general partner is MBI Limited which carries on no business other than acting as Smurfit-MBI's general partner and has no assets other than its interest in Smurfit-MBI.

4 3083527 Nova Scotia Company is wholly-owned by SSC Canada. It does not carry on business except that it is one of the two Smurfit-MBI limited partners (the other being SSC Canada). BC Shipper Supplies Ltd. is no longer active. Specialty Containers Inc.'s assets were all sold in 2008. 639647 British Columbia Limited has no operations and holds the shares of BC Shippers Supplies Ltd. and Specialty Containers Inc.

5 SLP Finance General Partnership is owned by two Delaware companies. It does not carry on operations but owns the shares of 605681 N. B. Inc. which was liquidated in 2005 and of Francobec Company, a Nova Scotia company which previously operated a hardwood chipping facility which is now inactive. It has US\$574 million in investment assets.

6 Stone Container Finance Company of Canada II does not carry on business except that it issued notes, the proceeds of which were remitted to SSC Canada. It has assets of US\$62 million and liabilities of US\$207 million. Collectively all of these companies and partnerships are referred to as the CCAA Entities.

7 The CCAA Entities employ approximately 2,600 people across Canada many of whom are unionized.

8 Smurfit-Stone operates as a North American company rather than as a collection of individual business units. The U.S. and Canadian operations are fully integrated. In this regard, they have a centralized cash management system. All high level management decisions are made by a U.S. management team and it will have responsibility for the restructuring plan for the CCAA entities.

9 A secured credit facility covers both the Canadian and American operations. The amount outstanding on this pre-filing secured credit facility as of January 23, 2009 was approximately US\$1 billion of which approximately US\$367 million is attributable to SSC Canada. Security over all material Canadian assets had been provided as part of this facility.

10 The debt of the CCAA Entities also includes Canadian notes of US\$200 million and trade creditor payables of US\$53.4 million. In addition, there is a Canadian accounts receivable securitization programme, the outstanding balance of which is US\$38 million as of January 23, 2009. There are six defined benefit registered pension plans in Canada for which there is an aggregate solvency deficiency of approximately \$132 million as at December 31, 2007.

11 The Applicants are insolvent, have indebtedness in excess of \$5 million and qualify pursuant to the CCAA. The proposed outline for a plan includes continuing the process of selling and realizing value in respect of closed and discontinued operations and coordinating with the US entities to achieve a balance sheet restructuring.

12 As a result of the Chapter 11 filing, the pre-filing secured credit facility is no longer available. In addition, the Chapter 11 filing constitutes an event of termination under the receivables agreement that governs the accounts receivable securitization programme. As such, absent some additional facility, the CCAA Entities would be required to repay amounts owing under the pre-filing credit agreement. In addition, they would no longer be able to benefit from the accounts receivable securitization programme, would have no access to operating credits, would be unable to operate in the ordinary course, and would be unable to satisfy ongoing obligations.

13 Under the DIP facility that is proposed, both SSC Canada and the U.S. company, Smurfit-Stone Container Enterprises, Inc. ("SSCUS") are borrowers; the total commitment is US\$750 million comprised of US\$315 million in revolving facilities available to both SSCUS and SSC Canada, a US\$400 million term loan available to SSCUS; and a US\$35 million term loan available to SSC Canada. The term loan facilities are being used to take out the accounts receivable securitization programme. The loans to SSCUS are guaranteed by SSCC and most of the U.S. debtors and by SSC Canada and the latter provides a charge over its assets for all advances made to SSCUS. There would be rights of subrogation. The loans to SSC Canada are guaranteed by SSCUS and most of its U.S. subsidiaries and secured by a charge over substantially all of the assets of Smurfit-Stone's U.S. entities. The borrowings of SSC Canada are guaranteed by the other CCAA entities.

14 While some of the DIP lenders also participated in the pre-filing secured credit facility, the DIP financing involves new money and is not a refinancing. New lenders are also participating in the DIP facility. The lenders of the pre-filing secured credit facility are unopposed to the order sought.

15 The DIP lenders are unwilling to extend the DIP facility to SSC Canada absent its guarantee of the obligations of SSCUS under the DIP facility. In addition, the business is fully integrated making it impracticable particularly in the current credit environment to secure alternate financing on a stand-alone basis. To continue operations, the DIP facility is required. Estimated cash on hand for the Canadian operating entities at January 23, 2009 was \$704,517 and the accounts payable balance is estimated to be in excess of US\$53 million.

16 The amount borrowed is to be secured by a charge on the Applicants' property following an Administration charge of \$1 million and a Directors' charge of \$8.6 million. Until a final order has been granted by the U.S. court approving continued lending under the DIP facility and until approved by this court, and prior to February 18, 2009, no more than \$100,000 million of the U.S. revolving commitment and \$15 million of the SSC Canada revolving commitment will be available for borrowing. During the initial 30-day stay period, the CCAA Entities anticipate they will require US \$50 million of which US\$31 million of the term loan is to be used to refinance the account receivables securitization programme. This will result in an increase in cash receipts.

17 The proposed Monitor filed a report. It described the extensive process undertaken to obtain new debt financing. It further understands that Smurfit-Stone, having thoroughly canvassed the market, does not have any satisfactory alternative financing arrangements available. The proposed Monitor is of the view that the restructuring and continuation of Smurfit-Stone and the CCAA Entities as a going concern is the best option available given that a going concern restructuring would preserve the value of Smurfit-Stone and the CCAA Entities whereas a liquidation and wind-down would likely result in a substantial diminution in value that could ultimately reduce creditors' recoveries. Significantly, the liquidation and wind-down of the CCAA Entities could eliminate a significant number of jobs, many of which would be preserved if the CCAA Entities are able to continue as a going concern. The proposed Monitor has also been advised that the CCAA Entities have recently been "net debtors", relying on advances from SSCUS to fund working capital requirements. Based on the information available to it, it is supportive of the DIP facility including SSC Canada's guarantee. In this regard, however, it is unable to provide views of the value of the guarantee or the probability that it will be called upon. Smurfit-Stone has advised the Monitor that SSC Canada's guarantee of SSCUS' obligations is contingent and that the DIP facility was negotiated with a third-party lender on the basis that there would be full recovery of all loans advanced to SSCUS under the DIP facility from the U.S. assets of Smurfit-Stone.

18 The successful restructuring of the CCAA Entities appears to be inextricably intertwined with the successful restructuring of the Smurfit-Stone enterprise in the Chapter 11 proceeding. In order to continue day-to-day operations and to facilitate the company's restructuring, the U.S. debtors and the CCAA Entities require access to significant funding. Given all of these facts, I am prepared to grant the relief requested.

19 As mentioned, the requested order extends the benefits of the protections provided by the order to Smurfit-MBI and SLP Finance General Partnership, both of which are partnerships but not Applicants. The operations of the partnerships are integral and closely interrelated with that of the Applicants and in my view the request is appropriate in the circumstances outlined. See also *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]).

20 As to the centralized cash management system, the proposed Monitor has reviewed it and will be able to adequately monitor the transfers of cash, including transfers within the system so that transactions applicable to SSC Canada and Smurfit-MBI can be ascertained, traced and properly recorded. The Monitor will review and monitor the system and report to the court from time to time. As of January 23, 2009, SSC Canada was estimated to have US\$121,000 and CDN \$185,000 in cash and Smurfit-MBI was estimated to have US\$97,000 and CDN\$414,000 in cash.

21 The CCAA Entities seek to pay certain pre-filing amounts owed to critical suppliers. The proposed Monitor has been advised that SSC Canada's operations depend on a ready supply of key materials such as wood, chemicals, fuel and energy from third party suppliers and, in addition, SSC Canada's and Smurfit-MBI's operations are reliant on rail and trucking services, custom brokers and third party warehouses. I am satisfied that the request to pay these pre-filing amounts is appropriate.

22 According to Smurfit-Stone, it is very difficult to separate the creditors of the U.S. debtors from the creditors of the CCAA Entities. Smurfit-Stone intends to engage Epiq Bankruptcy Solutions LLC to send notice of the Chapter 11 proceedings to all creditors owed more than \$1,000. The proposed Monitor has suggested that such notice include notice

of the CCAA proceedings to the creditors of the CCAA Entities. I am in agreement with this proposed course of action but request that the Monitor report to the court when service has been effected.

23 I also note and rely upon the comeback provision found in paragraph 57 of the order which allows any interested party to apply to the court to vary or amend this order on not less than seven days' notice.

24 There are obviously numerous other provisions in the order that I have not addressed specifically as I believe they are all self-evident. In all of the circumstances I am prepared to grant the order requested. Counsel will re-attend on Wednesday at 10:00 a.m. to address a further recognition order.

*Application granted.*

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**TAB 20**

2004 CarswellOnt 1211  
Ontario Superior Court of Justice [Commercial List]

Stelco Inc., Re

2004 CarswellOnt 1211, [2004] O.J. No. 1257, [2004] O.T.C. 284, 129 A.C.W.S. (3d) 1065, 48 C.B.R. (4th) 299

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

IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH  
RESPECT TO STELCO INC. AND THE OTHER APPLICANTS LISTED IN SCHEDULE "A"

APPLICATION UNDER THE COMPANIES' CREDITORS  
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Farley J.

Heard: March 5, 2004  
Judgment: March 22, 2004  
Docket: 04-CL-5306

Counsel: Michael E. Barrack, James D. Gage, Geoff R. Hall for Applicants  
David Jacobs, Michael McCreary for Locals, 1005, 5328, 8782 of the United Steel Workers of America  
Ken Rosenberg, Lily Harmer, Rob Centa for United Steelworkers of America  
Bob Thornton, Kyla Mahar for Ernst & Young Inc., Monitor of the Applicants  
Kevin J. Zych for Informal Committee of Stelco Bondholders  
David R. Byers for CIT  
Kevin McElcheran for GE  
Murray Gold, Andrew Hatnay for Retired Salaried Beneficiaries  
Lewis Gottheil for CAW Canada and its Local 523  
Virginie Gauthier for Fleet  
H. Whiteley for CIBC  
Gail Rubenstein for FSCO  
Kenneth D. Kraft for EDS Canada Inc.

