Court File No. CV-19-616077-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF IMPERIAL TOBACCO CANADA LIMITED, AND IMPERIAL TOBACCO COMPANY LIMITED

Applicants

BOOK OF AUTHORITIES OF THE APPLICANTS
(Genstar Settlement Approval Motion returnable June 26, 2019)

June 20, 2019

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LIST OF AUTHORITIES

TAB	CASE
1.	*ATB Financial v Metcalf and Mansfield Alternative Investments II Corp*, 2008 ONCA 587
2.	*Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44
3.	*Labourers' Pension Fund of Central and Eastern Canada v Sino-Forest Corporation*, 2013 ONSC 1078
4.	*Re 1511419 Ontario Inc*, 2015 ONSC 7538
5.	*Re Cline Mining Corporation*, 2015 ONSC 622
6.	*Re Grace Canada Inc*, 2008 CarswellOnt 6284 (Supt Ct)
7.	*Re Great Basin Gold Ltd*, 2012 BCSC 1773
8.	*Re Imperial Tobacco Canada Limited et al*, 2019 ONSC 1684
9.	*Re Imperial Tobacco Canada Limited et al*, 2019 ONSC 2222
10.	*Re Imperial Tobacco Canada Limited et al*, 2019 ONSC 2611
11.	*Re Indalex*, 2009 CarswellOnt 4465 (Sup Ct)
12.	*Re Nortel Networks Corp*, 2009 CarswellOnt 3583 (Sup Ct)
13.	*Re Nortel Networks Corporation*, 2010 ONSC 1708
14.	*Re Nortel Networks Corp*, 2010 ONSC 1977
15.	*Re Nortel Networks Corporation et al* (March 31, 2010), Ont Sup Ct, CV-09-7950 (Settlement Approval Order)
16.	*Re Nortel Networks Corp*, 2017 ONSC 700
17.	*Re Nortel Networks Corporation*, 2018 ONSC 6257
18.	*Re Sears Canada Inc et al* (July 13, 2017), Ont Sup Ct, CV-17-11846-00CL (Suspension of Special Payments, Supplemental Plan Payments and PRB Plan Payments, Approval of Term Sheet and Stay Extension Order)
19.	*Re Sino-Forest Corporation* (March 20, 2013), Ont Sup Ct, CV-12-9667-00CL (Ernst & Young Settlement Approval Order)
20.	*Re Timminco Ltd*, 2012 ONSC 4471
21.	*Re US Steel Canada Inc*, 2016 ONSC 7899
22.	*Re US Steel Canada Inc* (October 9, 2015), Ont Sup Ct, CV-14-10695-00CL (Cash Conservation and Business Preservation Order)
23.	*Re Walter Energy Canada Holdings, Inc*, 2018 BCSC 1135
24.	*Robertson v ProQuest Information and Learning Company*, 2011 ONSC 1647
25.	*Siemens v Manitoba (Attorney General)*, 2003 SCC 3

TAB 1

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, VIBROSYSTM 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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Subject: Insolvency; Civil Practice and Procedure
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.

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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 th . 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. [1] 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," [2] 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". [3] 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), 12 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. [4]

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. [5] 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 [6] *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*,[7] 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 is 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: [8]

> 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 its 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*, 4th ed. reissue, vol. 44 (1) (London: Butterworths, 1995) at paras. 1438, 1464 and 1467; Driedger, 2nd ed., *supra*, at 183; Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th 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; Merill 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 2

Most Negative Treatment: Distinguished
Most Recent Distinguished: I.P.P. v. Canada (Citizenship and Immigration) | 2018 FC 123, 2018 CF 123, 2018 CarswellNat 1665, 2018 CarswellNat 3523, 291 A.C.W.S. (3d) 606, 62 Imm. L.R. (4th) 9 | (F.C., Apr 3, 2018)

2000 SCC 44, 2000 CSC 44
Supreme Court of Canada

Blencoe v. British Columbia (Human Rights Commission)

2000 CarswellBC 1860, 2000 CarswellBC 1861, 2000 SCC 44, 2000 CSC 44, [2000] 10 W.W.R. 567, [2000] 2 S.C.R. 307, [2000] S.C.J. No. 43, 141 B.C.A.C. 161, 190 D.L.R. (4th) 513, 2000 C.L.L.C. 230-040, 231 W.A.C. 161, 23 Admin. L.R. (3d) 175, 260 N.R. 1, 38 C.H.R.R. D/153, 3 C.C.E.L. (3d) 165, 77 C.R.R. (2d) 189, 81 B.C.L.R. (3d) 1, 99 A.C.W.S. (3d) 1024, J.E. 2000-1872, REJB 2000-20288

The British Columbia Human Rights Commission, the Commissioner of Investigation and Mediation, the British Columbia Human Rights Tribunal and Andrea Willis, Appellants v. Robin Blencoe, Respondent and Irene Schell, Intervener and The Attorney General for Ontario, the Attorney General of British Columbia, the Saskatchewan Human Rights Commission, the Ontario Human Rights Commission, the Nova Scotia Human Rights Commission, the Manitoba Human Rights Commission, the Canadian Human Rights Commission, the Commission des droits de la personne et des droits de la jeunesse, the British Columbia Human Rights Coalition and the Women's Legal Education and Action Fund, Interveners

McLachlin C.J.C., L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel JJ.

Heard: January 24, 2000
Judgment: October 5, 2000 *
Docket: 26789

Proceedings: reversing (1998), 31 C.H.R.R. D/175 (B.C. C.A.); reversing (1998), 30 C.H.R.R. D/439 (B.C. S.C.)

Counsel: *John J. L. Hunter, Q.C.*, *Thomas F. Beasley*, *K. Michael Stephens* and *Stephanie L. McHugh*, for Appellants British Columbia Human Rights Commission and the Commissioner of Investigation and Mediation.
Robert F. Farvolden, for Appellant Andrea Willis.
Written submissions only by *Susan E. Ross*, for Appellant The British Columbia Human Rights Tribunal.
Joseph J. Arvay, Q.C., for Respondent.
Hart Schwartz, for Intervener The Attorney General for Ontario.
Harvey M. Groberman, Q.C., for Intervener The Attorney General of British Columbia.
Mark C. Stacey and *Rosy M. Mondin*, for Intervener Irene Schell.
Aaron L. Berg and *Denis Guénette*, for Intervener The Manitoba Human Rights Commission.
Lara J. Morris and *Maureen E. Shebib*, for Intervener The Nova Scotia Human Rights Commission.
Hélène Tessier, for Intervener Commission des droits de la personne et des droits de la jeunesse.
Fiona Keith, for Intervener The Canadian Human Rights Commission.
Milton Woodard, Q.C., for Intervener The Saskatchewan Human Rights Commission.
Cathryn Pike and *Jennifer Scott*, for Intervener The Ontario Human Rights Commission.
Jennifer L. Conkie and *Dianne Pothier*, for Intervener The Women's Legal Education and Action Fund.
Frances Kelly and *James Pozer*, for Intervener B.C. Human Rights Coalition.

Subject: Constitutional; Human Rights

Headnote

Human rights --- Practice and procedure — Commissions and boards of inquiry — Delay

Complaints of sexual harassment were filed against petitioner, who held public office — Complaints were eventually referred for hearing — Petitioner applied for judicial review to terminate proceedings on ground that 33-month pre-hearing delay breached s. 7 of Charter — Application was dismissed and appeal was allowed — Court of appeal held that there was undue delay and prejudice to privacy and human dignity which was not in accordance with principles of fundamental justice under s. 7 of Charter — Stay of proceedings was ordered — Appeal by commission allowed — Commission, though independent of government, was required to comply with Charter — State did not prevent petitioner from making any "fundamental personal choices" — Interests that petitioner was seeking to protect did not fall within "liberty" interest protected by s. 7 of Charter — Petitioner's prejudice was not seriously exacerbated by delays as damage to petitioner's reputation had already been done — Dignity and respect for person's reputation are not autonomous Charter rights — Right to be tried within reasonable time under s. 11(b) of Charter cannot be imported into s. 7 of Charter — Appropriate remedies exist in administrative law context to deal with state-caused delay in human rights proceedings — Proof of significant prejudice must exist for delay to give rise to stay — Delay in case was not such that it would necessarily result in hearing that lacked essential elements of fairness and was not inordinate — It could not be said that commission acted unfairly toward petitioner — Delay was not one which would offend community's sense of decency and fairness and did not amount to abuse of process — Canadian Charter of Rights and Freedoms, ss. 7, 11(b).

Human rights --- Practice and procedure — Judicial review — Grounds — Requirements of natural justice

Complaints of sexual harassment were filed against petitioner, who held public office — Complaints were eventually referred for hearing — Petitioner applied for judicial review to terminate proceedings on ground that 33-month pre-hearing delay breached s. 7 of Charter — Application was dismissed and appeal was allowed — Court of appeal held that there was undue delay and prejudice to privacy and human dignity which was not in accordance with principles of fundamental justice under s. 7 of the Charter — Stay of proceedings was ordered — Appeal by commission allowed — Appropriate remedies exist in administrative law context to deal with state-caused delay in human rights proceedings — Proof of significant prejudice must exist for delay to give rise to stay — Delay in case was not such that it would necessarily result in hearing that lacked essential elements of fairness and was not inordinate — It could not be said that commission acted unfairly toward petitioner — Delay was not one which would offend community's sense of decency and fairness and did not amount to abuse of process — Canadian Charter of Rights and Freedoms, s. 7.

Human rights --- Constitutional issues — Application of Charter

Complaints of sexual harassment were filed against petitioner, who held public office — Complaints were eventually referred for hearing — Petitioner applied for judicial review to terminate proceedings on ground that 33-month pre-hearing delay breached s. 7 of Charter — Application was dismissed and appeal was allowed — Court of appeal held there was undue delay and prejudice to privacy and human dignity which was not in accordance with principles of fundamental justice under s. 7 of the Charter — Stay of proceedings was ordered — Appeal by commission allowed — Commission, though independent of government, was required to comply with Charter — State did not prevent petitioner from making any "fundamental personal choices" — Interests that petitioner was seeking to protect did not fall within "liberty" interest protected by s. 7 of Charter — Petitioner's prejudice was not seriously exacerbated by delays as damage to reputation had already been done — Dignity and respect for person's reputation are not autonomous Charter rights — Right to be tried within reasonable time under s. 11(b) of Charter cannot be imported into s. 7 of Charter — Canadian Charter of Rights and Freedoms, ss. 7, 11(b).

Droits de la personne --- Procédure et règles de pratique — Commissions et commissions d'enquête — Délai

Plaintes de harcèlement sexuel on été déposées contre le requérant qui occupait une charge publique — Plaintes ont été finalement renvoyées pour audience — Requérant a demandé un contrôle judiciaire pour arrêter les procédures sous prétexte qu'un délai de 33 mois avant audience portait atteinte à l'art. 7 de la Charte — Requête a été rejetée et l'appel accueilli — Cour d'appel a dit qu'il y avait délai déraisonnable et atteinte à la vie privée et à la dignité humaine, ce qui allait à l'encontre des principes de justice naturelle de l'art. 7 de la Charte — Arrêt des procédures a été ordonné — Appel de la commission a été accueilli — Commission, même si indépendante du gouvernement, devait respecter la Charte — État n'a pas empêché le requérant de faire des choix personnels fondamentaux — Droits que le requérant voulait protéger

n'étaient pas inclus dans le droit à la « liberté » protégé par l'art. 7 de la Charte — Préjudice subi par le requérant n'a pas été sérieusement aggravé par les délais, parce que l'atteinte à la réputation du requérant avait déjà été faite — Dignité et droit au respect de sa réputation ne sont pas des droits distincts dans la Charte — Droit d'être jugé dans un délai raisonnable selon l'art. 11(b) de la Charte ne peut être transposé à l'art. 7 de la Charte — Droit administratif contient des réparations quant aux délais imputables à l'État dans le cadre de procédures en droits de la personne — Preuve d'un préjudice important dû au délai est nécessaire pour donner lieu à un arrêt des procédures — Délai en cause n'était ni excessif, ni si long qu'il en aurait résulté nécessairement une audience dépourvue des éléments essentiels de l'équité — On ne pouvait dire que la commission a agi de façon inéquitable envers le requérant — Délai n'en était pas un qui offenserait la société et n'était pas un abus de procédure — Charte canadienne des droits et libertés, art. 7, 11(b).

Droits de la personne --- Procédure et règles de pratique — Contrôle judiciaire — Motifs — Exigences de justice naturelle

Plaintes de harcèlement sexuel ont été déposées contre le requérant qui occupait une charge publique — Plaintes ont été finalement renvoyées pour audience — Requérant a demandé un contrôle judiciaire pour arrêter les procédures sous prétexte qu'un délai de 33 mois avant audience portait atteinte à l'art. 7 de la Charte — Requête a été rejetée et l'appel accueilli — Cour d'appel a dit qu'il y avait délai déraisonnable et atteinte à la vie privée et à la dignité humaine, ce qui allait à l'encontre des principes de justice naturelle de l'art. 7 de la Charte — Arrêt des procédures a été ordonné — Appel de la commission a été accueilli — Droit administratif contient des réparations quant aux délais imputables à l'État dans le cadre de procédures en matière de droits de la personne — Preuve d'un préjudice important doit exister pour que le délai donne lieu à un arrêt des procédures — Délai en cause n'était ni excessif, ni si long qu'il en aurait résulté nécessairement une audience dépourvue des éléments essentiels de l'équité — On ne pourrait dire que la commission a agi de façon inéquitable envers le requérant — Délai n'en était pas un qui offenserait la société et n'était pas un abus de procédure — Charte canadienne des droits et libertés, art. 7.

Droits de la personne --- Questions constitutionnelles — Application de la Charte

Plaintes de harcèlement sexuel ont été déposées contre le requérant qui occupait une charge publique — Plaintes ont été finalement renvoyées pour audience — Requérant a demandé un contrôle judiciaire pour arrêter les procédures sous prétexte qu'un délai de 33 mois avant audience portait atteinte à l'art. 7 de la Charte — Requête a été rejetée et l'appel accueilli — Cour d'appel a dit qu'il y avait délai déraisonnable et atteinte à la vie privée et à la dignité humaine, ce qui allait à l'encontre des principes de justice naturelle de l'art. 7 de la Charte — Arrêt des procédures a été ordonné — Appel de la commission a été accueili — Commission, même si indépendante du gouvernement, devait respecter la Charte — État n'a pas empêché le requérant de faire des « choix personnels fondamentaux » — Droits que le requérant voulait protéger n'étaient pas inclus dans le droit à la « liberté » protégé par l'art. 7 de la Charte — Préjudice subi par le requérant n'a pas été sérieusement aggravé par les délais, parce que l'atteinte à la réputation du réquerant avait déjà été faite — Dignité et respect de la réputation ne sont pas droits distincts de la Charte — Droit d'être jugé dans un délai raisonnable de l'art. 11(b) de la Charte ne peut être transposé à l'art. 7 de la Charte — Charte canadienne des droits et libertés, art. 7, 11(b).

The petitioner was a member of the Legislative Assembly and a member of the Cabinet. The petitioner's assistant went public with allegations that the petitioner had sexually harassed her. The petitioner stepped down as Minister, but remained in Cabinet pending the results of an inquiry. The Premier of British Columbia removed the petitioner from Cabinet and dismissed him from the party caucus. Two complaints were filed under the *Human Rights Act* alleging that the petitioner sexually harassed two women over a two-year period. The petitioner applied for judicial review to terminate the proceedings on the basis that the Human Rights Commission had lost jurisdiction due to an inordinate pre-hearing delay of 33 months. The application was dismissed on the ground that the delay was primarily attributable to the delayed responses of the petitioner at every stage of the proceedings. The delay was found reasonable given the institutional resources available.

The petitioner appealed on the ground that the delay breached his rights under s. 7 of the *Canadian Charter of Rights and Freedoms* and warranted a stay of proceedings. The appeal was allowed. The court of appeal found that the complaints were relatively simple and could have been quickly resolved. The court of appeal held that the proceedings became protracted without justification, partly due to the complainants' conduct. Because of the media coverage of the events, the petitioner lost his political career and unsuccessfully attempted to put his life back together by moving to Ontario. The court of appeal held that but for these proceedings, the media attention would have dissipated and the petitioner and his family could have had a better chance at reconstructing their lives. The court of appeal held that there was undue

delay and prejudice to privacy and human dignity which was not in accordance with the principles of fundamental justice under s. 7 of the *Charter*. The proceedings were stayed. The commission brought an appeal.

Held: The appeal was allowed.

Per Bastarache J. (McLachlin C.J.C, L'Heureux-Dubé, Gonthier, Major JJ. concurring): Both the federal Parliament and provincial legislatures are bound by the *Charter*. The issue was whether the commission was an agent of government pursuant to s. 32 of the *Charter*. The mere fact that the commission was independent of government was not determinative of the *Charter*'s application, nor was the fact that a statutory provision was not impugned. Bodies exercising statutory authority are bound by the *Charter* even though they are independent of government. The commission possesses more extensive powers than a natural person, such as compelling production of documents, which it exercises when investigating complaints. The commission exercises governmental powers conferred upon it by a legislative body and is required to act within the limits of its enabling statute. Although the commission has adjudicatory characteristics, it is a statutory creature which administrates a governmental program and must comply with the *Charter*.