Subject: Insolvency

**Related Abridgment Classifications**

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

**Bankruptcy and insolvency**

XIX Companies' Creditors Arrangement Act

XIX.1 General principles

XIX.1.b Qualifying company

**Headnote**

**Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Application of Act**

Steel company S Inc. applied for protection under Companies' Creditors Arrangement Act ("CCAA") on January 29, 2004 — Union locals moved to rescind initial order and dismiss initial application of S Inc. and its subsidiaries



on ground S Inc. was not "debtor company" as defined in s. 2 of CCAA because S Inc. was not insolvent — Motion dismissed — Given time and steps involved in reorganization, condition of insolvency perforce required expanded meaning under CCAA — Union affiant stated that S Inc. will run out of funding by November 2004 — Given that November was ten months away from date of filing, S Inc. had liquidity problem — S Inc. realistically cannot expect any increase in its credit line with its lenders or access to further outside funding — S Inc. had negative equity of \$647 million — On balance of probabilities, S Inc. was insolvent and therefore was "debtor company" as at date of filing and entitled to apply for CCAA protection.

## Table of Authorities

### Cases considered by *Farley J.*:

*A Debtor (No. 64 of 1992), Re* (1993), [1993] 1 W.L.R. 264 (Eng. Ch. Div.) — considered

*Anvil Range Mining Corp., Re* (2002), 2002 CarswellOnt 2254, 34 C.B.R. (4th) 157 (Ont. C.A.) — considered

*Bank of Montreal v. I.M. Krisp Foods Ltd.* (1996), [1997] 1 W.W.R. 209, 140 D.L.R. (4th) 33, 148 Sask. R. 135, 134 W.A.C. 135, 6 C.P.C. (4th) 90, 1996 CarswellSask 581 (Sask. C.A.) — considered

*Barsi v. Farcas* (1923), [1924] 1 W.W.R. 707, 2 C.B.R. 299, 18 Sask. L.R. 158, [1924] 1 D.L.R. 1154, 1923 CarswellSask 227 (Sask. C.A.) — referred to

*Bell ExpressVu Ltd. Partnership v. Rex* (2002), 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, [2002] 5 W.W.R. 1, 212 D.L.R. (4th) 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — considered

*Challmie, Re* (1976), 22 C.B.R. (N.S.) 78, 1976 CarswellBC 63 (B.C. S.C.) — considered

*Clarkson v. Sterling* (1887), 14 O.R. 460 (Ont. C.P.) — considered

*Consolidated Seed Exports Ltd., Re* (1986), 69 B.C.L.R. 273, 62 C.B.R. (N.S.) 156, 1986 CarswellBC 481 (B.C. S.C.) — considered

*Cumberland Trading Inc., Re* (1994), 23 C.B.R. (3d) 225, 1994 CarswellOnt 255 (Ont. Gen. Div. [Commercial List]) — considered

*Davidson v. Douglas* (1868), 15 Gr. 347, 1868 CarswellOnt 167 (Ont. Ch.) — considered

*Diemaster Tool Inc. v. Skvortsoff (Trustee of)* (1991), 3 C.B.R. (3d) 133, 1991 CarswellOnt 168 (Ont. Gen. Div.) — referred to

*Enterprise Capital Management Inc. v. Semi-Tech Corp.* (1999), 1999 CarswellOnt 2213, 10 C.B.R. (4th) 133 (Ont. S.C.J. [Commercial List]) — considered

*Gagnier, Re* (1950), 30 C.B.R. 74, 1950 CarswellOnt 101 (Ont. S.C.) — considered

*Gardner v. Newton* (1916), 10 W.W.R. 51, 26 Man. R. 251, 29 D.L.R. 276, 1916 CarswellMan 83 (Man. K.B.) — considered

*Inducon Development Corp., Re* (1991), 8 C.B.R. (3d) 306, 1991 CarswellOnt 219 (Ont. Gen. Div.) — considered

*Kenwood Hills Development Inc., Re* (1995), 30 C.B.R. (3d) 44, 1995 CarswellOnt 38 (Ont. Bkcty.) — considered

*King Petroleum Ltd., Re* (1978), 29 C.B.R. (N.S.) 76, 1978 CarswellOnt 197 (Ont. S.C.) — considered

*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — considered

*Maybank Foods Inc. (Trustee of) v. Provisioners Maritimes Ltd.* (1989), 92 N.S.R. (2d) 283, 75 C.B.R. (N.S.) 317, 45 B.L.R. 14, 237 A.P.R. 283, 1989 CarswellNS 27 (N.S. T.D.) — considered

*Montreal Trust Co. of Canada v. Timber Lodge Ltd.* (1992), 15 C.B.R. (3d) 14, (sub nom. *Timber Lodge Ltd. v. Montreal Trust Co. of Canada (No. 1)*) 101 Nfld. & P.E.I.R. 73, (sub nom. *Timber Lodge Ltd. v. Montreal Trust Co. of Canada (No. 1)*) 321 A.P.R. 73, 1992 CarswellPEI 13 (P.E.I. C.A.) — referred to

*MTM Electric Co., Re* (1982), 42 C.B.R. (N.S.) 29, 1982 CarswellOnt 170 (Ont. Bkcty.) — considered

*New Quebec Raglan Mines Ltd. v. Blok-Andersen* (1993), 9 B.L.R. (2d) 93, 1993 CarswellOnt 173 (Ont. Gen. Div. [Commercial List]) — referred to

*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey*) 1 O.R. (3d) 289, (sub nom. *Elan Corp. v. Comiskey*) 41 O.A.C. 282, 1990 CarswellOnt 139 (Ont. C.A.) — considered

*Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.* (2001), 2001 CarswellOnt 2954, 16 B.L.R. (3d) 74, 28 C.B.R. (4th) 294 (Ont. S.C.J. [Commercial List]) — considered

*Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.* (2003), 2003 CarswellOnt 5210, 46 C.B.R. (4th) 313, (sub nom. *Olympia & York Developments Ltd. (Bankrupt) v. Olympia & York Realty Corp.*) 180 O.A.C. 158 (Ont. C.A.) — considered

*Optical Recording Laboratories Inc., Re* (1990), 2 C.B.R. (3d) 64, 75 D.L.R. (4th) 747, 42 O.A.C. 321, (sub nom. *Optical Recording Laboratories Inc. v. Digital Recording Corp.*) 1 O.R. (3d) 131, 1990 CarswellOnt 143 (Ont. C.A.) — referred to

*Pacific Mobile Corp., Re* (1979), 32 C.B.R. (N.S.) 209, 1979 CarswellQue 76 (C.S. Que.) — referred to

*PWA Corp. v. Gemini Group Automated Distribution Systems Inc.* (1993), 103 D.L.R. (4th) 609, 49 C.P.R. (3d) 456, 64 O.A.C. 274, 15 O.R. (3d) 730, 10 B.L.R. (2d) 109, 1993 CarswellOnt 149 (Ont. C.A.) — considered

*PWA Corp. v. Gemini Group Automated Distribution Systems Inc.* (1993), 49 C.P.R. (3d) ix, 10 B.L.R. (2d) 244 (note), 104 D.L.R. (4th) vii, 68 O.A.C. 21 (note), 164 N.R. 78 (note), 16 O.R. (3d) xvi (S.C.C.) — referred to

*R. v. Proulx* (2000), [2000] 4 W.W.R. 21, 2000 SCC 5, 2000 CarswellMan 32, 2000 CarswellMan 33, 140 C.C.C. (3d) 449, 30 C.R. (5th) 1, 182 D.L.R. (4th) 1, 249 N.R. 201, 49 M.V.R. (3d) 163, [2000] 1 S.C.R. 61, 142 Man. R. (2d) 161, 212 W.A.C. 161 (S.C.C.) — referred to

*Sklar-Pepler Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312, 86 D.L.R. (4th) 621, 1991 CarswellOnt 220 (Ont. Gen. Div.) — considered

*Standard Trustco Ltd. (Trustee of) v. Standard Trust Co.* (1993), 13 O.R. (3d) 7, 21 C.B.R. (3d) 25, 1993 CarswellOnt 219 (Ont. Gen. Div.) — considered

*TDM Software Systems Inc., Re* (1986), 60 C.B.R. (N.S.) 92, 1986 CarswellOnt 203 (Ont. S.C.) — referred to

*Viteway Natural Foods Ltd., Re* (1986), 63 C.B.R. (N.S.) 157, 1986 CarswellBC 499 (B.C. S.C.) — referred to

*Webb v. Stenton* (1883), 11 Q.B.D. 518 (Eng. C.A.) — referred to

*633746 Ontario Inc. (Trustee of) v. Salvati* (1990), 79 C.B.R. (N.S.) 72, 73 O.R. (2d) 774, 1990 CarswellOnt 181 (Ont. S.C.) — considered

**Statutes considered:**

*Bankruptcy Act*, R.S.C. 1970, c. B-3

Generally — referred to

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

Generally — referred to

s. 2(1) "insolvent person" — referred to

s. 2(1) "insolvent person" (a) — considered

s. 2(1) "insolvent person" (b) — considered

s. 2(1) "insolvent person" (c) — considered

s. 43(7) — referred to

s. 121(1) — referred to

s. 121(2) — referred to

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

Generally — referred to

s. 2 "debtor company" — referred to

s. 2 "debtor company" (a) — considered

s. 2 "debtor company" (b) — considered

s. 2 "debtor company" (c) — considered

s. 2 "debtor company" (d) — considered

s. 12 — referred to

s. 12(1) "claim" — referred to

*Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11

Generally — referred to

**Words and phrases considered:**

**debtor company**

It seems to me that the [*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36] test of insolvency . . . which I have determined is a proper interpretation is that the [*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3] definition of [s. 2(1)] (a), (b) or (c) of insolvent person is acceptable with the caveat that as to (a), a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring.

MOTION by union that steel company was not "debtor company" as defined in *Companies' Creditors Arrangement Act*.

**Farley J.:**

1 As argued this motion by Locals 1005, 5328 and 8782 United Steel Workers of America (collectively "Union") to rescind the initial order and dismiss the application of Stelco Inc. ("Stelco") and various of its subsidiaries (collectively "Sub Applicants") for access to the protection and process of the *Companies' Creditors Arrangement Act* ("CCAA") was that this access should be denied on the basis that Stelco was not a "debtor company" as defined in s. 2 of the CCAA because it was not insolvent.

2 Allow me to observe that there was a great deal of debate in the materials and submissions as to the reason(s) that Stelco found itself in with respect to what Michael Locker (indicating he was "an expert in the area of corporate restructuring and a leading steel industry analyst") swore to at paragraph 12 of his affidavit was the "current crisis":

12. Contending with weak operating results and resulting tight cash flow, management has deliberately chosen not to fund its employee benefits. By contrast, Dofasco and certain other steel companies have consistently funded both their employee benefit obligations as well as debt service. If Stelco's management had chosen to fund pension obligations, presumably with borrowed money, *the current crisis* and related restructuring plans would focus on debt restructuring as opposed to the reduction of employee benefits and related liabilities. [Emphasis added.]

3 For the purpose of determining whether Stelco is insolvent and therefore could be considered to be a debtor company, it matters not what the cause or who caused the financial difficulty that Stelco is in as admitted by Locker on behalf of the Union. The management of a corporation could be completely incompetent, inadvertently or advertently; the corporation could be in the grip of ruthless, hard hearted and hard nosed outside financiers; the corporation could be the innocent victim of uncaring policy of a level of government; the employees (unionized or non-unionized) could be completely incompetent, inadvertently or advertently; the relationship of labour and management could be absolutely poisonous; the corporation could be the victim of unforeseen events affecting its viability such as a fire destroying an essential area of its plant and equipment or of rampaging dumping. One or more or all of these factors (without being exhaustive), whether or not of varying degree and whether or not in combination of some may well have been the cause of a corporation's difficulty. The point here is that Stelco's difficulty exists; the only question is whether Stelco is insolvent within the meaning of that in the "debtor company" definition of the CCAA. However, I would point out, as I did in closing, that no matter how this motion turns out, Stelco does have a problem which has to be addressed - addressed within the CCAA process if Stelco is insolvent or addressed outside that process if Stelco is determined not to be insolvent. The status quo will lead to ruination of Stelco (and its Sub Applicants) and as a result will very badly affect its stakeholder, including pensioners, employees (unionized and non-unionized), management, creditors, suppliers,

customers, local and other governments and the local communities. In such situations, time is a precious commodity; it cannot be wasted; no matter how much some would like to take time outs, the clock cannot be stopped. The watchwords of the Commercial List are equally applicable in such circumstances. They are communication, cooperation and common sense. I appreciate that these cases frequently invoke emotions running high and wild; that is understandable on a human basis but it is the considered, rational approach which will solve the problem.

4 The time to determine whether a corporation is insolvent for the purpose of it being a "debtor company" and thus able to make an application to proceed under the CCAA is the date of filing, in this case January 29, 2004.

5 The Monitor did not file a report as to this question of insolvency as it properly advised that it wished to take a neutral role. I understand however, that it did provide some assistance in the preparation of Exhibit C to Hap Steven's affidavit.

6 If I determine in this motion that Stelco is not insolvent, then the initial order would be set aside. See *Montreal Trust Co. of Canada v. Timber Lodge Ltd.* (1992), 15 C.B.R. (3d) 14 (P.E.I. C.A.). The onus is on Stelco as I indicated in my January 29, 2004 endorsement.

7 S. 2 of the CCAA defines "debtor company" as:

"debtor company" means any company that:

(a) is bankrupt or insolvent;

(b) has committed an act of bankruptcy within the meaning of *Bankruptcy and Insolvency Act* ["BIA"] or deemed insolvent within the meaning of the *Winding-Up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts;

(c) has made an authorized assignment against which a receiving order has been made under the *Bankruptcy and Insolvency Act*; or

(d) is in the course of being wound-up under the *Winding-Up and Restructuring Act* because the company is insolvent.

8 Counsel for the Existing Stelco Lenders and the DIP Lenders posited that Stelco would be able to qualify under (b) in light of the fact that as of January 29, 2004 whether or not it was entitled to receive the CCAA protection under (a) as being insolvent, it had ceased to pay its pre-filing debts. I would merely observe as I did at the time of the hearing that I do not find this argument attractive in the least. The most that could be said for that is that such game playing would be ill advised and in my view would not be rewarded by the exercise of judicial discretion to allow such an applicant the benefit of a CCAA stay and other advantages of the procedure for if it were capriciously done where there is not reasonable need, then such ought not to be granted. However, I would point out that if a corporation did capriciously do so, then one might well expect a creditor-initiated application so as to take control of the process (including likely the ouster of management including directors who authorized such unnecessary stoppage); in such a case, while the corporation would not likely be successful in a corporation application, it is likely that a creditor application would find favour of judicial discretion.

9 This judicial discretion would be exercised in the same way generally as is the case where s. 43(7) of the BIA comes into play whereby a bankruptcy receiving order which otherwise meets the test may be refused. See *Kenwood Hills Development Inc., Re* (1995), 30 C.B.R. (3d) 44 (Ont. Bkcty.) where at p. 45 I observed:

The discretion must be exercised judicially based on credible evidence; it should be used according to common sense and justice and in a manner which does not result in an injustice: See *Re Churchill Forest Industries (Manitoba) Ltd.* (1971), 16 C.B.R. (NS) 158 (Man. Q.B.).

10 Anderson J. in *MTM Electric Co., Re* (1982), 42 C.B.R. (N.S.) 29 (Ont. Bkcty.) at p. 30 declined to grant a bankruptcy receiving order for the eminently good sense reason that it would be counterproductive: "Having regard for the value of the enterprise and having regard to the evidence before me, I think it far from clear that a receiving order would confer a benefit on anyone." This common sense approach to the judicial exercise of discretion may be contrasted by the rather more puzzling approach in *TDM Software Systems Inc., Re* (1986), 60 C.B.R. (N.S.) 92 (Ont. S.C.).

11 The Union, supported by the International United Steel Workers of America ("International"), indicated that if certain of the obligations of Stelco were taken into account in the determination of insolvency, then a very good number of large Canadian corporations would be able to make an application under the CCAA. I am of the view that this concern can be addressed as follows. The test of insolvency is to be determined on its own merits, not on the basis that an otherwise technically insolvent corporation should not be allowed to apply. However, if a technically insolvent corporation were to apply and there was no material advantage to the corporation and its stakeholders (in other words, a pressing need to restructure), then one would expect that the court's discretion would be judicially exercised against granting CCAA protection and ancillary relief. In the case of Stelco, it is recognized, as discussed above, that it is in crisis and in need of restructuring - which restructuring, if it is insolvent, would be best accomplished within a CCAA proceeding. Further, I am of the view that the track record of CCAA proceedings in this country demonstrates a healthy respect for the fundamental concerns of interested parties and stakeholders. I have consistently observed that much more can be achieved by negotiations outside the courtroom where there is a reasonable exchange of information, views and the exploration of possible solutions and negotiations held on a without prejudice basis than likely can be achieved by resorting to the legal combative atmosphere of the courtroom. A mutual problem requires a mutual solution. The basic interest of the CCAA is to rehabilitate insolvent corporations for the benefit of all stakeholders. To do this, the cause(s) of the insolvency must be fixed on a long term viable basis so that the corporation may be turned around. It is not achieved by positional bargaining in a tug of war between two parties, each trying for a larger slice of a defined size pie; it may be achieved by taking steps involving shorter term equitable sacrifices and implementing sensible approaches to improve productivity to ensure that the pie grows sufficiently for the long term to accommodate the reasonable needs of the parties.

12 It appears that it is a given that the Sub Applicants are in fact insolvent. The question then is whether Stelco is insolvent.

13 There was a question as to whether Stelco should be restricted to the material in its application as presented to the Court on January 29, 2004. I would observe that CCAA proceedings are not in the nature of the traditional adversarial lawsuit usually found in our courtrooms. It seems to me that it would be doing a disservice to the interest of the CCAA to artificially keep the Court in the dark on such a question. Presumably an otherwise deserving "debtor company" would not be allowed access to a continuing CCAA proceeding that it would be entitled to merely because some potential evidence were excluded for traditional adversarial technical reasons. I would point out that in such a case, there would be no prohibition against such a corporation reapplying (with the additional material) subsequently. In such a case, what would be the advantage for anyone of a "pause" before being able to proceed under the rehabilitative process under the CCAA. On a practical basis, I would note that all too often corporations will wait too long before applying, at least this was a significant problem in the early 1990s. In *Inducon Development Corp., Re* (1991), 8 C.B.R. (3d) 306 (Ont. Gen. Div.), I observed:

Secondly, CCAA is designed to be remedial; it is not, however, designed to be preventative. CCAA should not be the last gasp of a dying company; it should be implemented, if it is to be implemented, at a stage prior to the death throes.

14 It seems to me that the phrase "death throes" could be reasonably replaced with "death spiral". In *Cumberland Trading Inc., Re* (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div. [Commercial List]), I went on to expand on this at p. 228:

I would also observe that all too frequently debtors wait until virtually the last moment, the last moment, or in some cases, beyond the last moment before even beginning to think about reorganizational (and the attendant support

that any successful reorganization requires from the creditors). I noted the lamentable tendency of debtors to deal with these situations as "last gasp" desperation moves in *Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 308 (Ont. Gen. Div.). To deal with matters on this basis minimizes the chances of success, even if "success" may have been available with earlier spade work.