Protection under s. 7 of the *Charter* extends beyond the criminal law to include situations in which state action directly engages the justice system and its administration. The question is not whether delays in human rights proceedings can engage s. 7 of the *Charter*, but rather whether the petitioner's s. 7 rights were actually engaged by delays in the circumstances of the case. The rights under s. 7 of the *Charter* must be recognized as three distinct interests of life, liberty and security of the person. The liberty interest protected includes a person's personal autonomy. A person's right to make fundamental personal decisions without interference from the state is a critical component of a person's liberty interest. In the circumstances, the state did not prevent the petitioner from making any "fundamental personal choices." The interests that the petitioner was seeking to protect did not fall within the "liberty" interest protected by s. 7 of the *Charter*. The right to security of the person encompasses serious state-imposed psychological stress. The psychological harm must be a result of the actions of the state and it must be serious harm. Stress, anxiety and stigma may result from any human rights allegation, regardless of whether the process occurs within a reasonable time. It was necessary to focus on the impairment, which could be said to flow from the delay in the process to demonstrate the necessary causal link. Doubt was raised in the circumstances as to whether the psychological harm suffered by the petitioner could be seen as the result of state-caused delay in the process. The petitioner was subjected to harassment by the press, was removed from his position in Cabinet and was already suffering from depression prior to any delays in the proceedings. The petitioner's life was terribly affected by the allegations of sexual harassment and it could not be said with sufficient certainty that the petitioner would have been able to successfully reconstruct his life if the proceedings had not been delayed. The central event leading to the media scrutiny was the dismissal of the petitioner from the Cabinet, which predated the filing of the complaints with the commission. The most prejudicial impact on the petitioner was caused not by the actions of the commission, but by the events prior to the complaints being filed and the actions of non-governmental actors. The petitioner's prejudice was not seriously exacerbated by the delays, as the damage to the petitioner's reputation had already been done.

The rights of "liberty and security of the person" protected by s. 7 of the *Charter* do not include a generalized right to dignity or a right to be free from stigma associated with a human rights complaint. Respect for the dignity of a person must guide the interpretation of the *Charter*, but it is not recognized as an independent protected right. Dignity is an underlying value and not an autonomous *Charter* right. Respect for a person's reputation is also an underlying value and not an autonomous *Charter* right.

The commission in this case did not invade the petitioner's privacy. As the petitioner held public office, it could be argued that he should have expected a certain amount of public scrutiny. An individual has only a reasonable expectation of privacy. The right to be free from stigma associated with a human rights complaint is not an interest basic to individual dignity. The state did not interfere with the petitioner's right to make decisions that affected his fundamental being. The prejudice suffered by the petitioner did not amount to state interference with his security of the person.

The right to be tried within a reasonable time under s. 11(b) of the *Charter* cannot be imported into s. 7 of the *Charter*. There is no constitutional right outside the criminal context to be "tried" within a reasonable time. *Charter* rights must be interpreted and defined in a contextual manner. The court of appeal erred in transplanting s. 11(b) principles set out in the criminal law context to human rights proceedings under s. 7. The purpose of human rights proceedings is not to punish, but to eradicate discrimination. Unlike the criminal process, it is not adversarial and conflictual. The role of the

commission, prior to referring the complaint to a tribunal for hearing, is investigative and conciliatory, not prosecutorial. The level of stress and anxiety experienced by a person against whom a complaint has been filed cannot be equated with that experienced by a person charged with a criminal offence. Some amount of stress and stigma attached to human rights proceedings must be accepted. There is no constitutional right or freedom against such stigma protected by s. 7 rights to "liberty" or "security of the person".

Appropriate remedies exist in the administrative law context to deal with state-caused delay in human rights proceedings. In order for delay to give rise to a stay of proceedings in the administrative law context, there must be proof of significant prejudice. Such prejudice would result in cases where a person's ability to answer the complaint against them is affected because memories have faded, essential witnesses have died or are unavailable, or evidence has been lost. The delay in this case was not such that it would necessarily result in a hearing that lacked the essential elements of fairness. The petitioner's right to a fair hearing was not jeopardized.

Unacceptable delay may amount to an abuse of process in certain circumstances, even where the fairness of the hearing has not been compromised. If delay has directly caused significant psychological harm to a person or attached a stigma to the person's reputation, such that the human rights system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process. As other remedies are available for abuse of process, a party seeking a stay of proceedings must meet a heavy onus. To constitute a breach of the duty of fairness, the delay must have been unreasonable or inordinate. The delay in this case was not inordinate. There was no extended period of inactivity in the processing of the complaints, except for a five-month period of inaction between the time that the petitioner responded to the complaints and the human rights officers were assigned to investigate the complaints. No explanation for this period of inaction was provided by the commission. The period between the end of the investigation process and the hearing date was not to be included in calculating the delay, as the hearing dates could not have been set earlier in the circumstances. Therefore the period of delay to be considered was actually 24 months. The commission was not to be held responsible for the eight-month delay caused by the petitioner's challenge to the lateness of the complaints and accusation that the complaints were in bad faith. Much of the delay resulted from the petitioner's actions. The commission was responsible for ensuring that complaints were not adjudicated unless there was some basis for the claims to go forward and therefore performed a screening function. The process is further lengthened by giving the parties the opportunity to make submissions before a referral is made to the tribunal, in accordance with the principles of natural justice. The commission is required to work through all of the necessary stages in the complaint process, and the complaints against the petitioner were handled in the same manner as all other human rights complaints. Comparing the delay in this case to the delay in analogous cases, it could not be said that the commission acted unfairly toward the petitioner. The delay was not one which would offend the community's sense of decency and fairness and did not amount to an abuse of process.

Per LeBel J. (dissenting in part) (Iacobucci, Binnie, Arbour JJ. concurring): It has been recognized that in administrative processes, other adverse effects can create an abusive situation independent of evidentiary prejudice. Administrative delay that is determined to be unreasonable based on its length, causes and effects is abusive and contrary to the principles that should be applied in a fair and efficient legal system. To determine whether delay has been unreasonable, it is necessary to look at the particular context and to consider the time taken compared to the inherent time requirements, the causes of delay beyond the inherent time requirements of the matter and the impact of the delay. The complaints against the petitioner were relatively simple and would not have justified a prolonged investigation. The commission was required to go through a number of steps to determine whether to send the matters to a hearing, but there was significant delay involved in each of the steps. In fact, the commission was unable to explain a five-month delay during the investigation in which there was no activity concerning the complaints. The delay contributed significantly to the prejudice suffered by the petitioner. The petitioner was entitled to some form of remedy. The interests of the complainants would have been grievously affected by a stay of proceedings. Such a remedy in the circumstances would be excessive and unfair. The delay did not compromise the fairness of the hearing and did not amount to shocking or gross abuse. The petitioner was entitled to an order for an expedited hearing. The petitioner was also entitled to his costs on a party-to-party basis.

Le requérant était membre de l'assemblée législative et membre du Cabinet. L'adjointe du requérant a dévoilé publiquement des allégations selon lesquelles le requérant l'avait harcelée sexuellement. Le requérant a démissionné de son poste de ministre, mais est demeuré membre du Cabinet en attendant les résultats de l'enquête. Le Premier Ministre de la Colombie-Britannique a exclu le requérant du Cabinet et l'a renvoyé du caucus du Parti. Deux plaintes ont été

déposées en vertu de la *Human Rights Act*, qui alléguaient que le requérant avait fait du harcèlement sexuel à l'endroit de deux femmes pendant une période de deux ans. Le requérant a présenté une demande de contrôle judiciaire pour obtenir l'arrêt des procédures sous prétexte que la Human Rights commission avait perdu compétence à cause d'un délai déraisonnable de 33 mois dans le traitement des plaintes. La requête a été rejetée au motif que le délai était dû surtout aux réponses tardives du requérant à toutes les étapes du processus. Le délai a été déclaré raisonnable vu les ressources institutionnelles disponibles.

Le requérant a appelé de la décision invoquant que le délai portait atteinte à ses droits selon l'art. 7 de la *Charte canadienne des droits et libertés* et justifiait l'arrêt des procédures. Le pourvoi a été accueilli. La Cour d'appel est arrivée à la conclusion que les plaintes n'étaient pas complexes et qu'elles auraient pu être réglées rapidement. Elle a dit que les procédures avaient été prolongées sans motif, en partie en raison de la conduite des plaignantes. Le requérant a perdu sa carrière politique à cause de la couverture médiatique des événements. Il a essayé, sans succès, de rebâtir sa vie en déménageant en Ontario. La Cour d'appel a conclu que, si ce n'était de ces procédures, l'attention médiatique se serait dissipée, et le requérant et sa famille auraient eu une meilleure chance de rebâtir leur vie. La Cour d'appel conclut donc que le délai était déraisonnable et qu'il y a eu un préjudice au droit à la vie privée et à la dignité, contrairement aux principes de justice fondamentale contenus dans l'art. 7 de la *Charte*. L'arrêt des procédures a été accordé. La commission a fait appel de la décision.

Arrêt: Le pourvoi a été accueilli.

Bastarache, J. (McLachlin, J.C.C., L'Heureux-Dubé, Gonthier, Major, JJ., souscrivant): Le Parlement fédéral ainsi que les assemblées législatives sont liés par la *Charte*. La question en l'espèce était de savoir si la commission était un agent du gouvernement selon l'art. 32 de la *Charte*. Ni le fait que la commission était indépendante du gouvernement, ni le fait qu'une disposition législative n'était pas contestée n'étaient des facteurs déterminants dans l'application de la *Charte*. Les organismes qui exercent l'autorité gouvernementale sont liés par la *Charte*, même s'ils sont indépendants du gouvernement. La commission possède plus de pouvoirs qu'une personne physique, qu'elle peut exercer lorsqu'elle enquête. Notamment, elle peut contraindre la production de documents. La commission exerce des pouvoirs gouvernementaux qui lui ont été conférés par un corps législatif, et se doit d'agir dans les limites de sa loi habilitante. Malgré que la commission ait des caractéristiques adjudicatives, elle est une créature de la loi qui met en oeuvre un programme gouvernemental et est assujettie à la *Charte*.

La protection de l'art. 7 de la *Charte* s'étend au-delà du droit criminel, pour inclure les cas où les actes gouvernementaux engagent directement le système judiciaire et son administration. La question n'est pas de savoir si les délais dans les procédures en matière de droits de la personne peuvent déclencher l'application de l'art. 7 de la *Charte*, mais plutôt de savoir si les droits du requérant garantis par l'art. 7 on été atteints par les délaisde l'espèce. Les droits de l'art. 7 doivent être vus comme constituant trois droits distincts, soit le droit à la vie, le droit à la liberté et le droit à la sécurité de la personne. Le droit à la liberté inclut le droit à l'autonomie personnelle. Le droit d'une personne de prendre des décisions personnelles fondamentales sans l'intervention de l'État est une composante cruciale du droit à la liberté. En l'espèce, l'État n'a aucunement empêché le requérant de faire des « choix personnels fondamentaux ». Les droits que le requérant cherchait à faire protéger ne font pas partie du droit à la « liberté » protégé par l'art. 7 de la *Charte*.

Le droit à la sécurité de la personne inclut la tension psychologique grave causée par l'État. Le préjudice psychologique doit en être un qui est causé par l'État et il doit être sérieux. Stress, anxiété et stigmatisation peuvent être causés par une allégation en matière de droits de la personne, que le processus se déroule dans un délai raisonnable ou non. Il était essentiel de regarder l'atteinte qui pouvait être due au délai dans le cadre du processus pour démontrer le lien nécessaire entre le préjudice et l'atteinte. En l'espèce, un doute a été soulevé, à savoir si le préjudice psychologique subi par le requérant pouvait être vu comme étant le résultat d'un délai causé par l'État. Le requérant a fait l'objet de harcèlement par la presse, a été exclu de son poste au sein du Cabinet et souffrait déjà de dépression avant la survenance de quelque délai dans les procédures. La vie du requérant a été très affectée par les allégations de harcèlement sexuel, et on ne peut dire avec une certitude suffisante que le requérant aurait pu rebâtir sa vie avec succès, n'eût été des délais. L'événement central qui a mené à l'examen des médias a été l'exclusion du requérant du Cabinet, précédant le dépôt des plaintes devant la commission. L'impact le plus préjudiciable sur le requérant fut causé non pas par les actions de la commission, mais par les événements précédant le dépôt des plaintes et par les actions des acteurs non gouvernementaux. Le préjudice du requérant n'a pas été sérieusement aggravé par les délais, parce que l'atteinte à la réputation du requérant avait déjà été faite.

Le droit à la « liberté et à la sécurité de la personne » protégé par l'art. 7 de la *Charte* n'inclut ni un droit général à la dignité, ni un droit à la protection contre la stigmatisation liée à une plainte fondée sur les droits de la personne. Le respect de la dignité d'une personne doit guider l'interprétation de la *Charte*, mais il n'est pas reconnu comme étant un droit distinct garanti. La dignité est une valeur sous-jacente et non un droit autonome de la *Charte*. Le respect de la réputation d'une personne est aussi une valeur sous-jacente et non un droit autonome de la *Charte*.

En l'espèce, la commission n'a pas fait d'atteinte à la vie privée du requérant. Parce que le requérant était député, il pourrait être argumenté qu'il aurait dû s'attendre à une certaine quantité d'ingérence publique. Un individu ne peut avoir qu'une espérance raisonnable de vie privée. Le droit à la protection contre la stigmatisation liée à une plainte fondée sur les droits de la personne n'est pas un droit de base de la dignité humaine. L'État n'est pas intervenu dans le droit du requérant à prendre des décisions qui touchent son être fondamental. Le préjudice subi par le requérant n'équivalait pas à de l'intervention étatique quant à la sécurité de sa personne

Le droit d'être jugé dans un délai raisonnable selon l'art. 11(b) de la *Charte* ne peut être transposé à l'art. 7 de la *Charte*. Il n'y a pas de droit constitutionnel, hors du droit criminel, à être « jugé » dans un délai raisonnable. Les droits de la *Charte* doivent être interprétés et définis dans leur contexte. La Cour d'appel a erré en transposant les principes de l'art. 11 définis en matière de droit criminel dans des procédures en matière de droits de la personne établis selon l'art. 7. Le but des procédures en matière de droits de la personne n'est pas de punir, mais d'éliminer la discrimination et, contrairement au droit criminel, le processus n'est pas contradictoire et conflictuel. Le rôle de la commission, avant de renvoyer une plainte au tribunal pour audience, en est un d'enquête et de conciliation, et non de poursuite. Le niveau de stress et d'anxiété souffert par une personne contre qui une plainte a été déposée ne peut être équivalent à l'expérience d'une personne inculpée pour une infraction criminelle. Une certaine quantité de stress et de stigmatisation rattachés aux procédures en matière de droits de la personne doit être acceptée. Le droit à la « liberté » ou à la « sécurité de la personne » garanti par l'art. 7 ne comporte donc aucun droit constitutionnel à la protection contre une telle stigmatisation.

Le droit administratif offre des réparations appropriées en ce qui concerne le délai imputable à l'État dans des procédures en matière de droits de la personne. Pour que le délai donne lieu à un arrêt des procédures dans le cadre du droit administratif, la preuve d'un préjudice important doit être faite. Un tel préjudice est occasionné dans les cas où la capacité d'une personne à répondre à une plainte faite contre elle est affectée parce que des souvenirs se sont effacés, que des témoins essentiels sont décédés ou non disponibles ou que la preuve a été perdue. En l'espèce, le délai en cause n'était pas si long qu'il en aurait résulté une audience dépourvue des éléments essentiels de l'équité. Le droit du requérant à une audience équitable n'a pas été compromis.

Un délai déraisonnable peut être équivalent à un abus de procédure dans certaines circonstances, même lorsque l'équité de l'audience n'a pas été compromise. Si le délai a causé directement un préjudice psychologique important à une personne, ou a attaché des stigmates à la réputation de cette personne, à un point tel que le régime de protection des droits de la personne en est déconsidéré, un tel préjudice serait suffisant pour constituer un abus de procédure. Parce qu'il y a d'autres remèdes disponibles en cas d'abus de procédures, le fardeau d'une partie qui recherche un tel arrêt est très lourd. Le délai en cause doit être déraisonnable ou excessif pour qu'il constitue un manquement au devoir d'équité procédurale. En l'espèce, le délai n'a pas été excessif. Il n'y a pas eu de période étendue pendant laquelle il n'y a eu aucun traitement des plaintes, sauf une période de cinq mois d'inactivité pendant laquelle le requérant a répondu aux plaintes et les agents de la commission ont été chargés d'enquêter. Aucune explication n'a été fournie par la commission pour expliquer ce délai. La période entre la fin de l'enquête et la date d'audience n'a pas été incluse dans le calcul du délai, parce que les dates d'audience n'auraient pu être fixées plus tôt, dans ce cas-ci. Donc, le délai à considérer était en réalité de 24 mois. La commission n'avait pas à être tenue responsable d'avoir contribué au délai de huit mois causé par la contestation du requérant quant au retard des plaintes et à son accusation que les plaintes étaient faites de mauvaise foi. Par ses actions, le requérant était responsable en partie du délai. La commission devait s'assurer que les plaintes ne soient pas jugées sans un quelconque fondement, pour que celles-ci avancent, et faisait donc un tri. Le processus est aussi rallongé par le fait qu'il est donné aux parties l'opportunité de faire des commentaires avant qu'un renvoi soit fait au Tribunal, selon les principes de justice naturelle. La commission doit passer à travers toutes les étapes nécessaires du processus de traitement des plaintes. Les plaintes contre le requérant ont été traitées de la même façon que toutes les plaintes en droits de la personne. En comparant le délai en l'espèce aux délais dans des causes analogues, on ne pouvait dire que la commission

a agi de façon inéquitable envers le requérant. Le délai n'en fut pas un qui pourrait heurter le sens de la justice et de la décence de la société et, donc, ne constituait pas un abus de procédure.

LeBel J. (dissident en partie) (Iacobucci, Binnie, Arbour, JJ., souscrivant): Il a été reconnu que dans le cadre des procédures administratives, d'autres effets préjudiciables peuvent créer une situation abusive, indépendamment d'un préjudice lié à la possibilité de présenter des éléments de preuve. Un délai administratif, dont il est déterminé qu'il est déraisonnable compte tenu de sa durée, de ses causes et de ses effets, est alors abusif et contraire aux principes qui doivent être appliqués dans un système judiciaire juste et efficace. Pour déterminer si un délai est déraisonnable, il est nécessaire de regarder le contexte particulier, et de considérer le temps pris versus le temps inhérent requis, les causes du délai au-delà du temps inhérent requis pour la cause et l'impact du délai. Les plaintes contre le requérant étaient relativement simples et n'auraient pas justifié une enquête prolongée. La commission se devait de passer à travers plusieurs étapes afin de déterminer si elle renvoyait le tout à l'audience, mais il y a eu des délais importants lors de chacune des étapes. D'ailleurs, la commission a été incapable d'expliquer un délai de cinq mois durant l'enquête pendant lequel il n'y a eu aucune activité concernant les plaintes. Le délai a contribué de façon significative au préjudice subi par le requérant. Le requérant avait droit à une forme de réparation. Les intérêts des plaignantes seraient gravement atteints par un arrêt des procédures. Un tel remède serait, en l'espèce, excessif et inéquitable. Le délai n'a pas compromis l'équité de l'audience et ne correspondait pas à un abus grossier ou choquant. Le requérant avait droit d'obtenir une ordonnance pour la tenue d'une audience accélérée. Le requérant avait aussi droit à des dépens comme entre parties.

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Thomson Newspapers Ltd. v. Canada (Director of Investigation & Research), 76 C.R. (3d) 129, [1990] 1 S.C.R. 425, 67 D.L.R. (4th) 161, 106 N.R. 161, 39 O.A.C. 161, 54 C.C.C. (3d) 417, 29 C.P.R. (3d) 97, 47 C.R.R. 1, 72 O.R. (2d) 415 (note) (S.C.C.) — referred to

Cases considered by/Jurisprudence citée par *LeBel J.* (dissenting in part) (*Iacobucci, Binnie, Arbour JJ.* concurring):

Andover Case (1701), 90 E.R. 1143, 2 Salk. 433, Holt. K.B. 441, 91 E.R. 377 (Eng. K.B.) — referred to

Bagg's Case, Re (1615), 77 E.R. 1271, 11 Co. Rep. 93b (Eng. K.B.) — referred to

Bhatnager v. Canada (Minister of Employment & Immigration), [1985] 2 F.C. 315 (Fed. T.D.) — considered

Brown v. Assn. of Professional Engineers & Geoscientists (British Columbia) (September 16, 1994), Doc. Vancouver A933892 (B.C. S.C. [In Chambers]) — referred to

Canada (Minister of Citizenship & Immigration) v. Tobiass, 118 C.C.C. (3d) 443, 151 D.L.R. (4th) 119, 10 C.R. (5th) 163, 131 F.T.R. 230 (note), [1997] 3 S.C.R. 391, 40 Imm. L.R. (2d) 23, 14 C.P.C. (4th) 1, 1 Admin. L.R. (3d) 1, 218 N.R. 81 (S.C.C.) — applied

Dass v. Canada (Minister of Employment & Immigration), 32 Imm. L.R. (2d) 209, 193 N.R. 309, 107 F.T.R. 320 (note), [1996] 2 F.C. 410 (Fed. C.A.) — referred to

Dee v. Canada (Minister of Citizenship & Immigration) (1998), 46 Imm. L.R. (2d) 278 (Fed. T.D.) — referred to

Ford Motor Co. of Canada v. Ontario (Human Rights Commission) (1995), 79 O.A.C. 72, 24 C.H.R.R. D/464 (Ont. Div. Ct.) — applied

Harelkin v. University of Regina, [1979] 2 S.C.R. 561, [1979] 3 W.W.R. 676, 26 N.R. 364, 96 D.L.R. (3d) 14 (S.C.C.) — referred to

Kiani v. Canada (Minister of Citizenship & Immigration) (1999), 50 Imm. L.R. (2d) 81 (Fed. T.D.) — referred to

Kodellas v. Saskatchewan (Human Rights Commission), [1989] 5 W.W.R. 1, 10 C.H.R.R. D/6305, 60 D.L.R. (4th) 143, 77 Sask. R. 94, 89 C.L.L.C. 17,027 (Sask. C.A.) — referred to

Martineau v. Matsqui Institution (No. 2) (1979), [1980] 1 S.C.R. 602, 13 C.R. (3d) 1 (Eng.), 15 C.R. (3d) 315 (Fr.), 50 C.C.C. (2d) 353, 106 D.L.R. (3d) 385, 30 N.R. 119 (S.C.C.) — considered

Misra v. College of Physicians & Surgeons (Saskatchewan), [1988] 5 W.W.R. 333, 52 D.L.R. (4th) 477, 70 Sask. R. 116, 36 Admin. L.R. 298 (Sask. C.A.) — considered

Misra v. College of Physicians & Surgeons (Saskatchewan) (1989), 79 Sask. R. 80n (S.C.C.) — referred to

Misra v. College of Physicians & Surgeons (Saskatchewan) (January 27, 1992), Doc. 21140 (S.C.C.) — referred to

Muia v. Canada (Minister of Citizenship & Immigration) (1996), 113 F.T.R. 234 (Fed. T.D.) — referred to

Nisbett v. Manitoba (Human Rights Commission), 14 Admin. L.R. (2d) 216, [1993] 4 W.W.R. 420, 93 C.L.L.C. 17,022, 14 C.R.R. (2d) 264, 85 Man. R. (2d) 101, 41 W.A.C. 101, 101 D.L.R. (4th) 744, 18 C.H.R.R. D/504 (Man. C.A.) — referred to

Preston v. Inland Revenue Commissioners, (sub nom. *Preston, Re)* [1985] A.C. 835, [1985] 2 All E.R. 327, [1985] 2 W.L.R. 836 (U.K. H.L.) — referred to

R. v. Askov, 79 C.R. (3d) 273, 59 C.C.C. (3d) 449, 49 C.R.R. 1, 74 D.L.R. (4th) 355, 75 O.R. (2d) 673, [1990] 2 S.C.R. 1199, 113 N.R. 241, 42 O.A.C. 81 (S.C.C.) — applied

R. v. Barker (1762), 97 E.R. 823, 3 Burr. 1265 (Eng. K.B.) — referred to

R. v. Bradley, [1941] S.C.R. 270, 1 Fox Pat. C. 131, 1 C.P.R. 1, [1941] 2 D.L.R. 737 (S.C.C.) — referred to

R. v. British Columbia (Workmen's Compensation Board), [1942] 2 W.W.R. 129, 57 B.C.R. 412, [1942] 2 D.L.R. 665 (B.C. C.A.) — referred to

R. v. Chief Constable of Merseyside Police, [1986] 1 Q.B. 424 (Eng. C.A.) — referred to

R. v. Conway, [1989] 1 S.C.R. 1659, 96 N.R. 241, 34 O.A.C. 165, 49 C.C.C. (3d) 289, 70 C.R. (3d) 209, 40 C.R.R. 1 (S.C.C.) — referred to

R. v. Jewitt, [1985] 2 S.C.R. 128, [1985] 6 W.W.R. 127, 20 D.L.R. (4th) 651, 61 N.R. 159, 21 C.C.C. (3d) 7, 47 C.R. (3d) 193 (S.C.C.) — referred to

R. v. Morin, 12 C.R. (4th) 1, 71 C.C.C. (3d) 1, 134 N.R. 321, 8 C.R.R. (2d) 193, 53 O.A.C. 241, [1992] 1 S.C.R. 771 (S.C.C.) — referred to

R. v. O'Connor (1995), [1996] 2 W.W.R. 153, [1995] 4 S.C.R. 411, 44 C.R. (4th) 1, 103 C.C.C. (3d) 1, 130 D.L.R. (4th) 235, 191 N.R. 1, 68 B.C.A.C. 1, 112 W.A.C. 1, 33 C.R.R. (2d) 1 (S.C.C.) — referred to

R. v. Potvin, 23 C.R. (4th) 10, 155 N.R. 241, 83 C.C.C. (3d) 97, [1993] 2 S.C.R. 880, 16 C.R.R. (2d) 260, 105 D.L.R. (4th) 214, 66 O.A.C. 81 (S.C.C.) — referred to

R. v. Power, 2 M.V.R. (3d) 161, [1994] 1 S.C.R. 601, 89 C.C.C. (3d) 1, 117 Nfld. & P.E.I.R. 269, 365 A.P.R. 269, 165 N.R. 241, 29 C.R. (4th) 1 (S.C.C.) — referred to

R. v. Rahey, 75 N.R. 81, [1987] 1 S.C.R. 588, 39 D.L.R. (4th) 481, 78 N.S.R. (2d) 183, 33 C.C.C. (3d) 289, 57 C.R. (3d) 289, 33 C.R.R. 275, 193 A.P.R. 183 (S.C.C.) — applied

R. v. Rourke (1977), [1978] 1 S.C.R. 1021, 38 C.R.N.S. 268, [1977] 5 W.W.R. 487, 35 C.C.C. (2d) 129, 16 N.R. 181, 76 D.L.R. (3d) 193 (S.C.C.) — referred to

R. v. Secretary of State for the Home Department (1975), (sub nom. *Phansopkar, ex parte)* [1976] Q.B. 606, [1980] 2 All E.R. 735, [1975] 3 W.L.R. 302 (Eng. C.A.) — referred to

R. v. Young (1984), 46 O.R. (2d) 520, 13 C.C.C. (3d) 1, 3 O.A.C. 254, 40 C.R. (3d) 289, 10 C.R.R. 307 (Ont. C.A.) — referred to

Ratzlaff v. British Columbia (Medical Services Commission), 17 B.C.L.R. (3d) 336, 69 B.C.A.C. 217, 113 W.A.C. 217, [1996] 5 W.W.R. 532 (B.C. C.A.) — considered

Schachter v. Canada, 92 C.L.L.C. 14,036, 10 C.R.R. (2d) 1, 139 N.R. 1, 93 D.L.R. (4th) 1, 53 F.T.R. 240 (note), [1992] 2 S.C.R. 679 (S.C.C.) — referred to

Stefani v. College of Dental Surgeons (British Columbia) (1996), 27 B.C.L.R. (3d) 34, 44 Admin. L.R. (2d) 122 (B.C. S.C.) — referred to

Statutes considered by/Législation citée par *Bastarache J.* (*McLachlin C.J.C., L'Heureux-Dubé, Gonthier, Major JJ.* concurring):

Canadian Charter of Rights and Freedoms/*Charte canadienne des droits et libertés*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act1982 (U.K.), 1982, c. 11/Partie I de la Loi constitutionnelle de 1982,constituant l'annexe B de la Loi de 1982 sur le Canada (R.-U.), 1982, c. 11

Generally/en général — referred to

s. 1 — referred to

s. 7 — considered

s. 8 — referred to

s. 11(b) — considered

s. 15(1) — referred to

s. 24 — referred to

s. 24(1) — considered

s. 32(1) — considered

Criminal Code/*Code criminel*, R.S.C./L.R.C. 1970, c. C-34

s. 251 — referred to

Criminal Code/*Code criminel*, R.S.C./L.R.C. 1985, c. C-46

Generally/en général — referred to

s. 241(b) — referred to

Human Rights Act, S.B.C. 1984, c. 22

Generally — referred to

s. 13(1)(d) — pursuant to

Human Rights Code, R.S.B.C. 1996, c. 210

Generally — referred to

s. 24(1) [rep. & sub. R.S.B.C. 1996, c. 210 (Supp.), s. 3] — considered

s. 24(2) [rep. & sub. R.S.B.C. 1996, c. 210 (Supp.), s. 3] — considered

s. 24(4) [rep. & sub. R.S.B.C. 1996, c. 210 (Supp.), s. 3] — considered

s. 27 — pursuant to

Supreme Court Act/*Loi sur la cour suprême*, R.S.C./L.R.C. 1985, c. S-26

s. 47 — considered

Statutes considered by/Législation citée par *LeBel J.* (dissenting in part) (*Iacobucci, Binnie, Arbour JJ.*) concurring:

Canadian Charter of Rights and Freedoms/*Charte canadienne des droits et libertés*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act1982 (U.K.), 1982, c. 11/Partie I de la Loi constitutionnelle de 1982,constituant l'annexe B de la Loi de 1982 sur le Canada (R.-U.), 1982, c. 11

Generally/en général — referred to

s. 7 — considered

Magna Carta, 1215 (17 John)

Generally — referred to

Supreme Court Act/*Loi sur la cour suprême*, R.S.C./L.R.C. 1985, c. S-26

s. 47 — referred to

Treaties considered by/Traités cités par *LeBel J.* (dissenting in part) (*Iacobucci, Binnie, Arbour JJ.* concurring):
European Convention for the Protection of Human Rights and Fundamental Freedoms
Generally — referred to

APPEAL by Human Rights Commission from judgment reported at 31 C.H.R.R. D/175, 160 D.L.R. (4th) 303, 107 B.C.A.C. 162, 174 W.A.C. 162, 49 B.C.L.R. (3d) 216, [1998] 9 W.W.R. 457, 53 C.R.R. (2d) 189, 7 Admin. L.R. (3d) 220 (B.C. C.A.), allowing petioner's appeal from judgment reported at (1998), 30 C.H.R.R. D/439, 35 C.C.E.L. (2d) 41, 49 B.C.L.R. (3d) 201, [1999] 1 W.W.R. 139 (B.C. S.C.), dismissing petioner's application for judicial review to terminate proceedings by Human Rights Commission.

POURVOI de la Human Rights Commission à l'encontre d'un jugement publié à 31 C.H.R.R. D/175, 160 D.L.R. (4th) 303, 107 B.C.A.C. 162, 174 W.A.C. 162, 49 B.C.L.R. (3d) 216, [1998] 9 W.W.R. 457, 53 C.R.R. (2d) 189, 7 Admin. L.R. (3d) 220 (B.C. C.A.), accueillant l'appel du requérant à l'encontre du jugement, publié à (1998), 30 C.H.R.R. D/439, 35 C.C.E.L. (2d) 41, 49 B.C.L.R. (3d) 201, [1999] 1 W.W.R. 139 (B.C. S.C.), rejetant la demande du requérant en contrôle judiciaire pour obtenir l'arrêt des procédures de la Human Rights Commission.

***Bastarache J.* (*McLachlin C.J.C.*, *L'Heureux-Dubé*, *Gonthier*, *Major JJ.* concurring):**

I. Introduction

1 This case raises the issue of whether the respondent's rights to "liberty and security of the person" under s. 7 of the *Canadian Charter of Rights and Freedoms* were violated by state-caused delay in the human rights proceedings against him. In the alternative, should this Court find that s. 7 of the *Charter* was not engaged, it must be determined whether the respondent was entitled to a remedy pursuant to principles of administrative law, notwithstanding that he had not been prejudiced in his ability to respond to the complaints against him.

2 I have concluded that the respondent's rights to liberty and security of the person were not implicated in the circumstances of this case. There is therefore no need to determine whether the alleged violation was in accordance with the principles of fundamental justice. While I accept that, under administrative law principles, a denial of natural justice may occur for reasons other than procedural unfairness to the respondent, I find that there has been no denial of natural justice or abuse of process in the circumstances of this case.

II. Factual Background

3 In 1995, the respondent, Robin Blencoe, had been a member of the British Columbia legislature for 12 years. In March of that year the respondent's assistant, Fran Yanor, went public with allegations that the respondent had sexually harassed her. Following this allegation, the respondent stepped down as Minister, but remained in Cabinet pending the results of an inquiry. On April 4, 1995, Premier Harcourt removed the respondent from Cabinet and dismissed him from the New Democratic Party caucus. Subsequently, in July and August of 1995, two sexual harassment complaints were filed with the British Columbia Council of Human Rights ("Council" or "Commission") against the respondent and the provincial Crown under the *Human Rights Act*, S.B.C. 1984, c. 22 (now the *Human Rights Code*, R.S.B.C. 1996, c. 210, since January 1, 1997) (also referred to as the "Act" or the "Code") by the appellant Andrea Willis and the intervener, Irene Schell ("Complaints" or "Complaint").

4 The Complaints centered around various incidents of sexual harassment alleged to have occurred between March 1993 and March 1995. It is not necessary, for the purposes of this appeal, that I comment on the particulars of the Complaints in any detail. In brief, Ms. Willis worked as a senior clerk in the respondent's ministerial office and alleged that the respondent discriminated against her because of her sex with respect to terms and conditions of her employment, causing her to resign. The alleged incidents occurred in August 1994 and March 1995. Ms. Schell represented a government-funded sports association with which the respondent had contact in his ministerial capacity. She alleged that the respondent had discriminated against her because of her sex with respect to a service or facility

customarily available to the public. The alleged incidents occurred in March 1993 and on several occasions in July 1993 and July 1994.

5 While the events that followed in the human rights proceedings are lengthy, they nevertheless merit recitation in some detail in order to adequately address the alleged delay in the process. The following are what I consider to be the most relevant facts regarding each of the Complaints.

A. The Schell Complaint

6 The Schell Complaint dealt with conduct which allegedly occurred more than six months before the Complaint was filed. For this reason, a threshold issue of timeliness arose pursuant to s. 13(1)(d) of the Act. By letter dated July 20, 1995, the respondent's counsel was informed that the Commission was considering whether to proceed with the investigation of the Schell Complaint and that timeliness submissions should be made. Letters were sent by the respondent on July 21 and July 28, 1995, requesting particulars of the Complaint. Particulars were provided by the Commission by letter dated August 2, 1995.

7 On August 31, 1995, the respondent's counsel notified the Commission that the respondent would not provide a detailed submission on the timeliness issue until Ms. Schell discharged the onus of proving that her Complaint was filed in good faith. The Commission informed the respondent that it was not necessary for Ms. Schell to adduce further material on this matter. The respondent subsequently provided substantive submissions on the timeliness issue on September 22, 1995.

8 On November 14, 1995, the respondent was informed that the Commission had received Ms. Schell's submissions on October 11, 1995, and that the submissions of both parties were being considered. The respondent had not been forwarded a copy of Ms. Schell's submissions. Following two requests for such by Mr. Blencoe, the Commission provided him with a copy of this document on December 15, 1995, stating that the production of such document was a departure from normal procedures. On February 8, 1996, the respondent provided the Commission with a response to Ms. Schell's timeliness submissions.

9 On February 21, 1996, the respondent was informed that the Council had decided to proceed with the investigation and that he had 30 days to provide a full response to the allegations. In letters dated March 1 and March 27, 1996, the respondent requested the initial correspondence between Ms. Schell and the Commission. The respondent maintained that he would not respond to the particulars of allegation until such correspondence was produced. On April 1, 1996, the respondent was informed that such documents would not be disclosed and that the investigation would continue on the basis of existing materials if no response was received by April 10, 1996. A general denial to the allegations was given by the respondent on April 10, 1996. On June 19, 1996, the respondent received a letter from the Commission in response to his request regarding how long he would be required to wait for a hearing date. He was informed that a hearing could not be scheduled until the Commission determined that a hearing was required.