15 I have not been able to find in the CCAA reported cases any instance where there has been an objection to a corporation availing itself of the facilities of the CCAA on the basis of whether the corporation was insolvent. Indeed, as indicated above, the major concern here has been that an applicant leaves it so late that the timetable of necessary steps may get impossibly compressed. That is not to say that there have not been objections by parties opposing the application on various other grounds. Prior to the 1992 amendments, there had to be debentures (plural) issued pursuant to a trust deed; I recall that in *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101, 1 O.R. (3d) 289 (Ont. C.A.), the initial application was rejected in the morning because there had only been one debenture issued but another one was issued prior to the return to court that afternoon. This case stands for the general proposition that the CCAA should be given a large and liberal interpretation. I should note that there was in *Enterprise Capital Management Inc. v. Semi-Tech Corp.* (1999), 10 C.B.R. (4th) 133 (Ont. S.C.J. [Commercial List]) a determination that in a creditor application, the corporation was found not to be insolvent, but see below as to BIA test (c) my views as to the correctness of this decision.

16 In *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) I observed at p. 32:

One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors.

17 In *Anvil Range Mining Corp., Re* (2002), 34 C.B.R. (4th) 157 (Ont. C.A.), the court stated to the same effect:

The second submission is that the plan is contrary to the purposes of the CCAA. Courts have recognized that the purpose of the CCAA is to enable compromises to be made for the common benefit of the creditors and the company and to keep the company alive and out of the hands of liquidators.

18 Encompassed in this is the concept of saving employment if a restructuring will result in a viable enterprise. See *Diemaster Tool Inc. v. Skvortsoff (Trustee of)* (1991), 3 C.B.R. (3d) 133 (Ont. Gen. Div.). This concept has been a continuing thread in CCAA cases in this jurisdiction stretching back for at least the past 15 years, if not before.

19 I would also note that the jurisprudence and practical application of the bankruptcy and insolvency regime in place in Canada has been constantly evolving. The early jails of what became Canada were populated to the extent of almost half their capacity by bankrupts. Rehabilitation and a fresh start for the honest but unfortunate debtor came afterwards. Most recently, the *Bankruptcy Act* was revised to the BIA in 1992 to better facilitate the rehabilitative aspect of making a proposal to creditors. At the same time, the CCAA was amended to eliminate the threshold criterion of there having to be debentures issued under a trust deed (this concept was embodied in the CCAA upon its enactment in 1933 with a view that it would only be large companies with public issues of debt securities which could apply). The size restriction was continued as there was now a threshold criterion of at least \$5 million of claims against the applicant. While this restriction may appear discriminatory, it does have the practical advantage of taking into account that the costs (administrative costs including professional fees to the applicant, and indeed to the other parties who retain professionals) is a significant amount, even when viewed from the perspective of \$5 million. These costs would be prohibitive in a smaller situation. Parliament was mindful of the time horizons involved in proposals under BIA where the maximum length of a proceeding including a stay is six months (including all possible extensions) whereas under CCAA, the length is in the discretion of the court judicially exercised in accordance with the facts and the circumstances of the case. Certainly sooner is better than later. However, it is fair to observe that virtually all CCAA cases which proceed go on for over six months and those with complexity frequently exceed a year.

20 Restructurings are not now limited in practical terms to corporations merely compromising their debts with their creditors in a balance sheet exercise. Rather there has been quite an emphasis recently on operational restructuring as well so that the emerging company will have the benefit of a long term viable fix, all for the benefit of stakeholders. See *Sklar-Pepler Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) at p. 314 where Borins J. states:

The proposed plan exemplifies the policy and objectives of the Act as it proposes a regime for the court-supervised re-organization for the Applicant company intended to avoid the devastating social and economic effects of a creditor-initiated termination of its ongoing business operations and enabling the company to carry on its business in a manner in which it is intended to cause the least possible harm to the company, its creditors, its employees and former employees and the communities in which its carries on and carried on its business operations.

21 The CCAA does not define "insolvent" or "insolvency". Houlden & Morawetz, *The 2004 Annotated Bankruptcy and Insolvency Act* (Toronto, Carswell; 2003) at p. 1107 (N5) states:

In interpreting "debtor company", reference must be had to the definition of "insolvent person" in s. 2(1) of the *Bankruptcy and Insolvency Act* . . .

To be able to use the Act, a company must be bankrupt or insolvent: *Reference re Companies' Creditors Arrangement Act (Canada)*, 16 C.B.R. 1, [1934] S.C.R. 659, [1934] 4 D.L.R. 75. The company must, in its application, admit its insolvency.

22 It appears to have become fairly common practice for applicants and others when reference is made to insolvency in the context of the CCAA to refer to the definition of "insolvent person" in the BIA. That definition is as follows:

s. 2(1) . . .

"insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, and whose liability to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

23 Stelco acknowledges that it does not meet the test of (b); however, it does assert that it meets the test of both (a) and (c). In addition, however, Stelco also indicates that since the CCAA does not have a reference over to the BIA in relation to the (a) definition of "debtor company" as being a company that is "(a) bankrupt or insolvent", then this term of "insolvent" should be given the meaning that the overall context of the CCAA requires. See the modern rule of statutory interpretation which directs the court to take a contextual and purposive approach to the language of the provision at issue as illustrated by *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.) at p. 580:

Today there is only one principle or approach, namely the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

24 I note in particular that the (b), (c) and (d) aspects of the definition of "debtor company" all refer to other statutes, including the BIA; (a) does not. S. 12 of the CCAA defines "claims" with reference over to the BIA (and otherwise refers to the BIA and the *Winding-Up and Restructuring Act*). It seems to me that there is merit in considering that the test for



insolvency under the CCAA may differ somewhat from that under the BIA, so as to meet the special circumstances of the CCAA and those corporations which would apply under it. In that respect, I am mindful of the above discussion regarding the time that is usually and necessarily (in the circumstances) taken in a CCAA reorganization restructuring which is engaged in coming up with a plan of compromise and arrangement. The BIA definition would appear to have been historically focussed on the question of bankruptcy - and not reorganization of a corporation under a proposal since before 1992, secured creditors could not be forced to compromise their claims, so that in practice there were no reorganizations under the former *Bankruptcy Act* unless all secured creditors voluntarily agreed to have their secured claims compromised. The BIA definition then was essentially useful for being a pre-condition to the "end" situation of a bankruptcy petition or voluntary receiving order where the upshot would be a realization on the bankrupt's assets (not likely involving the business carried on - and certainly not by the bankrupt). Insolvency under the BIA is also important as to the Paulian action events (eg., fraudulent preferences, settlements) as to the conduct of the debtor *prior* to the bankruptcy; similarly as to the question of provincial preference legislation. Reorganization under a plan or proposal, on the contrary, is with a general objective of the applicant continuing to exist, albeit that the CCAA may also be used to have an orderly disposition of the assets and undertaking in whole or in part.

25 It seems to me that given the time and steps involved in a reorganization, and the condition of insolvency perforce requires an expanded meaning under the CCAA. Query whether the definition under the BIA is now sufficient in that light for the allowance of sufficient time to carry through with a realistically viable proposal within the maximum of six months allowed under the BIA? I think it sufficient to note that there would not be much sense in providing for a rehabilitation program of restructuring/reorganization under either statute if the entry test was that the applicant could not apply until a rather late stage of its financial difficulties with the rather automatic result that in situations of complexity of any material degree, the applicant would not have the financial resources sufficient to carry through to hopefully a successful end. This would indeed be contrary to the renewed emphasis of Parliament on "rescues" as exhibited by the 1992 and 1997 amendments to the CCAA and the BIA.

26 Allow me now to examine whether Stelco has been successful in meeting the onus of demonstrating with credible evidence on a common sense basis that it is insolvent within the meaning required by the CCAA in regard to the interpretation of "debtor company" in the context and within the purpose of that legislation. To a similar effect, see *PWA Corp. v. Gemini Group Automated Distribution Systems Inc.* (1993), 103 D.L.R. (4th) 609 (Ont. C.A.), leave to appeal to S.C.C. dismissed [(1993), 49 C.P.R. (3d) ix (S.C.C.)] wherein it was determined that the trial judge was correct in holding that a party was not insolvent and that the statutory definition of insolvency pursuant to the BIA definition was irrelevant to determine that issue, since the agreement in question effectively provided its own definition by implication. It seems to me that the CCAA test of insolvency advocated by Stelco and which I have determined is a proper interpretation is that the BIA definition of (a), (b) or (c) of insolvent person is acceptable with the caveat that as to (a), a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring. That is, there should be a reasonable cushion, which cushion may be adjusted and indeed become in effect an encroachment depending upon reasonable access to DIP between financing. In the present case, Stelco accepts the view of the Union's affiant, Michael Mackey of Deloitte and Touche that it will otherwise run out of funding by November 2004.

27 On that basis, allow me to determine whether Stelco is insolvent on the basis of (i) what I would refer to as the CCAA test as described immediately above, (ii) BIA test (a) or (iii) BIA test (c). In doing so, I will have to take into account the fact that Stephen, albeit a very experienced and skilled person in the field of restructurings under the CCAA, unfortunately did not appreciate that the material which was given to him in Exhibit E to his affidavit was modified by the caveats in the source material that in effect indicated that based on appraisals, the fair value of the real assets acquired was in excess of the purchase price for two of the U.S. comparators. Therefore the evidence as to these comparators is significantly weakened. In addition at Q. 175-177 in his cross examination, Stephen acknowledged that it was reasonable to assume that a purchaser would "take over some liabilities, some pension liabilities and OPEB liabilities, for workers who remain with the plant." The extent of that assumption was not explored; however, I do note

that there was acknowledgement on the part of the Union that such an assumption would also have a reciprocal negative effect on the purchase price.

28 The BIA tests are disjunctive so that anyone meeting any of these tests is determined to be insolvent: see *Optical Recording Laboratories Inc., Re* (1990), 75 D.L.R. (4th) 747 (Ont. C.A.) at p. 756; *Viteway Natural Foods Ltd., Re* (1986), 63 C.B.R. (N.S.) 157 (B.C. S.C.) at p. 161. Thus, if I determine that Stelco is insolvent on *any one* of these tests, then it would be a "debtor company" entitled to apply for protection under the CCAA.

29 In my view, the Union's position that Stelco is not insolvent under BIA (a) because it has not entirely used up its cash and cash facilities (including its credit line), that is, it is not yet as of January 29, 2004 run out of liquidity conflates inappropriately the (a) test with the (b) test. The Union's view would render the (a) test necessarily as being redundant. See *R. v. Proulx*, [2000] 1 S.C.R. 61 (S.C.C.) at p. 85 for the principle that no legislative provision ought to be interpreted in a manner which would "render it mere surplusage." Indeed the plain meaning of the phrase "unable to meet his obligations as they generally become due" requires a construction of test (a) which permits the court to take a purposive assessment of a debtor's ability to meet his future obligations. See *King Petroleum Ltd., Re* (1978), 29 C.B.R. (N.S.) 76 (Ont. S.C.) where Steele J. stated at p. 80:

With respect to cl. (a), it was argued that at the time the disputed payments were made the company was able to meet its obligations as they generally became due because no major debts were in fact due at that time. This was premised on the fact that the moneys owed to Imperial Oil were not due until 10 days after the receipt of the statements and that the statements had not then been received. I am of the opinion that this is not a proper interpretation of cl. (a). *Clause (a) speaks in the present and future tenses and not in the past.* I am of the opinion that the company was an "insolvent person" within the meaning of cl. (a) because by the very payment-out of the money in question it placed itself in a position that it was unable to meet its obligations as they would generally become due. In other words, it had placed itself in a position that it would not be able to pay the obligations that it knew it had incurred and which it knew would become due in the immediate future. [Emphasis added.]

30 *King Petroleum Ltd.* was a case involving the question in a bankruptcy scenario of whether there was a fraudulent preference during a period when the corporation was insolvent. Under those circumstances, the "immediate future" does not have the same expansive meaning that one would attribute to a time period in a restructuring forward looking situation.

31 Stephen at paragraphs 40-49 addressed the restructuring question in general and its applicability to the Stelco situation. At paragraph 41, he outlined the significant stages as follows:

The process of restructuring under the CCAA entails a number of different stages, the most significant of which are as follows:

- (a) identification of the debtor's stakeholders and their interests;
- (b) arranging for a process of meaningful communication;
- (c) dealing with immediate relationship issues arising from a CCAA filing;
- (d) sharing information about the issues giving rise to the debtor's need to restructure;
- (e) developing restructuring alternatives; and
- (f) building a consensus around a plan of restructuring.

32 I note that January 29, 2004 is just 9-10 months away from November 2004. I accept as correct his conclusion based on his experience (and this is in accord with my own objective experience in large and complicated CCAA proceedings) that Stelco would have the liquidity problem within the time horizon indicated. In that regard, I also think it fair to

observe that Stelco realistically cannot expect any increase in its credit line with its lenders or access further outside funding. To bridge the gap it must rely upon the stay to give it the uplift as to pre-filing liabilities (which the Union misinterpreted as a general turnaround in its cash position without taking into account this uplift). As well, the Union was of the view that recent price increases would relieve Stelco's liquidity problems; however, the answers to undertaking in this respect indicated:

With respect to the Business Plan, the average spot market sales price per ton was \$514, and the average contract business sales price per ton was \$599. The Forecast reflects an average spot market sales price per ton of \$575, and average contract business sales price per ton of \$611. The average spot price used in the forecast considers further announced price increases, recognizing, among other things, the timing and the extent such increases are expected to become effective. The benefit of the increase in sales prices from the Business Plan is essentially offset by the substantial increase in production costs, and in particular in raw material costs, primarily scrap and coke, as well as higher working capital levels and a higher loan balance outstanding on the CIT credit facility as of January 2004.

I accept that this is generally a cancel out or wash in all material respects.

33 I note that \$145 million of cash resources had been used from January 1, 2003 to the date of filing. Use of the credit facility of \$350 million had increased from \$241 million on November 30, 2003 to \$293 million on the date of filing. There must be a reasonable reserve of liquidity to take into account day to day, week to week or month to month variances and also provide for unforeseen circumstances such as the breakdown of a piece of vital equipment which would significantly affect production until remedied. Trade credit had been contracting as a result of appreciation by suppliers of Stelco's financial difficulties. The DIP financing of \$75 million is only available if Stelco is under CCAA protection. I also note that a shut down as a result of running out of liquidity would be complicated in the case of Stelco and that even if conditions turned around more than reasonably expected, start-up costs would be heavy and quite importantly, there would be a significant erosion of the customer base (reference should be had to the Slater Hamilton plant in this regard). One does not liquidate assets which one would not sell in the ordinary course of business to thereby artificially salvage some liquidity for the purpose of the test: see *Pacific Mobile Corp., Re* (1979), 32 C.B.R. (N.S.) 209 (C.S. Que.) at p. 220. As a rough test, I note that Stelco (albeit on a consolidated basis with all subsidiaries) running significantly behind plan in 2003 from its budget of a profit of \$80 million now to a projected loss of \$192 million and cash has gone from a positive \$209 million to a negative \$114 million.

34 Locker made the observation at paragraph 8 of his affidavit that:

8. Stelco has performed poorly for the past few years primarily due to an inadequate business strategy, poor utilization of assets, inefficient operations and generally weak management leadership and decision-making. This point is best supported by the fact that Stelco's local competitor, Dofasco, has generated outstanding results in the same period.

Table 1 to his affidavit would demonstrate that Dofasco has had superior profitability and cashflow performance than its "neighbour" Stelco. He went on to observe at paragraphs 36-37:

36. Stelco can achieve significant cost reductions through means other than cutting wages, pensions and benefits for employees and retirees. Stelco could bring its cost levels down to those of restructured U.S. mills, with the potential for lowering them below those of many U.S. mills.

37. Stelco could achieve substantial savings through productivity improvements within the mechanisms of the current collective agreements. More importantly, a major portion of this cost reduction could be achieved through constructive negotiations with the USWA in an out-of-court restructuring that does not require intervention of the courts through the vehicle of CCAA protection.

I accept his constructive comments that there is room for cost reductions and that there are substantial savings to be achieved through productivity improvements. However, I do not see anything detrimental to these discussions and

negotiations by having them conducted within the umbrella of a CCAA proceeding. See my comments above regarding the CCAA in practice.

35 But I would observe and I am mystified by Locker's observations at paragraph 12 (quoted above), that Stelco should have borrowed to fund pension obligations to avoid its current financial crisis. This presumes that the borrowed funds would not constitute an obligation to be paid back as to principal and interest, but rather that it would assume the character of a cost-free "gift".

36 I note that Mackey, without the "laundry list" he indicates at paragraph 17 of his second affidavit, is unable to determine at paragraph 19 (for himself) whether Stelco was insolvent. Mackey was unable to avail himself of all available information in light of the Union's refusal to enter into a confidentiality agreement. He does not closely adhere to the BIA tests as they are defined. In the face of positive evidence about an applicant's financial position by an experienced person with expertise, it is not sufficient to displace this evidence by filing evidence which goes no further than raising questions: see *Anvil Range Mining Corp.*, *supra* at p. 162.

37 The Union referred me to one of my decisions *Standard Trustco Ltd. (Trustee of) v. Standard Trust Co.* (1993), 13 O.R. (3d) 7 (Ont. Gen. Div.) where I stated as to the MacGirr affidavit:

The Trustee's cause of action is premised on MacGirr's opinion that STC was insolvent as at August 3, 1990 and therefore the STC common shares and promissory note received by Trustco in return for the Injection had no value at the time the Injection was made. Further, MacGirr ascribed no value to the opportunity which the Injection gave to Trustco to restore STC and salvage its thought to be existing \$74 million investment. In stating his opinion MacGirr defined solvency as:

- (a) the ability to meet liabilities as they fall due; and
- (b) that assets exceed liabilities.

On cross-examination MacGirr testified that in his opinion on either test STC was insolvent as at August 3, 1990 since as to (a) STC was experiencing then a negative cash flow and as to (b) the STC financial statements incorrectly reflected values. As far as (a) is concerned, I would comment that while I concur with MacGirr that at some time in the long run a company that is experiencing a negative cash flow will eventually not be able to meet liabilities as they fall due but that is not the test (which is a "present exercise"). On that current basis STC was meeting its liabilities on a timely basis.

38 As will be seen from that expanded quote, MacGirr gave his own definitions of insolvency which are not the same as the s. 2 BIA tests (a), (b) and (c) but only a very loose paraphrase of (a) and (c) and an omission of (b). Nor was I referred to the *King Petroleum Ltd.* or *Proulx* cases *supra*. Further, it is obvious from the context that "sometime in the long run . . . eventually" is not a finite time in the foreseeable future.

39 I have not given any benefit to the \$313 - \$363 million of improvements referred to in the affidavit of William Vaughan at paragraph 115 as those appear to be capital expenditures which will have to be accommodated within a plan of arrangement or after emergence.

40 It seems to me that if the BIA (a) test is restrictively dealt with (as per my question to Union counsel as to how far in the future should one look on a prospective basis being answered "24 hours") then Stelco would not be insolvent under that test. However, I am of the view that that would be unduly restrictive and a proper contextual and purposive interpretation to be given when it is being used for a restructuring purpose even under BIA would be to see whether there is a reasonably foreseeable (at the time of filing) expectation that there is a looming liquidity condition or crisis which will result in the applicant running out of "cash" to pay its debts as they generally become due in the future without the benefit of the stay and ancillary protection and procedure by court authorization pursuant to an order. I think this is the more appropriate interpretation of BIA (a) test in the context of a reorganization or "rescue" as opposed to a threshold

to bankruptcy consideration or a fraudulent preferences proceeding. On that basis, I would find Stelco insolvent from the date of filing. Even if one were not to give the latter interpretation to the BIA (a) test, clearly for the above reasons and analysis, if one looks at the meaning of "insolvent" within the context of a CCAA reorganization or rescue solely, then of necessity, the time horizon must be such that the liquidity crisis would occur in the sense of running out of "cash" but for the grant of the CCAA order. On that basis Stelco is certainly insolvent given its limited cash resources unused, its need for a cushion, its rate of cash burn recently experienced and anticipated.