10 On September 6, 1996, the respondent was notified that an investigator had been assigned to the Schell Complaint. By letter dated November 8, 1996, the Commission wrote to the respondent, requesting a response to certain information obtained in the course of investigating the Schell Complaint. Such information was provided by the respondent on December 23, 1996. On March 4, 1997, Mr. Blencoe's counsel was provided with a copy of the investigation report and asked for a written response by April 8, 1997. Such response was given on March 27, 1997. On April 15, 1997, the respondent was provided with the submissions received from Ms. Schell in response to the investigation report. Mr. Blencoe was requested to reply by May 15, 1997. Such response was provided on May 14, 1997.

11 By letter dated July 3, 1997, the respondent was notified that the Schell Complaint would be referred to the B.C. Human Rights Tribunal ("Tribunal") for a hearing, without specifying the hearing date. That ended the involvement of the Commission in the Complaint. On September 10, 1997, the respondent was informed that the hearing was set for

March 4, 5 and 6, 1998 and a pre-hearing conference in November of 1997. The hearing was thus scheduled to take place approximately 32 months after the initial Complaint was filed.

B. The Willis Complaint

12 The respondent was informed of the Willis Complaint by letter dated September 11, 1995. The respondent challenged the timeliness of the Complaint and asked the Council to make a decision pursuant to s. 13(1)(d) of the Act. The respondent was asked to provide submissions on timeliness within 15 days of the letter dated September 21, 1995. Such submissions were provided by Mr. Blencoe on October 11, 1995 with respect to both Complaints. On December 21, 1995, the respondent was sent a copy of Ms. Willis's submissions on timeliness which were dated October 16, 1995. It was standard practice of the Council not to give respondents the complainant's response submissions.

13 On January 9, 1996, the respondent wrote to the Council, requesting that it refrain from making a decision regarding timeliness until he could reply to Ms. Willis's submissions. The respondent challenged both the timeliness of the Complaints and whether they were made in good faith. He declined to provide his response until such preliminary issues were addressed, contending that the Complaints should not be addressed at all. The Council concluded that the Complaints were timely, that there was no evidence of bad faith, and that the Complaints should be fully investigated. On January 11, 1996, the respondent was notified that the Commission was proceeding with its investigation of the Willis Complaint. The decision to proceed with this Complaint had been reached by the Council more than three weeks earlier, on December 18, 1995. The delay was said to have resulted from Council not returning the decision on timeliness file to the case management secretary and a temporary backlog in the clerical area.

14 On January 29, 1996, the respondent informed the Council that he was prepared to waive the investigation stage of the process and asked that the Council set the matter for hearing. However, this waiver was not feasible since the respondent was not prepared to concede that there was a sufficient evidentiary basis to warrant a hearing.

15 In April 1996, Mr. Blencoe's counsel inquired as to when the hearing was expected to occur. In June of 1996, he was informed that this could not be determined until the investigation was completed. The respondent was also informed that no investigator had been assigned to the Willis Complaint at that time and that there was a backlog of investigation files. By letter dated September 6, 1996, Mr. Blencoe was informed that an investigator had been assigned to the Willis Complaint. On November 8, 1996, Mr. Blencoe was asked to respond to certain information obtained during the investigation. Such response was given on December 23, 1996. On March 3, 1997, the respondent was provided with a completed investigation report and asked for written responses which were provided by the respondent on March 27, 1997. In April 1997, the respondent was sent the submissions of Ms. Willis. He replied to them on May 14, 1997.

16 On July 3, 1997, the respondent was informed that the Willis Complaint would be referred to the Tribunal for hearing. That ended the involvement of the Commission in the Complaint. On September 10, 1997, the respondent was notified that the hearing was set for March 18, 19 and 20, 1998 and a pre-hearing conference in November of 1997. The hearing was thus scheduled to take place approximately 32 months after the initial Complaint was filed.

17 Subsequent to the allegations of sex discrimination, the respondent and his family have been hounded by the media. Mr. Blencoe has suffered from severe depression and both he and his wife have sought psychological counselling. The respondent did not stand for re-election when his province went to the polls in 1996. Mr. Blencoe and his wife decided to move their family to Ontario in August 1996, in order to escape the media attention and seek employment. In May 1997, the family returned to Victoria, allegedly because they could not escape the harassment of the media which followed them to Ontario and because the respondent's wife received an excellent job offer in B.C. The respondent continues to be clinically depressed and has been prescribed medication. He was prevented from coaching his youngest son's soccer team on the grounds that the soccer association did not want him working with children. The respondent considers himself "unemployable" in B.C., due to the outstanding human rights Complaints against him.

18 On November 27, 1997, the respondent commenced proceedings for judicial review, claiming that the Commission had lost jurisdiction due to unreasonable delay in processing the human rights Complaints. The respondent alleged that the unreasonable delay caused serious prejudice to him and his family which amounted to an abuse of process and a denial of natural justice.

III. Judicial History

A. British Columbia Supreme Court (1998), 49 B.C.L.R. (3d) 201 (B.C. S.C.)

19 The respondent's application for judicial review was dismissed by Lowry J. on February 11, 1998. The question before the court was whether, given the time that had elapsed since the Complaints were first made to the Commission, personal hardship attributable to the stigma attached to the allegations justified the supervisory intervention of the court. The respondent also alleged that, because two prospective witnesses had died and the memories of other witnesses had faded, he would be unable to obtain a fair hearing. The respondent did not make an express s. 7 argument before the lower court, but relied instead on principles of natural justice, pursuant to administrative law jurisprudence and common law protections against undue delay. The respondent did however cite s. 7 jurisprudence to support his claim that the prejudice he suffered was analogous to the prejudice that justifies a stay of proceedings in the s. 7 context.

20 Lowry J. recognized that the allegations of sexual harassment had significantly affected the respondent's life and that his political career appeared to be finished. However, he added that it was difficult to determine to what extent such prejudice could be fairly attributed to any delay in the proceedings.

21 Lowry J. rejected the contention that, absent any application of the *Charter*, personal hardship attributable to unacceptable delay in an administrative process could, standing alone, constitute prejudice that entitled a respondent to prerogative relief. He held that delay will only constitute a denial of natural justice if the result of the delay is to directly prejudice the ability of an affected party to respond. He concluded that Mr. Blencoe's ability to have a fair hearing had not been prejudiced, since he was able to respond to the Complaints in an evidentiary sense.

22 Apart from an unexplained five-month period in the human rights process, Lowry J. found that there had been no extended period of inactivity in the processing of the Complaints from receipt to referral. Communication had been ongoing between the Commission, solicitors and complainants, and the respondent had not been ignored. Lowry J. thus concluded that there had been no "unacceptable delay" in the human rights process. He also noted that the respondent had not brought any of his personal hardship to the Commission's attention, nor had he requested a prioritization of the Complaints on that basis.

B. British Columbia Court of Appeal (1998), 49 B.C.L.R. (3d) 216 (B.C. C.A.)

23 Before the Court of Appeal, Mr. Blencoe expressly argued that his s. 7 rights to liberty and security of the person were violated due to the length of the delay in resolving the Complaints against him. On May 11, 1998, the Court of Appeal (McEachern C.J.B.C. and Prowse J.A. for the majority, in separate concurring reasons) allowed the appeal and directed that the human rights proceedings against the respondent be stayed. Lambert J.A., in dissent, would have upheld the judgment of the British Columbia Supreme Court.

(a) Majority Decision of McEachern C.J.B.C.

24 McEachern C.J.B.C. concluded that the undue delay and the continued prejudice to privacy and human dignity could not be in accordance with the principles of fundamental justice (para. 104). McEachern C.J.B.C. found that the delay could not be attributed to Mr. Blencoe since he was unable to identify any steps taken by the respondent to which he was not entitled in defending himself. McEachern C.J.B.C. opined that the Complaints were not complex, but were rather of the type that are "quickly resolved by courts and tribunals all the time" (para. 37), such that "a week at the outside would have sufficed" to complete the investigation (para. 51). He added (at paras. 47 and 51):

> ... a delay of over 30 months from the date of the complaints to a hearing on the merits is far too long. If Mr. Blencoe had been charged in the criminal courts with this type of sexual assault, the charge would very likely be dismissed on grounds of delay ....
>
> As I have already commented, the investigation was necessarily one-dimensional as there were no eyewitnesses, and a week at the outside would have sufficed.

25 Turning to the issue of prejudice, McEachern C.J.B.C. found that but for these proceedings, "it might reasonably be expected that the overwhelming [media] attention would have died away and [Blencoe] and his family could have attempted to reconstruct their lives" (para. 53). McEachern C.J.B.C. considered the contention that the prejudice suffered by the respondent was not caused by the delay, but rather by his dismissal from Cabinet. In this connection the Chief Justice held that the Supreme Court of Canada has elevated the "exacerbation" of an existing deprivation to the same level as the creation of the deprivation itself. He held that the excessive delay both created a substantial stigma against the accused and exacerbated an existing state of affairs, thus triggering the s. 7 right to security of the person.

26 McEachern C.J.B.C. noted that the jurisprudence surrounding the application of s. 7 in a non-penal context was "fraught with considerable difficulty" (para. 60). He identified two competing streams of jurisprudence as to the scope of s. 7 in the Supreme Court. First, McEachern C.J.B.C. described what he referred to as the "judicial domain" school, which limits s. 7 protection to criminal proceedings. This approach was then contrasted with a broader approach to s. 7 which protects an individual's right to "human dignity" and "privacy" outside the arena of criminal proceedings. McEachern C.J.B.C. adopted the more expansive approach (at para. 101):

> ... I feel constrained to follow what I regard as the emerging, preferred view in the Supreme Court of Canada that s. 7, under the rubric of liberty and security of the person, operates to protect both the privacy and dignity of citizens against the stigma of undue, prolonged humiliation and public degradation of the kind suffered by [Blencoe]. Everyone can be made answerable, according to law, for his or her conduct or misconduct, but a process established by law to provide accountability and appropriate remedies cannot be completely open-ended in the sense that human dignity, even for wrongdoers if such is the case, can be compromised for as long as it has occurred in this case.

(b) Concurring Majority Judgment of Prowse J.A.

27 Prowse J.A. held that the allegations in this case were analogous to allegations of sexual assault and thus engaged s. 7 of the *Charter*. Having regard to the nature of the allegations and the extent of the prejudice suffered by Mr. Blencoe, she agreed with McEachern C.J.B.C. that the delay of over 30 months was unreasonable and breached the respondent's right to security of the person in a manner not in accordance with the principles of fundamental justice.

(c) Dissenting Reasons of Lambert J.A.

28 In determining whether the delay was unacceptable, for the purposes of an assessment of natural justice, Lambert J.A. held that such decision was an issue of fact which was decided by the lower court. Consequently, he stated that Lowry J.'s decision should only be interfered with if there was a misconception of the evidence or if the decision was palpably wrong, neither of which had occurred in this case. On the legal question of which sorts of prejudice affect natural justice, Lambert J.A. agreed with Lowry J. that prejudice arising from delay must go to the intrinsic fairness of the hearing process and not merely to extrinsic factors such as stigma, stress or other forms of suffering.

29 Turning to the *Charter* issue, Lambert J.A. found it unnecessary to decide whether s. 7 of the *Charter* applies to non-criminal proceedings or whether suffering induced by stigmatization, stress and disruption of family life can constitute a deprivation of liberty or security of the person in the human rights context. He found that the stigma suffered by Mr. Blencoe, the stress and anxiety related thereto, the media publicity, and Mr. Blencoe's lack of employment, could not be attributed to the human rights process, nor were they exacerbated by a breach of the principles of fundamental justice. Lambert J.A. emphasized that Mr. Blencoe's rights and expectations had to be balanced against those of the two

complainants, in the context of the public interest in upholding an effective human rights process. Concluding that the principles of fundamental justice arising in the human rights process were not breached, Lambert J.A. would have found that the respondent was not entitled to relief under ss. 7 and 24 of the *Charter*.

IV. Relevant Constitutional Provisions

30 *Canadian Charter of Rights and Freedoms*

> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> **11.** Any person charged with an offence has the right
>
> (*b*) to be tried within a reasonable time;
>
> **24.** (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> **32.** (1) This Charter applies
>
> (*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

V. Issues

31 The following are the central issues to be determined for the disposition of this appeal:

1. Does the *Charter* apply to the actions of the B.C. Human Rights Commission?

2. Have the respondent's s. 7 rights to liberty and security of the person been violated by state-caused delay in the human rights proceedings?

3. If the respondent's s. 7 rights were not engaged, or if the state's actions were in accordance with the principles of fundamental justice, was the respondent entitled to a remedy pursuant to administrative law principles where the delay did not interfere with the right to a fair hearing?

4. If the respondent is entitled to a *Charter* or administrative law remedy, was the stay of proceedings an appropriate remedy in the circumstances of this case?

VI. Analysis

A. Does the *Charter* Apply to the Actions of the B.C. Human Rights Commission?

32 The scope of the *Charter's* application is delineated by s. 32(1) of the *Charter* which states:

> **32.** (1) This Charter applies
>
> (*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

> (*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

It is clear that both the federal Parliament and provincial legislatures are bound by the *Charter*. However, one threshold issue which has been raised in this case is whether the Commission and the Tribunal are agents of government pursuant to s. 32 of the *Charter*. The following three factors have been put forth to support the argument that these bodies are not bound by the *Charter*: (i) the organizations in question are required to be independent of government; (ii) the challenge in this case is not to any statutory provisions that might be said to be within the legislative sphere; and (iii) the organizations in question must act judicially since their functions are analogous to those exercised by courts of law.

33 For the reasons I address below, these claims are misguided with respect to their approach to the application of the *Charter*. Furthermore, for the purposes of this appeal, it is only necessary to address the *Charter's* applicability to the actions of the Commission since the prejudice suffered by the respondent is alleged to have resulted from unreasonable delay in the actions of the Commission.

34 The mere fact that a body is independent of government is not determinative of the *Charter's* application, nor is the fact that a statutory provision is not impugned. Being autonomous or independent from government is not a conclusive basis upon which to hold that the *Charter* does not apply.

35 Bodies exercising statutory authority are bound by the *Charter* even though they may be independent of government. This was confirmed by La Forest J., speaking for a unanimous Court in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 (S.C.C.), at para. 21:

> There is no doubt, however, that the *Charter* also applies to action taken under statutory authority. The rationale for this rule flows inexorably from the logical structure of s. 32. As Professor Hogg explains in his *Constitutional Law of Canada* (3rd ed. 1992 (loose-leaf)), vol. 1, at pp. 34-8.3 and 34-9:
>
> > Action taken under statutory authority is valid only if it is within the scope of that authority. Since neither Parliament nor a Legislature can itself pass a law in breach of the Charter, neither body can authorize action which would be in breach of the Charter. Thus, the limitations on statutory authority which are imposed by the Charter will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority.

There is no doubt that the Commission is created by statute and that all of its actions are taken pursuant to statutory authority.

36 One distinctive feature of actions taken under statutory authority is that they involve a power of compulsion not possessed by private individuals (P.W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at p. 34-12). Clearly the Commission possesses more extensive powers than a natural person. The Commission's authority is not derived from the consent of the parties. The *Human Rights Code* grants various powers to the Commission to both investigate complaints and decide how to deal with such complaints. Section 24 of the Code specifically allows the Commissioner to compel the production of documents. The relevant portions of this section state:

> **24** (1) For the purpose of investigating a complaint, the commissioner of investigation and mediation or a human rights officer may
>
> > (a) require the production of books, documents, correspondence or other records that relate or may relate to the complaint, and
> >
> > (b) make any inquiry relating to the complaint of any person, in writing or orally.

(2) If a person refuses to

(a) comply with a demand under subsection (1) (a) for the production of books, documents, correspondence or other records, or

(b) respond to an inquiry made under subsection (1) (b),

the commissioner of investigation and mediation or a human rights officer may apply to the Supreme Court for an order requiring the person to comply with the demand or respond to the inquiry.

(4) For the purpose of investigating a complaint, the commissioner of investigation and mediation or a human rights officer may, with the consent of the owner or occupier, enter and inspect any premises that in the opinion of that commissioner or the human rights officer may provide information relating to the complaint. ...

37 The Commission in this case cannot therefore escape *Charter* scrutiny merely because it is not part of government or controlled by government. In *Eldridge*, a unanimous Court concluded that a hospital was bound by the *Charter* since it was implementing a specific government policy or program. The Commission in this case is both implementing a specific government program and exercising powers of statutory compulsion.

38 With respect to the claim that the Commission exercises judicial functions and is thereby not subject to the *Charter*, the decision of this Court in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 (S.C.C.), is conclusive. Lamer J. (as he then was), in partial dissent but speaking for a unanimous Court on this point, held that the Charter applies to the orders of a statutorily appointed labour arbitrator. This determination was not open to challenge, as expressed by Lamer J., at pp. 1077-78:

> The fact that the *Charter* applies to the order made by the adjudicator in the case at bar is not, in my opinion, open to question. The adjudicator is a statutory creature: he is appointed pursuant to a legislative provision and derives all his powers from the statute. [Emphasis added.]

39 The facts in *Slaight* and the case at bar share at least one salient feature: the labour arbitrator (in *Slaight*) and the Commission (in the case at bar) each exercise governmental powers conferred upon them by a legislative body. The ultimate source of authority in each of these cases is government. All of the Commission's powers are derived from the statute. The Commission is carrying out the legislative scheme of the *Human Rights Code*. It is putting into place a government program or a specific statutory scheme established by government to implement government policy (see *Eldridge*, *supra*, at paras. 37 and 44, and *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570 (S.C.C.), at p. 584). The Commission must act within the limits of its enabling statute. There is clearly a "governmental quality" to the functions of a human rights commission which is created by government to promote equality in society generally.

40 Thus, notwithstanding that the Commission may have adjudicatory characteristics, it is a statutory creature and its actions fall under the authority of the *Human Rights Code*. The state has instituted an administrative structure, through a legislative scheme, to effectuate a governmental program to provide redress against discrimination. It is the administration of a governmental program that calls for *Charter* scrutiny. Once a complaint is brought before the Commission, the subsequent administrative proceedings must comply with the *Charter*. These entities are subject to *Charter* scrutiny in the performance of their functions just as government would be in like circumstances. To hold otherwise would allow the legislative branch to circumvent the *Charter* by establishing statutory bodies that are immune to *Charter* scrutiny. The above analysis leads inexorably to the conclusion that the *Charter* applies to the actions of the Commission.

B. Have the Respondent's Section 7 Rights to Liberty and Security of the Person Been Violated by State-caused Delay in Human Rights Proceedings?

(a) Court of Appeal Decisions on This Issue

41 Four appellate courts have dealt with the issue of whether s. 7 of the *Charter* applies in circumstances similar to the case at bar, including the decision under appeal. The majority of the Court of Appeal in *Blencoe* followed the decision in *Kodellas v. Saskatchewan (Human Rights Commission)* (1989), 60 D.L.R. (4th) 143 (Sask. C.A.), to hold that s. 7 of the *Charter* was violated. However, the Manitoba Court of Appeal in *Nisbett v. Manitoba (Human Rights Commission)* (1993), 101 D.L.R. (4th) 744 (Man. C.A.), and the Federal Court of Appeal in *Belloni v. Canadian Airlines International Ltd.* (1995), [1996] 1 F.C. 638 (Fed. C.A.), refused to follow *Kodellas*, holding that s. 7 cannot be applied to the consequences of delays in human rights proceedings.

42 In *Kodellas*, between the date of the first complaint and the date fixed for the hearing, almost four years had elapsed and three years and two months had elapsed with respect to the second complaint. Bayda C.J.S., dissenting in part with respect to the appropriate remedy, held that the delay violated Mr. Kodellas's s. 7 security of the person. In reaching this conclusion, Bayda C.J.S. referred to the dissenting judgment of Lamer J. in *R. v. Mills*, [1986] 1 S.C.R. 863 (S.C.C.) (hereinafter "*Mills* (1986)"), at p. 919, and reiterated in *R. v. Rahey*, [1987] 1 S.C.R. 588 (S.C.C.), at p. 605, where, in the context of s. 11(*b*) of the *Charter*, security of the person encompasses protection against "overlong subjection to the vexations and vicissitudes of a pending criminal accusation" (*Kodellas*, at p. 152). The unreasonable delay in *Kodellas* was found to result in two forms of prejudice to Mr. Kodellas. First, it extended his psychological trauma. Second, it reduced Mr. Kodellas's chances of a fair hearing (*Kodellas*, at p. 161).

43 In *Nisbett*, the Manitoba Court of Appeal denied relief sought by a medical doctor to prohibit the hearing of his employee's complaint of sexual harassment that had been outstanding for over three years. This decision was reached despite the stigma attached to the allegations which was described as "anxiety, the strain on family life, the disruption of his professional practice, the quest for evidence of similar conduct from former employees, the damage to his personal dignity and professional standing, the loss of self-esteem, and the continuing uncertainty as to the final outcome of the proceedings" (*Nisbett*, at p. 749). The Manitoba Court of Appeal refused to follow *Kodellas*, questioning whether the impact of a criminal proceeding for sexual assault can be equated with a human rights proceeding on allegations of sex discrimination for the purposes of s. 7. The Court of Appeal concluded that s. 7 had no application to non-penal proceedings under human rights legislation and that s. 11 of the *Charter* was restricted to criminal cases.

44 In *Canadian Airlines*, there was a 50-month delay between the filing of the complaint and the appointment of a tribunal to investigate. The Federal Court of Appeal also refused to follow *Kodellas*, and concluded that s. 7 did not apply to administrative proceedings of a non-criminal nature.

(b) Applicability of Section 7 Outside the Criminal Context

45 Although there have been some decisions of this Court which may have supported the position that s. 7 of the *Charter* is restricted to the sphere of criminal law, there is no longer any doubt that s. 7 of the *Charter* is not confined to the penal context. This was most recently affirmed by this Court in *New Brunswick (Minister of Health & Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 (S.C.C.), where Lamer C.J. stated that the protection of security of the person extends beyond the criminal law (at para. 58). He later added (at para. 65):

> ... s. 7 is not limited solely to purely criminal or penal matters. There are other ways in which the government, in the course of the administration of justice, can deprive a person of their s. 7 rights to liberty and security of the person, i.e., civil committal to a mental institution: see *B. (R.), supra*, at para. 22.

46 Thus, to the extent that the above decisions of *Nisbett* and *Canadian Airlines* stand for the proposition that s. 7 can never apply outside the criminal realm, they are incorrect. Section 7 can extend beyond the sphere of criminal law, at least where there is "state action which directly engages the justice system and its administration" (*G. (J.)*, at para. 66). If a case arises in the human rights context which, on its facts, meets the usual s. 7 threshold requirements, there is no specific bar against such a claim and s. 7 may be engaged. The question to be addressed, however, is not whether delays in human rights proceedings *can* engage s. 7 of the *Charter* but rather, whether the respondent's s. 7 rights were actually

engaged by delays in the circumstances of this case. Various parties in this case seem to have conflated the delay issue with the threshold s. 7 issue. However, whether the respondent's s. 7 rights to life, liberty and security of the person are engaged is a separate issue from whether the delay itself was unreasonable. I will now examine whether the s. 7 threshold requirements have been met and whether the respondent has demonstrated a breach of his s. 7 rights.

(c) Section 7 — General Principles

47 Section 7 of the *Charter* provides that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Thus, before it is even possible to address the issue of whether the respondent's s. 7 rights were infringed in a manner not in accordance with the principles of fundamental justice, one must first establish that the interest in respect of which the respondent asserted his claim falls within the ambit of s. 7. These two steps in the s. 7 analysis have been set out by La Forest J. in *R. v. Beare*, [1988] 2 S.C.R. 387 (S.C.C.), at p. 401, as follows:

> To trigger its operation there must first be a finding that there has been a deprivation of the right to "life, liberty and security of the person" and, secondly, that the deprivation is contrary to the principles of fundamental justice.

Thus, if no interest in the respondent's life, liberty or security of the person is implicated, the s. 7 analysis stops there. It is at the first stage in the s. 7 analysis that I have the greatest problem with the respondent's s. 7 arguments.

48 McEachern C.J.B.C. collapsed the s. 7 interests of "liberty" and "security of the person" into a single right protecting a person's dignity against the stigma of undue, prolonged humiliation and public degradation of the kind suffered by the respondent. In *Singh v. Canada (Minister of Employment & Immigration)*, [1985] 1 S.C.R. 177 (S.C.C.), at pp. 204-5, Wilson J. emphasized that "life, liberty and security of the person" are three distinct interests, and that it is incumbent on the Court to give meaning to each of these elements. This statement was endorsed by Lamer J. for a majority of this Court in *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486 (S.C.C.), at p. 500. In addressing the issue of whether the respondent's s. 7 rights have been breached in this case, I also prefer to keep the interests protected by s. 7 analytically distinct to the extent possible. For the purposes of this appeal, the outcome is dependent upon the meaning to be given to the interests of "liberty" and "security of the person".

(d) Liberty Interest

49 The liberty interest protected by s. 7 of the *Charter* is no longer restricted to mere freedom from physical restraint. Members of this Court have found that "liberty" is engaged where state compulsions or prohibitions affect important and fundamental life choices. This applies for example where persons are compelled to appear at a particular time and place for fingerprinting (*Beare*, *supra*); to produce documents or testify (*Thomson Newspapers Ltd. v. Canada (Director of Investigation & Research)*, [1990] 1 S.C.R. 425 (S.C.C.)); and not to loiter in particular areas (*R. v. Heywood*, [1994] 3 S.C.R. 761 (S.C.C.)). In our free and democratic society, individuals are entitled to make decisions of fundamental importance free from state interference. In *B. (R.) v. Children's Aid Society of Metropolitan Toronto* (1994), [1995] 1 S.C.R. 315 (S.C.C.), at p. 368, La Forest J., with whom L'Heureux-Dubé, Gonthier and McLachlin JJ. agreed, emphasized that the liberty interest protected by s. 7 must be interpreted broadly and in accordance with the principles and values underlying the *Charter* as a whole and that it protects an individual's personal autonomy:

> ... liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance.

50 In *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (S.C.C.), Wilson J., speaking for herself alone, was of the opinion that s. 251 of the *Criminal Code* violated not only a woman's right to security of the person but her s. 7 liberty interest as well. She indicated that the liberty interest is rooted in fundamental notions of human dignity, personal autonomy, privacy and choice in decisions regarding an individual's fundamental being. She conveyed this as follows, at p. 166:

> Thus, an aspect of the respect for human dignity on which the *Charter* is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty, as was noted in *Singh*, is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.

The above passage was endorsed by La Forest J. in *B. (R.), supra*, at para. 80. This Court in *B. (R.)* was asked to decide whether the s. 7 liberty interest protects the rights of parents to choose medical treatment for their children. The above passage from Wilson J. was applied by La Forest J. to individual interests of fundamental importance in our society such as the parental interest in caring for one's children.

51 In *Godbout c. Longueuil (Ville)*, [1997] 3 S.C.R. 844 (S.C.C.), at para. 66, La Forest J., writing for L'Heureux-Dubé J. and McLachlin J. (as she then was), reiterated his position that the right to liberty in s. 7 protects the individual's right to make inherently private choices and that choosing where to establish one's home is one such inherently personal choice:

> The foregoing discussion serves simply to reiterate my general view that the right to liberty enshrined in s. 7 of the *Charter* protects within its ambit the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference. I must emphasize here that, as the tenor of my comments in *B. (R.)* should indicate, I do not by any means regard this sphere of autonomy as being so wide as to encompass any and all decisions that individuals might make in conducting their affairs. Indeed, such a view would run contrary to the basic idea, expressed both at the outset of these reasons and in my reasons in *B. (R.)*, that individuals cannot, in any organized society, be guaranteed an unbridled freedom to do whatever they please. Moreover, I do not even consider that the sphere of autonomy includes within its scope every matter that might, however vaguely, be described as "private". Rather, as I see it, the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence. As I have already explained, I took the view in *B. (R.)* that parental decisions respecting the medical care provided to their children fall within this narrow class of inherently personal matters. In my view, choosing where to establish one's home is, likewise, a quintessentially private decision going to the very heart of personal or individual autonomy. [Emphasis added.]

La Forest J. therefore spoke in *Godbout* of a narrow sphere of inherently personal decision-making deserving of the law's protection. Choosing where to establish one's home fell within that narrow class according to three members of this Court.

52 Dissenting at the New Brunswick Court of Appeal in *G. (J.)*, I also favoured a more generous approach to the liberty interest that would protect personal rights that are inherent to the individual and consistent with the essential values of our society (*New Brunswick (Minister of Health & Community Services) v. G. (J.)* (1997), 187 N.B.R. (2d) 81 (N.B. C.A.), at para. 49). In this vein, the parental interest in raising and caring for one's children would be protected. I however agreed with La Forest J.'s caution that the liberty interest would encompass only those decisions that are of fundamental importance.

53 Professor Hogg, *supra*, at p. 44-9, supports a more cautious approach to the interpretation of s. 7 such that s. 7 does not become a residual right which envelopes all of the legal rights in the *Charter*. Professor Hogg also addresses the deliberate omission of "property" from "life, liberty and security of the person" in s. 7, and states, at p. 44-12:

> It also requires ... that those terms [liberty and security of the person] be interpreted as excluding economic liberty and economic security; otherwise, property, having been shut out of the front door, would enter by the back.

54 Although an individual has the right to make fundamental personal choices free from state interference, such personal autonomy is not synonymous with unconstrained freedom. In the circumstances of this case, the state has not

prevented the respondent from making any "fundamental personal choices". The interests sought to be protected in this case do not in my opinion fall within the "liberty" interest protected by s. 7.

(e) Security of the Person

55 In the criminal context, this Court has held that state interference with bodily integrity and serious state-imposed psychological stress constitute a breach of an individual's security of the person. In this context, security of the person has been held to protect both the physical and psychological integrity of the individual (*Morgentaler*, *supra*, at p. 56, *per* Dickson C.J., and at p. 173, *per* Wilson J.; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 (S.C.C.), at p. 587, *per* Sopinka J.; *Reference re ss. 193 & 195.1(1)(c) of the Criminal Code (Canada)*, [1990] 1 S.C.R. 1123 (S.C.C.), at p. 1177, *per* Lamer J.). These decisions relate to situations where the state has taken steps to interfere, through criminal legislation, with personal autonomy and a person's ability to control his or her own physical or psychological integrity such as prohibiting assisted suicide and regulating abortion.

56 The principle that the right to security of the person encompasses serious state-imposed psychological stress has recently been reiterated by this Court in *G. (J.)*, *supra*. At issue in *G. (J.)* was whether relieving a parent of the custody of his or her children restricts a parent's right to security of the person. Lamer C.J. held that the parental interest in raising one's children is one of fundamental personal importance. State removal of a child from parental custody thus constitutes direct state interference with the psychological integrity of the parent, amounting to a "gross intrusion" into the private and intimate sphere of the parent-child relationship (at para. 61). Lamer C.J. concluded that s. 7 guarantees every parent the right to a fair hearing where the state seeks to obtain custody of their children (at para. 55). However, the former Chief Justice also set boundaries in *G. (J.)* for cases where one's psychological integrity is infringed upon. He referred to the attempt to delineate such boundaries as "an inexact science" (para. 59).

57 Not all state interference with an individual's psychological integrity will engage s. 7. Where the psychological integrity of a person is at issue, security of the person is restricted to "serious state-imposed psychological stress" (Dickson C.J. in *Morgentaler*, *supra*, at p. 56). I think Lamer C.J. was correct in his assertion that Dickson C.J. was seeking to convey something qualitative about the type of state interference that would rise to the level of infringing s. 7 (*G. (J.)*, at para. 59). The words "serious state-imposed psychological stress" delineate two requirements that must be met in order for security of the person to be triggered. First, the psychological harm must be *state imposed*, meaning that the harm must result from the actions of the state. Second, the psychological prejudice must be *serious*. Not all forms of psychological prejudice caused by government will lead to automatic s. 7 violations. These two requirements will be examined in turn.

(i) Was the Harm to Mr. Blencoe the Result of State-Caused Delay in the Human Rights Process?

58 In *G. (J.)*, Lamer C.J. found direct state interference with the psychological integrity of the parent, describing the government action in that case as "direct state interference with the parent-child relationship" (para. 61). Later, at para. 66, Lamer C.J. referred to a child custody application as "an example of state action which *directly engages* the justice system and its administration" (emphasis added). He stressed that not every state action which interferes with the parent-child relationship would have triggered s. 7.

59 Stress, anxiety and stigma may arise from any criminal trial, human rights allegation, or even a civil action, regardless of whether the trial or process occurs within a reasonable time. We are therefore not concerned in this case with all such prejudice but only that impairment which can be said to flow from the delay in the human rights process. It would be inappropriate to hold government accountable for harms that are brought about by third parties who are not in any sense acting as agents of the state.

60 While it is incontrovertible that the respondent has suffered serious prejudice in connection with the allegations of sexual harassment against him, there must be a sufficient causal connection between the state-caused delay and the prejudice suffered by the respondent for s. 7 to be triggered. In *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.), at p. 447, Dickson J. (as he then was) concluded that the causal link between the actions of government and

the alleged *Charter* violation was too "uncertain, speculative and hypothetical to sustain a cause of action". In separate concurring reasons, Wilson J. also conveyed the need to have some type of direct causation between the actions of the state and the resulting deprivation. She stated, at p. 490:

> It is not necessary to accept the restrictive interpretation advanced by Pratte J., which would limit s. 7 to protection against arbitrary arrest or detention, in order to agree that the central concern of the section is direct impingement by government upon the life, liberty and personal security of individual citizens. At the very least, it seems to me, there must be a strong presumption that governmental action which concerns the relations of the state with other states, and which is therefore not directed at any member of the immediate political community, was never intended to be caught by s. 7 even although such action may have the incidental effect of increasing the risk of death or injury that individuals generally have to face. [Emphasis added.]

61 The appellants submit that the nexus between the harm to the respondent and the alleged delay in processing the Complaints is remote. They assert that the largest measure of prejudice to Mr. Blencoe resulted not from any delay but from the publicity surrounding the events, especially his dismissal from Cabinet and later from the NDP caucus. They add that the respondent himself fought the allegations against him in the public domain. For the reasons I set out below, I also have doubts whether, on the facts, the psychological harm suffered by the respondent can be seen as the result of state-caused delay in the human rights process.

62 On March 1, 1995, the respondent was informed by Premier Harcourt that his former assistant, Fran Yanor, made sexual harassment allegations against him. This allegation was made public one week later. On March 9, 1995, Mr. Blencoe stepped down as Minister but remained in Cabinet, pending the results of an inquiry. He issued a press release, "vehemently denying the harassment allegations". On March 10, 1995, the national and provincial press began running stories about the respondent's resignation and allegations against him by Ms. Yanor and two other women. On April 4, 1995, Premier Harcourt removed the respondent from Cabinet and dismissed him from the NDP caucus.

63 While the respondent was only notified of the Schell and Willis Complaints in July and September of 1995, the record demonstrates that Mr. Blencoe had suffered the following prejudice or "stigmatization" prior to that time: Mr. Blencoe and his family were hounded by the media from the time that the Yanor harassment allegations were made public; the respondent and his wife feared press leaks and stopped speaking to persons outside their close circle of family and friends; Mr. Blencoe's children were subjected to insults and name-calling at school; and Mr. Blencoe was under the care of a physician and was prescribed antidepressants by April of 1995. The respondent himself admits that from mid-March 1995 until August 1995, he was "extremely unwell". From April 11, 1995, to September 7, 1995, the respondent was on medical leave from the legislature. In the Fall of 1995, Mr. Blencoe considered whether to run in the upcoming election. Since he suspected that Premier Harcourt would refuse to sign his nomination papers, he decided not to seek the NDP nomination in his riding and resigned from the party on December 29, 1995. All of these events had occurred prior to any delays in the proceedings.