41 What about the BIA (c) test which may be roughly referred to as an assets compared with obligations test. See *New Quebec Raglan Mines Ltd. v. Blok-Andersen*, [1993] O.J. No. 727 (Ont. Gen. Div. [Commercial List]) as to fair value and fair market valuation. The Union observed that there was no intention by Stelco to wind itself up or proceed with a sale of some or all of its assets and undertaking and therefore some of the liabilities which Stelco and Stephen took into account would not crystallize. However, as I discussed at the time of the hearing, the (c) test is what one might reasonably call or describe as an "artificial" or notional/hypothetical test. It presumes certain things which are in fact not necessarily contemplated to take place or to be involved. In that respect, I appreciate that it may be difficult to get one's mind around that concept and down the right avenue of that (c) test. See my views at trial in *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.*, [2001] O.J. No. 3394 (Ont. S.C.J. [Commercial List]) at paragraphs 13, 21 and 33; affirmed [2003] O.J. No. 5242 (Ont. C.A.). At paragraph 33, I observed in closing:

33 . . . They (and their expert witnesses) all had to contend with dealing with rambling and complicated facts and, in Section 100 BIA, a section which is difficult to administer when fmv [fair market value] in a notational or hypothetical market involves ignoring what would often be regarded as self evidence truths but at the same time appreciating that this notational or hypothetical market requires that the objects being sold have to have realistic true to life attributes recognized.

42 The Court of Appeal stated at paragraphs 24-25 as follows:

24. Nor are the appellants correct to argue that the trial judge also assumed an imprudent vendor in arriving at his conclusion about the fair market value of the OYSF note would have to know that in order to realize value from the note any purchaser would immediately put OYSF and thus OYDL itself into bankruptcy to pre-empt a subsequent triggering event in favour of EIB. While this was so, and the trial judge clearly understood it, the error in this submission is that it seeks to inject into the analysis factors subjected to the circumstances of OYDL as vendor and not intrinsic to the value of the OYSF note. The calculation of fair market value does not permit this but rather must assume an unconstrained vendor.

25. The Applicants further argue that the trial judge eroded in determining the fair market value of the OYSF note by reference to a transaction which was entirely speculative because it was never considered by OYDL nor would have it been since it would have resulted in OYDL's own bankruptcy. I disagree. The transaction hypothesized by the trial judge was one between a notational, willing, prudent and informed vendor and purchaser based on factors relevant to the OYSF note itself rather than the particular circumstances of OYDL as the seller of the note. This is an entirely appropriate way to determine the fair market value of the OYSF note.

43 Test (c) deems a person to be insolvent if "the aggregate of [its] property is not, at a fair valuation, sufficient, or of disposed at a fairly conducted sale under legal process would not be sufficient to enable payment of all [its] obligations, due and accruing due." The origins of this legislative test appear to be the decision of Spragge V-C in *Davidson v. Douglas* (1868), 15 Gr. 347 (Ont. Ch.) at p. 351 where he stated with respect to the solvency or insolvency of a debtor, the proper course is:

to see and examine whether all his property, real and personal, be sufficient if presently realized for the payment of his debts, and in this view we must estimate his land, as well as his chattel property, not at what his neighbours or others may consider to be its value, but at what it would bring in the market at a forced sale, or a sale where the seller cannot await his opportunities, but must sell.

44 In *Clarkson v. Sterling* (1887), 14 O.R. 460 (Ont. C.P.) at p. 463, Rose J. indicted that the sale must be fair and reasonable, but that the determination of fairness and reasonableness would depend on the facts of each case.

45 The Union essentially relied on garnishment cases. Because of the provisions relating as to which debts may or may not be garnished, these authorities are of somewhat limited value when dealing with the test (c) question. However I would refer to one of the Union's cases *Bank of Montreal v. I.M. Krisp Foods Ltd.*, [1996] S.J. No. 655 (Sask. C.A.) where it is stated at paragraph 11:

11. Few phrases have been as problematic to define as "debt due or accruing due". The Shorter Oxford English Dictionary, 3<sup>rd</sup> ed. defines "accruing" as "arising in due course", but an examination of English and Canadian authority reveals that not all debts "arising in due course" are permitted to be garnisheed. (See Professor Dunlop's extensive research for his British Columbia Law Reform Commission's Report on Attachment of Debts Act, 1978 at 17 to 29 and its text *Creditor-Debtor Law in Canada*, 2<sup>nd</sup> ed. at 374 to 385.)

46 In *Barsi v. Farcas* (1923), [1924] 1 D.L.R. 1154 (Sask. C.A.), Lamont J.A. was cited for his statement at p. 522 of *Webb v. Stenton* (1883), 11 Q.B.D. 518 (Eng. C.A.) that: "an accruing debt, therefore, is a debt not yet actually payable, but a debt which is represented by an existing obligation."

47 Saunders J. noted in *633746 Ontario Inc. (Trustee of) v. Salvati* (1990), 79 C.B.R. (N.S.) 72 (Ont. S.C.) at p. 81 that a sale out of the ordinary course of business would have an adverse effect on that actually realized.

48 There was no suggestion by any of the parties that any of the assets and undertaking would have any enhanced value from that shown on the financial statements prepared according to GAAP.

49 In *King Petroleum Ltd.*, *supra* at p. 81 Steele J. observed:

To consider the question of insolvency under cl. (c) I must look to the aggregate property of the company and come to a conclusion as to whether or not it would be sufficient to enable payment of all obligations due and accruing due. There are two tests to be applied: First, its fair value and, secondly, its value if disposed of at a fairly conducted sale under legal process. The balance sheet is a starting point, but the evidence relating to the fair value of the assets and what they might realize if disposed of at a fairly conducted sale under legal process must be reviewed in interpreting it. In this case, I find no difficulty in accepting the obligations shown as liabilities because they are known. I have more difficulty with respect to the assets.

50 To my view the preferable interpretation to be given to "sufficient to enable payment of all his obligations, due and accruing due" is to be determined in the context of this test as a whole. What is being put up to satisfy those obligations is the debtor's assets and undertaking *in total*; in other words, the debtor in essence is taken as having sold everything. There would be no residual assets and undertaking to pay off any obligations which would not be encompassed by the phrase "all of his obligations, due and accruing due". Surely, there cannot be "orphan" obligations which are left hanging unsatisfied. It seems to me that the intention of "due and accruing due" was to cover off all obligations of whatever nature or kind and leave nothing in limbo.

51 S. 121(1) and (2) of the BIA, which are incorporated by reference in s. 12 of the CCAA, provide in respect to provable claims:

S. 121(1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

(2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such claim shall be made in accordance with s. 135.

52 *Houlden and Morawetz 2004 Annotated supra* at p. 537 (G28(3)) indicates:

The word "liability" is a very broad one. It includes all obligations to which the bankrupt is subject on the day on which he becomes bankrupt except for contingent and unliquidated claims which are dealt with in s. 121(2).

However contingent and unliquidated claims would be encompassed by the term "obligations".

53 In *Gardner v. Newton* (1916), 29 D.L.R. 276 (Man. K.B.), Mathers C.J.K.B. observed at p. 281 that "contingent claim, that is, a claim which may or may not ripen into a debt, according as some future event does or does not happen." See *A Debtor (No. 64 of 1992), Re*, [1993] 1 W.L.R. 264 (Eng. Ch. Div.) at p. 268 for the definition of a "liquidated sum" which is an amount which can be readily ascertained and hence by corollary an "unliquidated claim" would be one which is not easily ascertained, but will have to be valued. In *Gagnier, Re* (1950), 30 C.B.R. 74 (Ont. S.C.), there appears to be a conflation of not only the (a) test with the (c) test, but also the invocation of the judicial discretion not to grant the receiving order pursuant to a bankruptcy petition, notwithstanding that "[the judge was] unable to find the debtor is bankrupt". The debtor was able to survive the (a) test as he had the practice (accepted by all his suppliers) of providing them with post dated cheques. The (c) test was not a problem since the judge found that his assets should be valued at considerably more than his obligations. However, this case does illustrate that the application of the tests present some difficulties. These difficulties are magnified when one is dealing with something more significantly complex and a great deal larger than a haberdashery store - in the case before us, a giant corporation in which, amongst other things, is engaged in a very competitive history including competition from foreign sources which have recently restructured into more cost efficient structures, having shed certain of their obligations. As well, that is without taking into account that a sale would entail significant transaction costs. Even of greater significance would be the severance and termination payments to employees not continued by the new purchaser. Lastly, it was recognized by everyone at the hearing that Stelco's plants, especially the Hamilton-Hilton works, have extremely high environmental liabilities lurking in the woodwork. Stephen observed that these obligations would be substantial, although not quantified.

54 It is true that there are no appraisals of the plant and equipment nor of the assets and undertaking of Stelco. Given the circumstances of this case and the complexities of the market, one may realistically question whether or not the appraisals would be all that helpful or accurate.

55 I would further observe that in the notional or hypothetical exercise of a sale, then all the obligations which would be triggered by such sale would have to be taken into account.