64 There is no question that the respondent's life and that of his family have been terribly affected by the allegations of sexual harassment against him. His political career appears to be finished and, as professed by Lowry J., "the impact on his family of what has seemed at times an unrelenting media coverage has been traumatic" (para. 12). The respondent attributes this prejudice to the delay in the human rights proceedings. McEachern C.J.B.C. agreed, stating (at para. 53) that:

> There can be no doubt that the Appellant was severely wounded by the publicity surrounding his dismissal from the Cabinet. Such is the price of public life. But for these proceedings, however, it might reasonably be expected that the overwhelming attention would have died away and [Blencoe] and his family could have attempted to reconstruct their lives. [Emphasis added.]

With respect, I cannot agree with McEachern C.J.B.C.'s speculation that the respondent would have been able to reconstruct his life *but for* the proceedings (or I should say, *delay* in the proceedings). A higher level of certainty is required

than "might reasonably be expected" in order to find that government has caused a deprivation of an individual's *Charter* rights.

65 Based on the above facts, the Willis and Schell allegations were clearly not the first events in the sexual harassment claims against the respondent. Lambert J.A. asserted that "the human rights process started with the complaints in *April, 1995*" (para. 5 (emphasis in original)). Based on the record, however, it is clear that the Willis and Schell Complaints were only filed with the Commission in July and August of that year. The respondent himself asserts that the complaints to the Premier's office are what resulted in his removal from Cabinet and caucus. He makes this assertion to support his contention that the date from which the delay should be computed should pre-date the official Complaints to the Commission. This argument rather undermines the respondent's assertion that the state caused his prejudice. The central event leading to the intense media scrutiny was the dismissal of the respondent from Cabinet and caucus in April of 1995, following the allegations of Fran Yanor. At that time, there had been no complaints to the Commission. The Yanor allegations are thus more closely tied to the dismissal from Cabinet, and consequently the stigma. I therefore find that the most prejudicial impact on Mr. Blencoe was caused not by the actions of the Commission but rather by the events prior to the Complaints which caused the respondent to be ousted from Cabinet and caucus as well as the result of actions by non-governmental actors such as the press, employers and a soccer association. The harm to the respondent resulted from the publicity surrounding the allegations themselves coupled with the political fall-out which ensued rather than any delay in the human rights proceedings which had yet to commence at the time that the respondent began to experience stigma.

66 Lambert J.A. rejected the connection between the delay and the prejudice. Although recognizing that the respondent and his family had suffered dreadfully, Lambert J.A. found that "[n]one of that stigma was brought about by the processes under the *Human Rights Act* or the *Human Rights Code*. Nor, in my opinion, was it much exacerbated by those processes" (para. 29). Lambert J.A. was also of the opinion that the stigma would not come to an end after the Tribunal had made its decision, "no matter the content of that decision" (para. 29).

67 I am in agreement with Lowry J. and Lambert J.A. on this issue. My understanding is that there remains a civil suit pending against Mr. Blencoe for sexual harassment and that Ms. Willis's Complaint against the Government on these very same issues has not been stayed. The prolongation of stigma from this ongoing publicity was therefore likely regardless of the delay in the human rights proceedings. At best, the respondent was deprived of a speedy opportunity to clear his name.

68 While I conclude that the delay in the human rights process was not the direct cause of the respondent's prejudice, another question which arises is whether it exacerbated his prejudice. According to McEachern C.J.B.C., the excessive delay in the human rights proceedings both created a stigma against Mr. Blencoe and *exacerbated* an existing prejudice, which, according to the majority of the Court of Appeal, is tantamount to the creation of the prejudice itself. McEachern C.J.B.C. relied on the decision of this Court in *Rodriguez*, *supra*, to find that the Commission's exacerbation of the deprivation of security of the person that Mr. Blencoe suffered at the hands of the media, triggered s. 7 (at para. 56). The respondent similarly argues that the delay exacerbated the stigmatization, claiming that additional media stories surfaced each time there was a new development in the processing of the Complaints. He relies on this Court's decision in *Morgentaler*, *supra*, to support the position that it is sufficient if the delay is "a contributing cause" of the prejudice.

69 First, with respect to this "contributing cause" argument, I find it very difficult to equate the situations in *Rodriguez* and *Morgentaler* with that in the case at bar. In *Rodriguez*, the Crown had erroneously characterized Mrs. Rodriguez's deprivation of security of the person as caused not by government but by her physical disabilities. In rejecting that argument, Sopinka J. held that the *Criminal Code* prohibition at s. 241(*b*) would contribute to Mrs. Rodriguez's distress if she was prevented from managing her death (p. 584). A *Criminal Code* prohibition therefore directly deprived Mrs. Rodriguez of the ability to terminate her life. The Court in *Rodriguez* surely did not eliminate the need to establish a relationship between the harm complained of and the state action. In *Rodriguez*, all of the members of the Court agreed that government actions deprived Mrs. Rodriguez of the right to terminate her life at the time of her choosing. In the absence of government involvement, Mrs. Rodriguez would not have suffered a deprivation of her s. 7 rights. The same cannot be said of the facts in the case at bar.

70 In the same vein, the *Morgentaler* case dealt with direct state interference with a woman's bodily integrity in that the delays in obtaining therapeutic abortions were caused by the mandatory procedures in s. 251 of the *Criminal Code* and resulted in a higher probability of complications and greater health risks to women. In that case, it could not have been argued that the cause of the deprivation is a woman's pregnancy rather than the *Criminal Code* prohibition. The decisions in *Morgentaler* and *Rodriguez* do not, in my opinion, obviate the need to establish a significant connection between the harm and the impugned state action to invoke the *Charter*.

71 Moreover, even accepting this exacerbation argument, it is difficult to see how the respondent's prejudice was seriously exacerbated by the delays. In the absence of delays in the proceedings, the respondent would nevertheless have faced unproven allegations of sexual harassment and discrimination and suffered stigma as a result. It is thus clear that the respondent's reputation was harmed prior to the filing of the Complaints with the Commission. The delays in the proceedings could only have extended the time that rumours were circulating. As previously mentioned, the continuation of the concurrent complaint and civil action must also be considered. As professed by L'Heureux-Dubé J. in *R. v. O'Connor*, [1995] 4 S.C.R. 411 (S.C.C.), at para. 119, with respect to privacy, "once invaded, it can seldom be regained". Much the same is true of reputation; it is quickly ruined and difficult to re-establish. It is thus difficult to see how procedural delay could have seriously increased the damage to the respondent's reputation that had already been done. The true prejudice to the respondent in this case may only be the lost opportunity to clear his name rapidly.

72 At trial, Lowry J. made the following finding concerning the cause of Mr. Blencoe's suffering (at para. 13):

> The stigma attached to the outstanding complaints has certainly contributed in large measure to the very real hardship Mr. Blencoe has experienced. His public profile as a Minister of the Crown rendered him particularly vulnerable to the media attention that has been focused on him and his family, and the hardship has, in the result, been protracted and severe.

73 Perhaps this statement supports the view that the outstanding Complaints did contribute to the stigma to some degree and that it was therefore a cause of the respondent's suffering. Because I find in the next section that the state has not directly intruded into a private and intimate sphere of the respondent's life, I assume without deciding that there is a sufficient nexus between the state-caused delay and the prejudice to Mr. Blencoe. I now turn to the question of whether this interference amounts to a violation of the respondent's security of the person.

(ii) Quality of the Interference

74 McEachern C.J.B.C. concluded that liberty and security of the person under s. 7 protect both the privacy and dignity of individuals against the stigma of undue, prolonged humiliation and public degradation of the kind suffered by Mr. Blencoe (at para. 101). He therefore conflated s. 7 into a general right to dignity and protection against the stigma of undue, prolonged humiliation and public degradation suffered as a result of an administrative proceeding. The question which arises is whether the rights of "liberty and security of the person" protected by s. 7 of the *Charter* include a generalized right to dignity, or more specifically, a right to be free from stigma associated with a human rights complaint? In my opinion, they do not.

75 The "right to dignity" accepted by McEachern C.J.B.C. essentially rests on several ideas. First, it is based on previous statements by this Court as to the importance and value of dignity. Second, it is based on the recognition in cases such as *Morgentaler* and *O'Connor* that state-induced psychological stress can infringe s. 7. Third, McEachern C.J.B.C. imports the notion of "stigma" as developed under s. 11(*b*) of the *Charter* in the criminal law context. Each of these bases for a generalized right to dignity under s. 7 will be addressed in turn.

1. Dignity

76 The *Charter* and the rights it guarantees are inextricably bound to concepts of human dignity. Indeed, notions of human dignity underlie almost every right guaranteed by the *Charter* (*Morgentaler*, *supra*, at pp. 164-66, *per* Wilson J.). As professed by Dickson C.J. in his discussion of s. 1 of the *Charter* in *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.), at p. 136:

> The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified. [Emphasis added.]

77 In *Rodriguez*, *supra*, Sopinka J. states that it is unquestioned that respect for human dignity is an underlying principle upon which our society is based (at p. 592). In *O'Connor*, *supra*, at para. 63, L'Heureux-Dubé J. states that, "[t]his Court has repeatedly recognized that human dignity is at the heart of the *Charter*". More recently, this Court has stated in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 (S.C.C.), at para. 51, that the purpose of s. 15(1) of the *Charter*, "is to prevent the violation of essential human dignity and human freedom". Respect for the inherent dignity of persons is clearly an essential value in our free and democratic society which must guide the courts in interpreting the *Charter*. This does not mean, however, that dignity is elevated to a free-standing constitutional right protected by s. 7 of the *Charter*. Dignity has never been recognized by this Court as an independent right but has rather been viewed as finding expression in rights, such as equality, privacy or protection from state compulsion. In cases such as *Morgentaler*, *Rodriguez* and *B. (R.)*, dignity was linked to personal autonomy over one's body or interference with fundamental personal choices. Indeed, dignity is often involved where the ability to make fundamental choices is at stake.

78 In my view, the notion of "dignity" in the decisions of this Court is better understood not as an autonomous *Charter* right, but rather, as an underlying value. In *Beare*, *supra*, at p. 401, La Forest J. cautions that s. 7 must not be interpreted too broadly, stating that:

> Like other provisions of the *Charter*, s. 7 must be construed in light of the interests it was meant to protect. It should be given a generous interpretation, but it is important not to overshoot the actual purpose of the right in question

While this statement may have been *obiter* since the case was decided on the principles of fundamental justice, this caution with respect to the interpretation of "life, liberty and security of the person" is relevant nevertheless. La Forest J. chose not to base his finding of a s. 7 deprivation on any principle of "dignity or self-respect", as did Bayda C.J.S. of the Court of Appeal in that case. La Forest J. chose instead to find a deprivation of liberty and security of the person for the reasons of Cameron J.A. in the court below, based on the statutory requirement that a person surrender himself into the custody of the authorities and submit to bodily intrusions on pain of arrest and prosecution. La Forest J. conveys this, at p. 402:

> The Court of Appeal, we saw, found that the impugned provisions constituted an infringement of the right guaranteed by the opening words of s. 7, the majority because fingerprinting offends the "dignity and self-respect" of at least those persons who because of their self-perception or the perception of the community would feel demeaned by being thus treated. In short, the majority thought that being subjected to fingerprinting was to be treated like a criminal. This approach appears to be broad and indefinite and to introduce an undesirable notion of differentiation among those subjected to the procedure. For my part, I prefer the more specific finding of Cameron J.A. that the impugned provisions infringe the rights guaranteed by s. 7 because they require a person to appear at a specific time and place and oblige that person to go through an identification process on pain of imprisonment for failure to comply. [Emphasis added.]

79 According to the respondent, the human dignity of a person is closely tied to a person's reputation and privacy interests. Indeed, much of the harm which has been suffered by Mr. Blencoe in this case has been the damage which has been done to his reputation. Essentially, the respondent argues that his reputation has been ruined through the stigma he has suffered as a result of the publicity relating to the human rights proceedings against him. While this Court found in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 (S.C.C.), that reputation was a concept underlying *Charter* rights, it too is not an independent *Charter* right in and of itself (at para. 120):

> Although it is not specifically mentioned in the *Charter*, the good reputation of the individual represents and reflects the innate dignity of the individual, a concept which underlies all the *Charter* rights. It follows that the protection of the good reputation of an individual is of fundamental importance to our democratic society. [Emphasis added.]

80 Respect for a person's reputation, like respect for dignity of the person, is a value that underlies the *Charter*. These two values do not support the respondent's proposition that protection of reputation or freedom from the stigma associated with human rights complaints are independent constitutional s. 7 rights. Moreover, the above passages from *Hill* regarding the protection of reputation were made in the context of a defamation case. Defamation laws are intended to protect reputation. Dignity and reputation are not self-standing rights. Neither is freedom from stigma. I would therefore agree with the following passage from *Reference re ss. 193 & 195.1(1)(c) of the Criminal Code (Canada)*, *supra*, at p. 1170, wherein Lamer J. cautioned:

> If liberty or security of the person under s. 7 of the *Charter* were defined in terms of attributes such as dignity, self-worth and emotional well-being, it seems that liberty under s. 7 would be all inclusive. In such a state of affairs there would be serious reason to question the independent existence in the *Charter* of other rights and freedoms such as freedom of religion and conscience or freedom of expression.

2. State Interference with Psychological Integrity

81 In order for security of the person to be triggered in this case, the impugned state action must have had a serious and profound effect on the respondent's psychological integrity (*G. (J.)*, *supra*, at para. 60). There must be state interference with an individual interest of fundamental importance (at para. 61). Lamer C.J. stated in *G. (J.)*, at para. 59:

> It is clear that the right to security of the person does not protect the individual from the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action. If the right were interpreted with such broad sweep, countless government initiatives could be challenged on the ground that they infringe the right to security of the person, massively expanding the scope of judicial review, and, in the process, trivializing what it means for a right to be constitutionally protected.

He went on to state (at paras. 63-64):

> Not every state action which interferes with the parent-child relationship will restrict a parent's right to security of the person. For example, a parent's security of the person is not restricted when, without more, his or her child is sentenced to jail or conscripted into the army. Nor is it restricted when the child is negligently shot and killed by a police officer: see *Augustus v. Gosset*, [1996] 3 S.C.R. 268.
>
> While the parent may suffer significant stress and anxiety as a result of the interference with the relationship occasioned by these actions, the quality of the "injury" to the parent is distinguishable from that in the present case. In the aforementioned examples, the state is making no pronouncement as to the parent's fitness or parental status, nor is it usurping the parental role or prying into the intimacies of the relationship. In short, the state is not directly interfering with the psychological integrity of the parent *qua* parent. The different effect on the psychological integrity of the parent in the above examples leads me to the conclusion that no constitutional rights of the parent are engaged. [Emphasis added.]

82 The quality of the injury must therefore be assessed. In my opinion, all of the cases which have come within the broad interpretation of "security of the person" outside of the penal context differ markedly from the interests that are at issue in this case. Violations of security of the person in this context include only serious psychological incursions resulting from state interference with an individual interest of fundamental importance.

83 It is only in exceptional cases where the state interferes in profoundly intimate and personal choices of an individual that state-caused delay in human rights proceedings could trigger the s. 7 security of the person interest. While these fundamental personal choices would include the right to make decisions concerning one's body free from state interference or the prospect of losing guardianship of one's children, they would not easily include the type of stress, anxiety and stigma that result from administrative or civil proceedings.

84 In *O'Connor*, *supra*, this Court dealt with the disclosure of therapeutic records of a complainant in a sexual assault case. L'Heureux-Dubé J. described the psychological trauma that could be faced by sexual assault victims if forced to disclose their therapeutic records, at para. 112:

> These people must contemplate the threat of disclosing to the very person accused of assaulting them in the first place, and quite possibly in open court, records containing intensely private aspects of their lives, possibly containing thoughts and statements which have never even been shared with the closest of friends or family.

Such a situation amounts to direct state interference with a complainant's psychological integrity. Moreover, *O'Connor* was reached primarily on the basis of privacy concerns and animated by principles protected by s. 8 of the *Charter*. In *O'Connor*, at para. 110, L'Heureux-Dubé J. listed the cases in which the Court "expressed sympathy" for the idea that s. 7 includes a right to privacy. But she concluded that people have only a "reasonable expectation of privacy" (emphasis deleted) because privacy "must be balanced against legitimate societal needs" (para. 117). However, unlike sexual assault victims who may be said to have a reasonable expectation of privacy in their therapeutic records, the Commission in this case has not invaded any of the respondent's privacy interests. If there was any invasion of the respondent's privacy, it cannot be said to have resulted from state action. Moreover, when one assumes a very prominent public office as the respondent has, it is arguable that a certain amount of public scrutiny is to be expected. The respondent injected himself into the public realm and the public scrutiny that it entailed. An individual can have no more than a reasonable expectation of privacy.

85 Where the therapeutic relationship between a sexual assault complainant and his or her physician is threatened by the disclosure of private records, this Court has recently held that security of the person is implicated (*R. v. Mills*, [1999] 3 S.C.R. 668 (S.C.C.) (hereinafter "*Mills* (1999)"), at para. 85). However, this is because the therapeutic relationship between doctor and patient is crucial to the patient's psychological integrity. This relationship must be protected to safeguard the mental integrity of patients and to thereby aid victims in recovering from their trauma. To disclose confidential records would undermine this relationship and jeopardize the victim's psychological integrity.

86 Few interests are as compelling as, and basic to individual autonomy than, a woman's choice to terminate her pregnancy, an individual's decision to terminate his or her life, the right to raise one's children, and the ability of sexual assault victims to seek therapy without fear of their private records being disclosed. Such interests are indeed basic to individual dignity. But the alleged right to be free from stigma associated with a human rights complaint does not fall within this narrow sphere. The state has not interfered with the respondent's right to make decisions that affect his fundamental being. The prejudice to the respondent in this case, as recognized by Lowry J., at para. 10, is essentially confined to his personal hardship. He is not "employable" as a politician, he and his family have moved residences twice, his financial resources are depleted, and he has suffered physically and psychologically. However, the state has not interfered with the respondent and his family's ability to make essential life choices. To accept that the prejudice suffered by the respondent in this case amounts to state interference with his security of the person would be to stretch the meaning of this right.