56 All liabilities, contingent or unliquidated would have to be taken into account. See *King Petroleum Ltd., supra* p. 81; *Salvati, supra* pp. 80-1; *Maybank Foods Inc. (Trustee of) v. Provisioners Maritimes Ltd.* (1989), 45 B.L.R. 14 (N.S. T.D.) at p. 29; *Challmie, Re* (1976), 22 C.B.R. (N.S.) 78 (B.C. S.C.), at pp. 81-2. In *Challmie* the debtor ought to have known that his guarantee was very much exposed given the perilous state of his company whose liabilities he had guaranteed. It is interesting to note what was stated in *Maybank Foods Inc. (Trustee of)*, even if it is rather patently obvious. Tidman J. said in respect of the branch of the company at p. 29:

Mr. MacAdam argues also that the \$4.8 million employees' severance obligation was not a liability on January 20, 1986. The *Bankruptcy Act* includes as obligations both those due and accruing due. Although the employees' severance obligation was not due and payable on January 20, 1986 it was an obligation "accruing due". The Toronto facility had experienced severe financial difficulties for some time; in fact, it was the major, if not the sole cause, of Maybank's financial difficulties. I believe it is reasonable to conclude that a reasonably astute perspective buyer of the company has a going concern would have considered that obligation on January 20, 1986 and that it would have substantially reduced the price offered by that perspective buyer. Therefore that obligation must be considered as an obligation of the company on January 20, 1986.



57 With the greatest of respect for my colleague, I disagree with the conclusion of Ground J. in *Enterprise Capital Management Inc.*, *supra* as to the approach to be taken to "due and accruing due" when he observed at pp. 139-140:

It therefore becomes necessary to determine whether the principle amount of the Notes constitutes an obligation "due or accruing due" as of the date of this application.

There is a paucity of helpful authority on the meaning of "accruing due" for purposes of a definition of insolvency. Historically, in 1933, in *P. Lyall & Sons Construction Co. v. Baker*, [1933] O.R. 286 (Ont. C.A.), the Ontario Court of Appeal, in determining a question of set-off under the *Dominion Winding-Up Act* had to determine whether the amount claimed as set-off was a debt due or accruing due to the company in liquidation for purposes of that Act. Marsten J. at pp. 292-293 quoted from Moss J.A. in *Mail Printing Co. v. Clarkson* (1898), 25 O.R. 1 (Ont. C.A.) at p. 8:

A debt is defined to be a sum of money which is certainly, and at all event, payable without regard to the fact whether it be payable now or at a future time. And an accruing debt is a debt not yet actually payable, but a debt which is represented by an existing obligation: Per Lindley L.J. in *Webb v. Stenton* (1883), 11 Q.D.D. at p. 529.

Whatever relevance such definition may have had for purposes of dealing with claims by and against companies in liquidation under the old winding-up legislation, it is apparent to me that it should not be applied to definitions of insolvency. To include every debt payable at some future date in "accruing due" for the purposes of insolvency tests would render numerous corporations, with long term debt due over a period of years in the future and anticipated to be paid out of future income, "insolvent" for the purposes of the BIA and therefore the CCAA. For the same reason, I do not accept the statement quoted in the *Enterprise* factum from the decision of the Bankruptcy Court for the Southern District of New York in *Centennial Textiles Inc., Re*, 220 B.R. 165 (U.S.N.Y.D.C. 1998) that "if the present saleable value of assets are less than the amount required to pay existing debt as they mature, the debtor is insolvent". In my view, the obligations, which are to be measured against the fair valuation of a company's property as being obligations due and accruing due, must be limited to obligations currently payable or properly chargeable to the accounting period during which the test is being applied as, for example, a sinking fund payment due within the current year. Black's Law Dictionary defines "accrued liability" as "an obligation or debt which is properly chargeable in a given accounting period, but which is not yet paid or payable". The principal amount of the Notes is neither due nor accruing due in this sense.

58 There appears to be some confusion in this analysis as to "debts" and "obligations", the latter being much broader than debts. Please see above as to my views concerning the floodgates argument under the BIA and CCAA being addressed by judicially exercised discretion even if "otherwise warranted" applications were made. I pause to note that an insolvency test under general corporate litigation need not be and likely is not identical, or indeed similar to that under these insolvency statutes. As well, it is curious to note that the cut off date is the end of the current fiscal period which could have radically different results if there were a calendar fiscal year and the application was variously made in the first week of January, mid-summer or the last day of December. Lastly, see above and below as to my views concerning the proper interpretation of this question of "accruing due".

59 It seems to me that the phrase "accruing due" has been interpreted by the courts as broadly identifying obligations that will "become due". See *Viteway Natural Foods Ltd.* below at pp. 163-4 - at least at some point in the future. Again, I would refer to my conclusion above that *every obligation* of the corporation in the hypothetical or notional sale must be treated as "accruing due" to avoid orphan obligations. In that context, it matters not that a wind-up pension liability may be discharged over 15 years; in a test (c) situation, it is crystallized on the date of the test. See *Optical Recording Laboratories Inc. supra* at pp. 756-7; *Viteway Natural Foods Ltd., Re* (1986), 63 C.B.R. (N.S.) 157 (B.C. S.C.) at pp. 164-63-4; *Consolidated Seed Exports Ltd., Re* (1986), 62 C.B.R. (N.S.) 156 (B.C. S.C.) at p. 163. In *Consolidated Seed Exports Ltd.*, Spencer J. at pp. 162-3 stated:



In my opinion, a futures broker is not in that special position. The third definition of "insolvency" may apply to a futures trader at any time even though he has open long positions in the market. Even though Consolidated's long positions were not required to be closed on 10<sup>th</sup> December, the chance that they might show a profit by March 1981 or even on the following day and thus wipe out Consolidated's cash deficit cannot save it from a condition of insolvency on that day. The circumstances fit precisely within the third definition; if all Consolidated's assets had been sold on that day at a fair value, the proceeds would not have covered its obligations due and accruing due, including its obligations to pay in March 1981 for its long positions in rapeseed. The market prices from day to day establish a fair valuation. . . .

The contract to buy grain at a fixed price at a future time imposes a present obligation upon a trader taking a long position in the futures market to take delivery in exchange for payment at that future time. It is true that in the practice of the market, that obligation is nearly always washed out by buying an offsetting short contract, but until that is done the obligation stands. The trader does not know who will eventually be on the opposite side of his transaction if it is not offset but all transactions are treated as if the clearing house is on the other side. It is a present obligation due at a future time. It is therefore an obligation accruing due within the meaning of the third definition of "insolvency".

60 The possibility of an expectancy of future profits or a change in the market is not sufficient; *Consolidated Seed Exports Ltd.* at p. 162 emphasizes that the test is to be done on that day, the day of filing in the case of an application for reorganization.

61 I see no objection to using Exhibit C to Stephen's affidavit as an aid to review the balance sheet approach to test (c). While Stephen may not have known who prepared Exhibit C, he addressed each of its components in the text of his affidavit and as such he could have mechanically prepared the exhibit himself. He was comfortable with and agreed with each of its components. Stelco's factum at paragraphs 70-1 submits as follows:

70. In Exhibit C to his Affidavit, Mr. Stephen addresses a variety of adjustments to the Shareholder's Equity of Stelco necessary to reflect the values of assets and liabilities as would be required to determine whether Stelco met the test of insolvency under Clause C. In cross examination of both Mr. Vaughan and Mr. Stephen only one of these adjustments was challenged - the "Possible Reductions in Capital Assets."

71. The basis of the challenge was that the comparative sales analysis was flawed. In the submission of Stelco, none of these challenges has any merit. Even if the entire adjustment relating to the value in capital assets is ignored, the remaining adjustments leave Stelco with assets worth over \$600 million less than the value of its obligations due and accruing due. This fundamental fact is not challenged.

62 Stelco went on at paragraphs 74-5 of its factum to submit:

74. The values relied upon by Mr. Stephen if anything, understate the extent of Stelco's insolvency. As Mr. Stephen has stated, and no one has challenged by affidavit evidence or on cross examination, in a fairly conducted sale under legal process, the value of Stelco's working capital and other assets would be further impaired by: (i) increased environmental liabilities not reflected on the financial statements, (ii) increased pension deficiencies that would be generated on a wind up of the pension plans, (iii) severance and termination claims and (iv) substantial liquidation costs that would be incurred in connection with such a sale.

75. No one on behalf of the USWA has presented any evidence that the capital assets of Stelco are in excess of book value on a stand alone basis. Certainly no one has suggested that these assets would be in excess of book value if the related environmental legacy costs and collective agreements could not be separated from the assets.

63 Before turning to that exercise, I would also observe that test (c) is also disjunctive. There is an insolvency condition if the total obligation of the debtor exceed either (i) a fair valuation of its assets or (ii) the proceeds of a sale fairly conducted under legal process of its assets.

64 As discussed above and confirmed by Stephen, if there were a sale under legal process, then it would be unlikely, especially in this circumstance that values would be enhanced; in all probability they would be depressed from book value. Stephen took the balance sheet GAAP calculated figure of equity at November 30, 2003 as \$804.2 million. From that, he deducted the loss for December 2003 - January 2004 of \$17 million to arrive at an equity position of \$787.2 million as at the date of filing.

65 From that, he deducted, reasonably in my view, those "booked" assets that would have no value in a test (c) sale namely: (a) \$294 million of future income tax recourse which would need taxable income in the future to realize; (b) \$57 million for a write-off of the Platemill which is presently hot idled (while Locker observed that it would not be prohibitive in cost to restart production, I note that neither Stephen nor Vaughn were cross examined as to the decision not to do so); and (c) the capitalized deferred debt issue expense of \$3.2 million which is being written off over time and therefore, truly is a "nothing". This totals \$354.2 million so that the excess of value over liabilities before reflecting obligations not included in the financials directly, but which are, substantiated as to category in the notes would be \$433 million.

66 On a windup basis, there would be a pension deficiency of \$1252 million; however, Stephen conservatively in my view looked at the Mercer actuary calculations on the basis of a going concern finding deficiency of \$656 million. If the \$1252 million windup figure had been taken, then the picture would have been even bleaker than it is as Stephen has calculated it for test (c) purposes. In addition, there are deferred pension costs of \$198.7 million which under GAAP accounting calculations is allowed so as to defer recognition of past bad investment experience, but this has no realizable value. Then there is the question of Employee Future Benefits. These have been calculated as at December 31, 2003 by the Mercer actuary as \$909.3 million but only \$684 million has been accrued and booked on the financial statements so that there has to be an increased provision of \$225.3 million. These off balance sheet adjustments total \$1080 million.