3. Importing the Notion of "Stigma" from the Criminal Law Context

87 In *Mills* (1986), *supra*, at pp. 919-20, Lamer J., in dissent, found that the combination of loss of privacy, stigma, and disruption of family life engaged an individual's security of the person in the context of s. 11(*b*) of the *Charter*, stating that:

> ... security of the person is not restricted to physical integrity; rather, it encompasses protection against "overlong subjection to the vexations and vicissitudes of a pending criminal accusation". ... These include stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction.

88 However, it must be emphasized that this statement was made in the context of s. 11(*b*) of the *Charter* which provides that a person charged with an offence has the right "to be tried within a reasonable time". The qualifier to this right is that it applies to individuals who have been "charged with an offence". The s. 11(*b*) right therefore has no application in civil or administrative proceedings. This Court has often cautioned against the direct application of criminal justice standards in the administrative law area. We should not blur concepts which under our *Charter* are clearly distinct. The s. 11(*b*) guarantee of a right to an accused person to be tried within a reasonable time cannot be imported into s. 7. There is no analogous provision to s. 11(*b*) which applies to administrative proceedings, nor is there a constitutional right outside the criminal context to be "tried" within a reasonable time.

89 Lamer C.J. later reiterated this statement from *Mills* (1986) in *G. (J.)*, at para. 62. In so doing, however, this Court did not make freedom from stigma a free-standing right. Nor did it establish that respondents in sexual harassment proceedings suffer so greatly that s. 11(*b*) principles should apply to them. As will be demonstrated below, the nature of the harm caused by human rights delay is different.

90 In *Kodellas*, *supra*, the Saskatchewan Court of Appeal clearly equated criminal sexual assault charges with human rights sex discrimination complaints. Bayda C.J.S. (dissenting on another issue) conveyed this as follows, at pp. 152-53:

> For the purpose of determining the effect upon the "security of the person" I see no logical distinction of substance between the subjection to the vexations and vicissitudes of "a pending criminal accusation" based upon sexual harassment and sexual assault and the subjection to the vexations and vicissitudes of a pending accusation in penal (*i.e., quasi*-criminal) proceedings under s. 35(2) of the Code, of discrimination based upon sexual harassment and sexual assault. It is but a small step from there to find that for the same purpose no distinction of substance can be made between an accusation in a penal proceeding under the Code and an identical accusation in remedial proceedings under ss. 27 to 33 of the Code. Whether they occur in a criminal context, or in the context of a penal proceeding, such as that provided for in the Code, or in the context of remedial proceedings (which, as will be shown later, is the context relevant to this case) the "vexations and vicissitudes" will invariably "include stigmatization of the (alleged discriminator), loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction". This is so because the hurt to the alleged discriminator emanates from the accusation, not from the type of proceedings in which the accusation is made. After all, it matters not a whit to all of the relevant actors — the public, the persons who are the source of the hurt, those who are indirectly affected by the hurt (such as the alleged discriminator's family) and the alleged discriminator, who is directly affected by the hurt and who is the subject and direct object of the hurt — whether the accusation is made in one procedural forum or another. What matters is the *fact* of the accusation.
>
> In determining whether prejudice occurred in a given situation, it is important to note that it is in the very nature of this form of prejudice (*i.e.*, feelings of mental hurt or "stigmatization") that it arises automatically upon a formal accusation being made. Lamer J. in *Rahey*, while elucidating this form of prejudice (in the context of s. 11(*b*) of the Charter), recognized this when he said at [p.] 609:
>
> > With respect to the security of the person, I do not believe that actual impairment need be proven by the accused to render the section operative. An objective standard is the only realistic means through which the security

> interest of the accused may be protected under the section. Otherwise, each individual accused would have the burden of demonstrating that he or she has subjectively suffered a form of anxiety, stress or stigmatization as a result of the criminal charge. We are dealing largely with the impairment of mental well-being, a matter which can only be established with considerable difficulty at considerable cost. [Underlining added; italics in original.]

91 The majority of the Court of Appeal in the case at bar followed the above reasoning in *Kodellas*. The effect of the Appeal Court decision in *Blencoe* was to import a requirement for a hearing within a reasonable time into the processing of human rights complaints. Although the majority of the Court of Appeal disclaimed a direct s. 11(*b*) right, numerous references were made in its reasons, equating sexual harassment proceedings to criminal proceedings for sexual assault where s. 11(*b*) would apply. Indeed, the majority speaks of "this type of sexual assault" (para. 47), "stigma against the accused" (para. 56), "prosecution of these complaints" (para. 58), a "straightforward case of sexual assault" (para. 102), "[allegations] which are tantamount to ... sexual assault" (para. 108), and "unproven charges of sexual harassment" (para. 57). The basis for the majority of the Court of Appeal's reasons in this case is the treatment of sexual harassment human rights complaints as akin to a pending criminal sexual assault charge.

92 With respect, the Court of Appeal in *Kodellas* and the majority of the Court of Appeal in the case at bar have erred in transplanting s. 11(*b*) principles set out in the criminal law context to human rights proceedings under s. 7. Not only are there fundamental differences between criminal proceedings and human rights proceedings that the majority failed to recognize, but, more importantly, s. 11(*b*) of the *Charter* is restricted to a pending criminal case. The effect of the Court of Appeal's decision was to extract an element of s. 11(*b*) — the element of *stigma*, which may be sufficient in the context of criminal proceedings and s. 11(*b*), to create a deprivation of the security of the person — and apply it to a process that differs with respect to objectives, consequences and procedures. As this Court has recently confirmed in *Mills* (1999), *supra*, at paras. 61 and 64, *Charter* rights must be interpreted and defined in a contextual manner, because they often inform, and are informed by, other similarly deserving rights and values at play in particular circumstances. The Court of Appeal has failed to examine the rights protected by s. 7 in the context of this case.

93 In the criminal law context, the test to be applied under s. 11(*b*) is an objective one, and prejudice may be inferred from unreasonable delay. This stands in sharp contrast to the two-tiered approach to s. 7 of the *Charter*, where the mere passage of time in resolving a complaint does not automatically give rise to the kind of prejudice that is presumed to follow from the laying of a charge under s. 11(*b*) of the *Charter*. In this regard, Lamer J.'s comments in *Mills* (1986), *supra*, are premised on the fact that there has already been an "overlong subjection to the vexations and vicissitudes of a pending criminal accusation" (p. 919). This is a finding that would be made not at the threshold stage of the s. 7 analysis but is rather to be examined at the principles of fundamental justice stage. The Court of Appeal in *Kodellas* and in the case at bar erred in conflating the two stages of the s. 7 analysis. Philip Bryden similarly concluded that the two stages of the s. 7 analysis were merged by the majority of the Court of Appeal in this case ("*Blencoe v. British Columbia (Human Rights Commission)*: A Case Comment" (1999), 33 *U.B.C. L. Rev.* 153), at p. 158:

> In my view, Chief Justice McEachern's formulation of when s. 7 applies tends to conflate the threshold question of whether liberty or personal security have been denied with the ultimate question of whether the process in place satisfies the requirements of fundamental justice. The main reason we use threshold tests for the applicability of constitutional protection is to focus our attention on the situations where we believe the special safeguards associated with constitutional protection are needed.

94 In discussing the nature and purpose of s. 11(*b*), Lamer J. emphasized in *Mills* (1986), *supra*, that the need for protecting the individual in such cases arises "from the nature of the criminal justice system and of our society" (p. 920). He described the criminal justice process as "adversarial and conflictual" and states that the very nature of the criminal process will heighten the stress and anxiety that results from a criminal charge. In contrast to the criminal realm, the filing of a human rights complaint implies no suspicion of wrongdoing on the part of the state. The investigation by the Commission is aimed solely at determining what took place and ultimately to settle the matter in a non-adversarial manner. The purpose of human rights proceedings is not to punish but to eradicate discrimination. Tribunal orders are compensatory rather than punitive. The investigation period in the human rights process is not one where the

Commission "prosecutes" the respondent. The Commission has an investigative and conciliatory role until the time comes to make a recommendation whether to refer the complaint to the Tribunal for hearing. These human rights proceedings are designed to vindicate private rights and address grievances. As stated by Dickson C.J. in *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 (S.C.C.), at p. 917:

> It is essential, however, to recognize that, as an instrument especially designed to prevent the spread of prejudice and to foster tolerance and equality in the community, the *Canadian Human Rights Act* is very different from the *Criminal Code*. The aim of human rights legislation, and of s. 13(1), is not to bring the full force of the state's power against a blameworthy individual for the purpose of imposing punishment. Instead, provisions found in human rights statutes generally operate in a less confrontational manner, allowing for a conciliatory settlement if possible and, where discrimination exists, gearing remedial responses more towards compensating the victim.

95 In criminal proceedings, the accusation alone may engage a security interest because of the grave social and personal consequences to the accused — including potential loss of physical liberty, subjection to social stigma and ostracism from the community — which are the unavoidable consequences of an open and adversarial judicial system. However, this Court in *Taylor*, *supra*, at pp. 932-33, has commented directly on the diminished role of stigma in the human rights context:

> ... the present appeal concerns an infringement of s. 2(*b*) in the context of a human rights statute. The chill placed upon open expression in such a context will ordinarily be less severe than that occasioned where criminal legislation is involved, for attached to a criminal conviction is a significant degree of stigma and punishment, whereas the extent of opprobrium connected with the finding of discrimination is much diminished and the aim or remedial measures is more upon compensation and protection of the victim. As was stated in *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, at p. 1134, under a human rights regime:
>
> > It is the (discriminatory) practice itself which is sought to be precluded. The purpose of the Act is not to punish wrongdoing but to prevent discrimination.
> >
> > The last point is an important one and it deserves to be underscored. There is no indication that the purpose of the *Canadian Human Rights Act* is to assign or to punish moral blameworthiness.

96 I do not doubt that parties in human rights sex discrimination proceedings experience some level of stress and disruption of their lives as a consequence of allegations of complainants. Even accepting that the stress and anxiety experienced by the respondent in this case was linked to delays in the proceedings, I cannot conclude that the scope of his security of the person protected by s. 7 of the *Charter* covers such emotional effects nor that they can be equated with the kind of stigma contemplated in *Mills* (1986), *supra*, of an overlong and vexatious pending criminal trial or in *G. (J.)*, *supra*, where the state sought to remove a child from his or her parents. If the purpose of the impugned proceedings is to provide a vehicle or act as an arbiter for redressing private rights, some amount of stress and stigma attached to the proceedings must be accepted. This will also be the case when dealing with the regulation of a business, profession, or other activity. A civil suit involving fraud, defamation or the tort of sexual battery will also be "stigmatizing". The Commission's investigations are not public, the respondent is asked to provide his version of events, and communication goes back and forth. While the respondent may be vilified by the press, there is no "stigmatizing" state pronouncement as to his "fitness" that would carry with it serious consequences such as those in *G. (J.)* . There is thus no constitutional right or freedom against such stigma protected by the s. 7 rights to "liberty" or "security of the person".

(f) Conclusion on Liberty and Security of the Person

97 To summarize, the stress, stigma and anxiety suffered by the respondent did not deprive him of his right to liberty or security of the person. The framers of the *Charter* chose to employ the words, "life, liberty and security of the person", thus limiting s. 7 rights to these three interests. While notions of dignity and reputation underlie many *Charter* rights,

they are not stand-alone rights that trigger s. 7 in and of themselves. Freedom from the type of anxiety, stress and stigma suffered by the respondent in this case should not be elevated to the stature of a constitutionally protected s. 7 right.

98 My conclusion that the respondent is unable to cross the first threshold of the s. 7 *Charter* analysis in the circumstances of this case should not be construed as a holding that state-caused delays in human rights proceedings can *never* trigger an individual's s. 7 rights. It may well be that s. 7 rights can be engaged by a human rights process in a particular case. I leave open the possibility that in other circumstances, delays in the human rights process may violate s. 7 of the *Charter*.

99 Because of my conclusion that there was no deprivation of the respondent's right to liberty or security of the person, I need not proceed to the second stage of the analysis to determine whether the alleged deprivation was in accordance with the principles of fundamental justice. However, for the reasons that immediately follow in the administrative law section, I express the view that the delay, in the circumstances of this case, would not have violated the principles of fundamental justice.

C. Was the Respondent Entitled to a Remedy Pursuant to Administrative Law Principles?

100 While I have concluded that the respondent is not entitled to a remedy under the *Charter*, I must still address the issue of whether the respondent is entitled to a remedy under principles of administrative law. This issue was pleaded before Lowry J. of the B.C. Supreme Court. Counsel were advised by us during the hearing that, notwithstanding that pleadings were not made before this Court on administrative law *per se*, we were nevertheless prepared to deal with this issue. The question to be addressed in this section is whether the delay in this case could amount to a denial of natural justice even where the respondent's ability to have a fair hearing has not been compromised.

(a) Prejudice to the Fairness of the Hearing

101 In my view, there are appropriate remedies available in the administrative law context to deal with state-caused delay in human rights proceedings. However, delay, without more, will not warrant a stay of proceedings as an abuse of process at common law. Staying proceedings for the mere passage of time would be tantamount to imposing a judicially created limitation period (see: *R. v. L. (W.K.)*, [1991] 1 S.C.R. 1091 (S.C.C.), at p. 1100; *Akthar v. Canada (Minister of Employment & Immigration)*, [1991] 3 F.C. 32 (Fed. C.A.). In the administrative law context, there must be proof of significant prejudice which results from an unacceptable delay.

102 There is no doubt that the principles of natural justice and the duty of fairness are part of every administrative proceeding. Where delay impairs a party's ability to answer the complaint against him or her, because, for example, memories have faded, essential witnesses have died or are unavailable, or evidence has been lost, then administrative delay may be invoked to impugn the validity of the administrative proceedings and provide a remedy (D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at p. 9-67; W. Wade and C. Forsyth, *Administrative Law* (7th ed. 1994), at pp. 435-36). It is thus accepted that the principles of natural justice and the duty of fairness include the right to a fair hearing and that undue delay in the processing of an administrative proceeding that impairs the fairness of the hearing can be remedied (see, for example, J.M. Evans, H.N. Janish and D.J. Mullan, *Administrative Law: Cases, Text and Materials* (4th ed. 1995), at p. 256; Wade and Forsyth, *supra*, at pp. 435-36; *Nisbett*, *supra*, at p. 756; *Canadian Airlines, supra*; *Ford Motor Co. of Canada v. Ontario (Human Rights Commission)* (1995), 24 C.H.R.R. D/464 (Ont. Div. Ct.); *Freedman v. College of Physicians & Surgeons (New Brunswick)* (1996), 41 Admin. L.R. (2d) 196 (N.B. Q.B.)).

103 The respondent argued before the B.C. Supreme Court that the delay in the administrative process caused him prejudice that amounted to a denial of natural justice in that he could no longer receive a fair hearing. He alleged that two witnesses had died and that the memories of many witnesses might be impaired by the passage of time. Lowry J. referred to these claims as "vague assertions that fall far short of establishing an inability to prove facts necessary to

respond to the complaints" (para. 10). Lowry J. concluded that the respondent's opportunity to make full answer and defence had not been compromised and thereby refused to terminate the proceedings.

104 The respondent also argued before Lowry J. that he was not provided with a copy of Ms. Schell's timeliness submissions for a two-month period and that he had not received proper disclosure. Lowry J. did not consider the respondent prejudiced in this regard. With respect to the alleged failure to disclose information to the respondent, this is not, in my opinion, a case in which the unfairness is so obvious that there would be a denial of natural justice, or in which there was an abuse of process such that it would be inappropriate to put the respondent through hearings before the Tribunal. I would therefore adopt the finding of Lowry J. that the delay in this case is not such that it would necessarily result in a hearing that lacks the essential elements of fairness. The respondent's right to a fair hearing has not been jeopardized. Proof of prejudice has not been demonstrated to be of sufficient magnitude to impact on the fairness of the hearing. This is a finding of fact made by the trial judge that has not, in my opinion, been successfully attacked on appeal. The question which must be addressed is therefore whether the delay in this case could amount to a denial of natural justice or an abuse of process even where the respondent has not been prejudiced in an evidentiary sense.

(b) Other Forms of Prejudice

105 It is trite law that there is a general duty of fairness resting on all public decision-makers (*Martineau v. Matsqui Institution (No. 2)* (1979), [1980] 1 S.C.R. 602 (S.C.C.), at p. 628). The human rights processes at issue in this case must have been conducted in a manner that is entirely consistent with the principles of natural justice and procedural fairness. Perhaps the best illustration of the traditional meaning of this duty of fairness in administrative law can be discerned from the following words of Dickson J. in *Martineau*, at p. 631:

> In the final analysis, the simple question to be answered is this: Did the tribunal on the facts of the particular case act fairly toward the person claiming to be aggrieved? It seems to me that this is the underlying question which the courts have sought to answer in all the cases dealing with natural justice and with fairness.

106 Throughout the authorities in this area, terms such as "natural justice", "procedural fairness", "abuse of process", and "abuse of discretion" are employed. In *Martineau*, at p. 629, Dickson J. (writing for three judges, while all nine concurred in the result), stated that "the drawing of a distinction between a duty to act fairly, and a duty to act in accordance with the rules of natural justice, yields an unwieldy conceptual framework". With regard to these terms, I would adopt the following words of Sherstobitoff J.A. of the Saskatchewan Court of Appeal in *Misra v. College of Physicians & Surgeons (Saskatchewan)* (1988), 52 D.L.R. (4th) 477 (Sask. C.A.), at p. 490:

> There are two common denominators in each of the terms. The first is the impossibility of precise definition because of their breadth and the wide array of circumstances which may bring them into play. The other is the concept of "fairness" or "fair play". They clearly overlap. Unreasonable delay is a possible basis upon which to raise any of them.

107 The respondent contends that the delay in the human rights proceedings constitutes a breach of procedural fairness amounting to a denial of natural justice and resulting in an abuse of process. The question is whether one can look to the psychological and sociological harm caused by the delay rather than merely to the procedural or legal effect, namely, whether the ability to make full answer and defence has been compromised, to determine whether there has been a denial of natural justice. This issue is a difficult one and there is no clear authority in this area.