67 Taking that last adjustment into account would result in a *negative* equity of (\$433 million minus \$1080 million) or *negative* \$647 million. On that basis without taking into account possible reductions in capital assets as dealt with in the somewhat flawed Exhibit E nor environmental and other costs discussed above, Stelco is insolvent according to the test (c). With respect to Exhibit E, I have not relied on it in any way, but it is entirely likely that a properly calculated Exhibit E would provide comparators (also being sold in the U.S. under legal process in a fairly conducted process) which tend to require a further downward adjustment. Based on test (c), Stelco is significantly, not marginally, under water.

68 In reaching my conclusion as to the negative equity (and I find that Stephen approached that exercise fairly and constructively), please note my comments above regarding the possible assumption of pension obligations by the purchaser being offset by a reduction of the purchase price. The 35% adjustment advocated as to pension and employee benefits in this regard is speculation by the Union. Secondly, the Union emphasized cash flow as being important in evaluation, but it must be remembered that Stelco has been negative cash flow for some time which would make that analysis unreliable and to the detriment of the Union's position. The Union treated the \$773 million estimated contribution to the shortfall in the pension deficiency by the Pension Benefits Guarantee Fund as eliminating that as a Stelco obligation. That is not the case however as that Fund would be subrogated to the claims of the employees in that respect with a result that Stelco would remain liable for that \$773 million. Lastly, the Union indicated that there should be a \$155 million adjustment as to the negative equity in Sub Applicants when calculating Stelco's equity. While Stephen at Q. 181-2 acknowledged that there was no adjustment for that, I agree with him that there ought not to be since Stelco was being examined (and the calculations were based) on an unconsolidated basis, not on a consolidated basis.

69 In the end result, I have concluded on the balance of probabilities that Stelco is insolvent and therefore it is a "debtor company" as at the date of filing and entitled to apply for the CCAA initial order. My conclusion is that (i) BIA test (c) strongly shows Stelco is insolvent; (ii) BIA test (a) demonstrates, to a less certain but sufficient basis, an insolvency

and (iii) the "new" CCAA test again strongly supports the conclusion of insolvency. I am further of the opinion that I properly exercised my discretion in granting Stelco and the Sub Applicants the initial order on January 29, 2004 and I would confirm that as of the present date with effect on the date of filing. The Union's motion is therefore dismissed.

70 I appreciate that all the employees (union and non-union alike) and the Union and the International have a justifiable pride in their work and their workplace - and a human concern about what the future holds for them. The pensioners are in the same position. Their respective positions can only be improved by engaging in discussion, an exchange of views and information reasonably advanced and conscientiously listened to and digested, leading to mutual problem solving, ideas and negotiations. Negative attitudes can only lead to the detriment to all stakeholders. Unfortunately there has been some finger pointing on various sides; that should be put behind everyone so that participants in this process can concentrate on the future and not inappropriately dwell on the past. I understand that there have been some discussions and interchange over the past two weeks since the hearing and that is a positive start.

*Motion dismissed.*

### APPENDIX

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2004 CarswellOnt 2936  
Ontario Court of Appeal

Stelco Inc., Re

2004 CarswellOnt 2936, [2004] O.J. No. 1903

**In the Matter of the Companies' Creditors  
Arrangement Act, R.S.C. 1985, c. C-36, As Amended**

In the Matter of a Proposed Plan of Compromise or Arrangement with Respect  
to Stelco Inc. and the other Applicants Listed on Schedule "A" Application under  
the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, As Amended

Doherty J.A., Laskin J.A., Moldaver J.A.

Judgment: May 5, 2004

Docket: CA M31129

Counsel: David P. Jacobs, for Moving Party  
Michael E. Barrack, for Responding Party

Subject: Insolvency; Civil Practice and Procedure

**Related Abridgment Classifications**

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

**Bankruptcy and insolvency**

XIX Companies' Creditors Arrangement Act

XIX.1 General principles

XIX.1.b Qualifying company

**Headnote**

**Bankruptcy and insolvency**

**Per Curiam:**

1 Leave to appeal refused. Costs to the respondents Stelco in the amount by \$2,000 and to the "primary lender" in the amount of \$1000.

**TAB 21**

2015 ONSC 303  
Ontario Superior Court of Justice

Target Canada Co., Re

2015 CarswellOnt 620, 2015 ONSC 303, [2015] O.J. No. 247, 22 C.B.R. (6th) 323, 248 A.C.W.S. (3d) 753

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

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.

Morawetz R.S.J.

Heard: January 15, 2015  
Judgment: January 16, 2015  
Docket: CV-15-10832-00CL

Counsel: Tracy Sandler, Jeremy Dacks for Applicants, 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

Jay Swartz for Target Corporation

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

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

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

Subject: Insolvency; Property

**Related Abridgment Classifications**

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

**Bankruptcy and insolvency**

XIX Companies' Creditors Arrangement Act

XIX.2 Initial application

XIX.2.e Proceedings subject to stay

XIX.2.e.vi Miscellaneous

**Bankruptcy and insolvency**

XIX Companies' Creditors Arrangement Act

XIX.2 Initial application

XIX.2.h Miscellaneous

**Headnote**

**Bankruptcy and insolvency — Companies' Creditors Arrangement Act — Initial application — Proceedings subject to stay — Miscellaneous**

Applicant group of companies were involved in Canadian operations of U.S. retailer T Co. — Canadian operations suffered significant loss in every quarter — T Co. decided to stop funding Canadian operations — Applicants sought to wind down Canadian operations and applied for relief under Companies' Creditors Arrangement Act (CCAA)

— Application granted — Initial order granted — Stay of proceedings granted — Stay extended to certain limited partnerships, which were related to or carried on operations integral to applicants' business — Stay of proceedings extended to rights of third party tenants against landlords that arose out of insolvency — Stay extended to T Co. and its U.S. subsidiaries in relation to claims derivative of claims against Canadian operations.

**Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Miscellaneous**

Applicant group of companies were involved in Canadian operations of U.S. retailer T Co. — Canadian operations suffered significant loss in every quarter — T Co. decided to stop funding Canadian operations — Applicants sought to wind down Canadian operations and applied for relief under Companies' Creditors Arrangement Act (CCAA) — Application granted — Initial order granted — Stay of proceedings granted — It was appropriate to grant broad relief to ensure status quo was maintained — Applicants were all insolvent — Although there was no prospect restructured "going concern" solution would result, use of CCAA protection was appropriate in circumstances — Creation of employee trust to cover payments to employees was approved — Key employee retention program (KERP) and charge as security for KERP payments were approved — Appointment of Employee Representative Counsel was approved — DIP Lenders' Charge and DIP Facility were approved — Administration charge and Directors' and Officers' charge approved.

**Table of Authorities**

**Cases considered by Morawetz R.S.J.:**

*Canwest Global Communications Corp., Re* (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) — considered

*Canwest Publishing Inc./Publications Canwest Inc., Re* (2010), 63 C.B.R. (5th) 115, 2010 CarswellOnt 212, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) — followed

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*Nortel Networks Corp., Re* (2009), 2009 CarswellOnt 1330 (Ont. S.C.J. [Commercial List]) — considered

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**Statutes considered:**

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

Generally — referred to

s. 2 "insolvent person" — considered

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

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s. 11 — considered

s. 11.02 [en. 2005, c. 47, s. 128] — considered

s. 11.02(1) [en. 2005, c. 47, s. 128] — considered

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.2(4) [en. 1997, c. 12, s. 124] — considered

s. 11.7(1) [en. 1997, c. 12, s. 124] — considered

s. 11.51 [en. 2005, c. 47, s. 128] — considered

s. 36 — considered

**Rules considered:**

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

Generally — referred to

**Words and phrases considered:**

insolvent

"Insolvent" is not expressly defined in the [*Companies' Creditors Arrangement Act* (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* . . . 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".

APPLICATION for relief under *Companies' Creditors Arrangement Act*.

**Morawetz R.S.J.:**

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. ("NEI"), an entity organized under the laws of Luxembourg. Target Corporation (which is incorporated under the laws of the State of Minnesota) owns NEI 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 billion. 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 (Ont. S.C.J. [Commercial List]), [*Stelco*], leave to appeal refused, [2004] O.J. No. 1903 (Ont. C.A.), leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336 (S.C.C.), 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 *Prizm Income Fund, Re*, [2011] O.J. No. 1491 (Ont. S.C.J.), 2011 and *Canwest Global Communications Corp., Re*, [2009] O.J. No. 4286 (Ont. S.C.J. [Commercial List]) [*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 *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) ("*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., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]); *Prizm Income Fund, Re*, 2011 ONSC 2061 (Ont. S.C.J.); *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) ("*Canwest Publishing*") and *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List]) ("*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 *T. Eaton Co., Re*, 1997 CarswellOnt 1914 (Ont. 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 *Nortel Networks Corp., Re*, 2009 CarswellOnt 1330 (Ont. S.C.J. [Commercial List]) [*Nortel Networks (KERP)*], and *Grant Forest Products Inc., Re*, 2009 CarswellOnt 4699 (Ont. S.C.J. [Commercial List]). In *U.S. Steel Canada Inc., Re*, 2014 ONSC 6145 (Ont. S.C.J.), 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 *Nortel Networks Corp., Re*, 2009 CarswellOnt 3028 (Ont. S.C.J. [Commercial List]) (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 CCAA 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./Publications Canwest Inc.*, Re, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]), 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. (4th) 193, [2002] 2 S.C.R. 522 (S.C.C.), 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.

*Application granted.*

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

Court File No:

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT  
OF EXPRESS FASHION APPAREL CANADA INC. and EXPRESS  
CANADA GC GP, INC.**

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

PROCEEDING COMMENCED AT TORONTO

**BOOK OF AUTHORITIES OF THE APPLICANTS**

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