108 In cases where the *Charter* was held not to apply, most courts and tribunals did not go further to decide whether the stress and stigma resulting from an unacceptable delay were so significant as to amount to an abuse of process. On the other hand, where courts did go further, they most often adopted a narrow approach to the principles of natural justice. For example, in *Nisbett*, *supra*, the Manitoba Court of Appeal concluded that delay may amount to an abuse of process that the law will remedy only where "on the record there has been demonstrated evidence of prejudice of sufficient magnitude to impact on the fairness of the hearing" (p. 757). In *Canadian Airlines, supra*, the Federal Court of Appeal followed *Nisbett*, concluding that the prejudice must be such "as to deprive a party of his right to a full and

complete defence" (p. 641). In the case at bar, Lowry J. for the B.C. Supreme Court, found that unless there was prejudice to hearing fairness, the type of personal hardship and psychological prejudice suffered by Mr. Blencoe could not give rise to a breach of natural justice (at para. 31):

> ... it cannot be said that the personal hardship Mr. Blencoe has suffered, albeit protracted by the time the administrative process has taken, gives rise to any *Charter* considerations. To my mind, it then becomes difficult to see how it can nonetheless be said to be a prejudice giving rise to a denial of natural justice. If it were, there would have been no need for the *Kodellas* court to resort to section 7 of the *Charter*. And, having rejected the applicability of section 7, the *Nisbett* court would have been bound to consider whether the personal hardship in that case constituted a prejudice that supported the prerogative relief sought.

109 However, courts and tribunals have also referred to other types of prejudice than trial fairness, holding that, where a commission or tribunal has abused its process to the detriment of an individual, a court has the discretion to grant a remedy. For example, in *Stefani v. College of Dental Surgeons (British Columbia)* (1996), 44 Admin. L.R. (2d) 122 (B.C. S.C.), a variety of effects on the petitioner were examined, including a cloud over his professional reputation resulting from a delay of two years and three months between the receipt of the complaint and the inspection, and an additional six- or seven-month delay which followed. However, the delay in that case had also resulted in an inability for the petitioner to have a fair hearing.

110 We have also been referred to the case of *Brown v. Assn. of Professional Engineers & Geoscientists (British Columbia)* (September 16, 1994), Doc. Vancouver A933892 (B.C. S.C. [In Chambers]), where the B.C. Supreme Court referred to the petitioner's right to a fair trial having been jeopardized as well as the petitioner suffering harm to his reputation. In *Brown*, it took three years to serve the petitioner with notice of the inquiry after receiving the complaints. The delays were in no part caused by the petitioner.

111 In *Misra*, *supra*, a college disciplinary board elected to await the completion of criminal proceedings against Misra, while suspending him from the practice of medicine in the interim five-year period. After five years, the criminal proceedings were abandoned and the board council decided to hold a hearing. Sherstobitoff J.A. held for the court that (at p. 490):

> The concept of natural justice or procedural fairness as outlined by Dickson J. in *Martineau* is broad enough to encompass principles which, in other contexts, have been termed abuse of discretion or abuse of process because of delay and related matters. A court, in exercising its supervisory function over an administrative tribunal is entitled to prohibit abuse of that tribunal's process in cases of unfairness or oppression caused or contributed to by delay resulting in a denial of natural justice.

112 The Court of Appeal found that Misra's ability to defend himself would likely be impaired and that he had already been punished by virtue of the five-year suspension (pp. 492-93). It is clear, however, that in *Misra* the court felt that it is only in exceptional cases that delay will amount to unfairness. Moreover, in *Misra*, an essential part of the prejudice suffered was the result of the lengthy suspension. Finally, the court also concluded that there was prejudice to Misra's right to a fair hearing due to the passage of a five-year period.

113 In *Ratzlaff v. British Columbia (Medical Services Commission)* (1996), 17 B.C.L.R. (3d) 336 (B.C. C.A.), Hollinrake J.A. for the B.C. Court of Appeal agreed with the appellant that, "where the delay is so egregious that it amounts to an abuse of power or can be said to be oppressive, the fact that the hearing itself will be a fair one is of little or no consequence" (para. 19). At issue in *Ratzlaff* was a lengthy delay in processing disciplinary charges against a physician that had affected how the physician arranged his finances. In not restricting abuse of process to procedural unfairness, Hollinrake J.A. stated, at paras. 22-23:

> Abuse of power is a broader notion, akin to oppression. It encompasses procedural unfairness, conduct equivalent to breach of contract or of representation, and, in my view, unjust delay. I should add that not all lengthy delays are unjust; regard must be had to the causes of delay, and to resulting reasonable changes of position.
>
> Where a party in the position of the appellant relies on delay as amounting to an abuse of power it is incumbent on that party to demonstrate a resulting change of position. In my opinion, the very fact that the appellant continued with his practice as he did and throughout the whole period of time in issue is sufficient to establish such a change of position.

114 *Ratzlaff* differs from the case at bar in that the physician carried on his practice thinking that his problems were behind him. He had even retired thinking that his billing disputes were over. Moreover, the chambers judge found that the physician had literally requested that action be taken but that it was three years before the Commission even communicated with him (para. 11). In all, it had been seven years before the physician had received a hearing notice.

115 I would be prepared to recognize that unacceptable delay may amount to an abuse of process in certain circumstances even where the fairness of the hearing has not been compromised. Where inordinate delay has directly caused significant psychological harm to a person, or attached a stigma to a person's reputation, such that the human rights system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process. The doctrine of abuse of process is not limited to acts giving rise to an unfair hearing; there may be cases of abuse of process for other than evidentiary reasons brought about by delay. It must however be emphasized that few lengthy delays will meet this threshold. I caution that in cases where there is no prejudice to hearing fairness, the delay must be clearly unacceptable and have directly caused a significant prejudice to amount to an abuse of process. It must be a delay that would, in the circumstances of the case, bring the human rights system into disrepute. The difficult question before us is in deciding what is an "unacceptable delay" that amounts to an abuse of process.

(c) Abuse of Process Principles

116 The respondent's case is that there has been an unacceptable delay in the administrative process which has caused him to be prejudiced by the stigma attached to the two Complaints to an extent that justifies the process being terminated now. Abuse of process is a common law principle invoked principally to stay proceedings where to allow them to continue would be oppressive. As stated by Brown and Evans, supra, at pp. 9-71 and 9-72:

> The stringency of the requirements for showing that delay constitutes a breach of fairness would seem to be due, at least in part, to the drastic nature of the only appropriate remedy. Unlike other instances of procedural unfairness where it is open to a court to remit the matter for redetermination in a procedurally fair manner, the remedy for undue delay will usually be to prevent the tribunal from exercising its legislative authority, either by prohibiting it from proceeding with the hearing, or by quashing the resulting decision. [Emphasis added.]

117 In the context of a breach of s. 11(*b*) of the *Charter*, a stay has been found to constitute the only possible remedy (*R. v. Askov*, [1990] 2 S.C.R. 1199 (S.C.C.)). The respondent asked for the same remedy in his administrative law proceedings before Lowry J. There is, however, no support for the notion that a stay is the only remedy available in administrative law proceedings. A stay accords very little importance to the interest of implementing the *Human Rights Code* and giving effect to the complainants' rights to have their cases heard. Other remedies are available for abuse of process. Where a respondent asks for a stay, he or she will have to bear a heavy burden. The discussion that follows often links abuse of process and the remedy of a stay because the stay, as I have said, is the only applicable remedy in the context of a s. 11(*b*) application. Nevertheless, I wish to underline that my inquiry here is directed only at the determination of the existence of an abuse of process on the facts of this case.

118 In *R. v. Jewitt*, [1985] 2 S.C.R. 128 (S.C.C.), this Court unanimously affirmed that the doctrine of abuse of process was available in criminal proceedings. In so doing, and as professed by L'Heureux-Dubé J. in *R. v. Power*, [1994] 1 S.C.R. 601 (S.C.C.), at p. 613, the Court borrowed the comments of Dubin J.A. in *R. v. Young* (1984), 40 C.R. (3d) 289 (Ont.

C.A.), in describing the abuse of process doctrine, stating that a stay of proceedings should be granted where "compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency" or where the proceedings are "oppressive or vexatious". The Court also adopted the Ontario Court of Appeal's warning in *Young* that this is a power which can be exercised only in the "clearest of cases" (p. 614). This was reiterated on many occasions by this Court (see, for example, *R. v. Potvin*, [1993] 2 S.C.R. 880 (S.C.C.); *R. v. Scott*, [1990] 3 S.C.R. 979 (S.C.C.); *Power*, *supra*).

119 In *R. v. Conway*, [1989] 1 S.C.R. 1659 (S.C.C.), at p. 1667, L'Heureux-Dubé J. explained the underlying purpose of the doctrine of abuse of process as follows:

> Under the doctrine of abuse of process, the unfair or oppressive treatment of an appellant disentitles the Crown to carry on with the prosecution of the charge. The prosecution is set aside, not on the merits (see *Jewitt, supra*, at p. 148), but because it is tainted to such a degree that to allow it to proceed would tarnish the integrity of the court. The doctrine is one of the safeguards designed to ensure "that the repression of crime through the conviction of the guilty is done in a way which reflects our fundamental values as a society" (*Rothman v. The Queen*, [1981] 1 S.C.R. 640, at p. 689, *per* Lamer J.) It acknowledges that courts must have the respect and support of the community in order that the administration of criminal justice may properly fulfil its function. Consequently, where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings. [Emphasis added.]

120 In order to find an abuse of process, the court must be satisfied that, "the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted" (Brown and Evans, *supra*, at p. 9-68). According to L'Heureux-Dubé J. in *Power*, *supra*, at p. 616, "abuse of process" has been characterized in the jurisprudence as a process tainted to such a degree that it amounts to one of the clearest of cases. In my opinion, this would apply equally to abuse of process in administrative proceedings. For there to be abuse of process, the proceedings must, in the words of L'Heureux-Dubé J., be "unfair to the point that they are contrary to the interests of justice" (p. 616). "Cases of this nature will be extremely rare" (*Power*, *supra*, at p. 616). In the administrative context, there may be abuse of process where conduct is equally oppressive.

(d) Was the Delay Unacceptable?

121 To constitute a breach of the duty of fairness, the delay must have been unreasonable or inordinate (Brown and Evans, *supra*, at p. 9-68). There is no abuse of process by delay *per se*. The respondent must demonstrate that the delay was unacceptable to the point of being so oppressive as to taint the proceedings. While I am prepared to accept that the stress and stigma resulting from an inordinate delay may contribute to an abuse of process, I am not convinced that the delay in this case was "inordinate".

122 The determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case. As previously mentioned, the determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the various rights at stake in the proceedings, in the attempt to determine whether the community's sense of fairness would be offended by the delay.

123 With respect to the actual length of the delay in this case and whether it had been "unacceptable", Lowry J. noted that, unlike the cases to which he had been referred, there was no extended period without any activity in the processing of the Complaints from receipt to referral, except for an inexplicable five-month period of inaction from April 10, 1996, when the respondent provided his substantive response to the Complaints, to September 6, 1996, when human rights officers were assigned to investigate the Complaints. The Commission's counsel provided no explanation or excuses for this five-month gap at the oral hearing. However, according to a letter to the complainant and the respondent dated

March 6, 1996, the Council referred to a period of "adjustment" where investigative resources were being transferred from the Employment Standards Branch to the Council and that from then on the Council was to conduct its own investigations. This letter also stated that some investigations would be commenced prior to April 1, 1996, beginning with those complaints that had experienced the longest delays. The Council stated that it appreciated the parties' patience in waiting to be notified as to when the investigation would begin. Lowry J. found that, other than during this five-month period, communication had been ongoing between the Council, solicitors and complainants, and the respondent had not been ignored. There had been a continuous dialogue between the parties (at para. 39).

124 With respect to calculating the delay, Lowry J. found that the only time that could be considered for the delay was between the filing of the Complaint to the end of the investigation process, in July. He stated that the Tribunal could not be criticized for not setting the hearing dates earlier as the respondent did not press for earlier dates, did not question the fixed dates and cancelled the pre-hearing conference. While the respondent did at one point inquire as to whether one of the Complaints could be set for hearing without investigation, this would have required a concession that there was sufficient evidence to warrant a hearing, a concession which Mr. Blencoe was not prepared to make. Following Lowry J.'s reasoning, the delay would be computed until July of 1997, thus reducing the delay from 32 months to 24 months.

125 During those 24 months, the Commission also had to deal with a challenge by the respondent as to the lateness of the Complaints and his accusation that the Complaints were in bad faith. The respondent refused to respond to the allegations until this determination was made. As a result, the process was delayed for some eight months. The respondent was perfectly entitled to bring forward allegations of bad faith and to question the timeliness of the Complaints. However, the Commission should not be held responsible for contributing to this part of the delay. In this regard, Lowry J. stated (at para. 42):

> It is not suggested that Mr. Blencoe was not entitled to challenge the complaints, as he did at the outset, but having done so, and having been unsuccessful, it is not in my view open to him now to claim that the events of the eight months elapsed contributed to an unacceptable delay.

Thus, while the respondent was entitled to take the steps he did, the Court of Appeal wrongly considered the delay attributable to the aforementioned challenges in computing the delay caused by the Commission. Clearly much of this delay resulted from the respondent's actions, though there appear to be other delays caused by the Commission. As expressed by Lambert J.A., at para. 29, some of the delay was attributable to the Commission, some to the respondent, but very little of it was attributable to either of the two complainants — Ms. Schell or Ms. Willis.

126 The arguments advanced by the parties before us rely heavily on criminal judgments where delay was considered in the context of s. 11(b) or s. 7 of the *Charter*. It must be kept in mind, as mentioned in paras. 93-95, that the human rights process of receiving complaints, investigating them, determining whether they are substantial enough to investigate and report and then to refer the matter to the Tribunal for hearing is a very different process from the criminal process. The B.C. human rights process is designed to protect respondents by ensuring that cases are not adjudicated unless there is some basis for the claims to go forward and unless the issue cannot be disposed of prior to adjudication. Pursuant to s. 27 of the *Human Rights Code*, the Commission may dismiss a complaint if, *inter alia*, it is brought too late, the acts alleged do not contravene the Code, there is no reasonable basis for referring the complaint to a hearing, if it does not appear to be in the interest of the group bringing the complaint, the complaint was filed for improper motives or if the complaint was made in bad faith. The Commission therefore performs a gatekeeping or screening function, preventing those cases that are trivial or insubstantial from proceeding. There is also the goal of settlement through mediation which is lacking in the criminal context. The human rights process thus takes a great deal more time prior to referring a complaint to the Tribunal for hearing.

127 The principles of natural justice also require that both sides be given an opportunity to participate in reviewing documents at various stages in the process and to review the investigation report. The parties therefore have a chance to make submissions before a referral is made to the Tribunal. These steps in the process take time. Indeed, the Commission was under a statutory obligation to proceed as it did. The process itself was not challenged in this case.

True, the Commission took longer than is desirable to process these Complaints. I am not condoning that. Nevertheless, McEachern C.J.B.C. has exaggerated in stating that "a week at the outside would have sufficed" to investigate these Complaints (para. 51). While the case may not have been an extremely complicated one, these stages are necessary for the protection of the respondents in the context of the human rights complaints system.

128 The Commission seems to have handled the Complaints against Mr. Blencoe in the same manner as it handles all of its human rights complaints. The respondent argues that the Commission should have been sensitive to his particular needs and to have consequently expedited his Complaints on a priority basis. However, as professed by Lowry J., there is, "little if anything in the record to suggest that Mr. Blencoe raised with the Commission any of the hardship he has suffered or that he sought to be afforded any priority on that basis" (para. 45).

129 In *Kodellas*, *supra*, the Saskatchewan Court of Appeal held that the determination of whether the delay is unreasonable is, in part, a comparative one whereby one can compare the length of delay in the case at bar with the length of time normally taken for processing in the same jurisdiction and in other jurisdictions in Canada. While this factor has limited weight, I would note that in this regard, on average, it takes the Canadian Human Rights Commission 27 months to resolve a complaint (J. Simpson, "Human Rights Commission Mill Grinds Slowly", *The Globe & Mail* (October 1, 1998), A18, as quoted in R. E. Hawkins, "Reputational Review III: Delay, Disrepute and Human Rights Commissions" (2000), 25 *Queen's L.J.* 599, at p. 600). In Ontario, the average length of complaints, according to the 1997-1998 Report, is 19.9 months (*Annual Report of the Ontario Human Rights Commission* (1998), at p. 24). The respondent's counsel at the oral hearing quoted a report of the B.C. Ministry where the average time to get to a hearing in B.C. is three years.

130 The delay in the case at bar should be compared to that in analogous cases. In *Nisbett*, the sexual harassment complaint had been outstanding for approximately three years. In *Canadian Airlines*, there was a 50-month delay between the filing of the complaint and the appointment of an investigator. In *Stefani*, there was a delay of two years and three months between the complaint and the inspection and an additional six- or seven-month delay which followed. In *Brown*, a three-year period had elapsed prior to serving the petitioner with notice of the inquiry. In *Misra*, there was a five-year delay during which time Misra was suspended from the practice of medicine. Finally, in *Ratzlaff*, it had been seven years before the physician received a hearing notice.

131 A review of the facts in this case demonstrates that, unlike the aforementioned cases where there was complete inactivity for extremely lengthy periods, the communication between the parties in the case at bar was ongoing. While Lowry J. acknowledged the five-month delay of inactivity, on balance, he found no unacceptable delay and considered the time that elapsed to be nothing more "than the time required to process complaints of this kind given the limitations imposed by the resources available" (para. 47). Lowry J. concluded as follows (at para. 49):

> In my view, it cannot be said that the Commission or the Tribunal have acted unfairly toward Mr. Blencoe. They have caused neither an unacceptable delay in the process nor a prejudice to him whereby fairness of the hearings scheduled to be conducted next month have been compromised. There has been no denial of natural justice and, accordingly, Mr. Blencoe's petition for judicial review cannot succeed.

132 As expressed by Salmon L.J. in *Allen v. Sir Alfred McAlpine & Sons Ltd.*, [1968] 1 All E.R. 543 (Eng. C.A.), at p. 561, "it should not be too difficult to recognise inordinate delay when it occurs". In my opinion, the five-month inexplicable delay or even the 24-month period from the filing of the Complaints to the referral to the Tribunal was not so inordinate or inexcusable as to amount to an abuse of process. Taking into account the ongoing communication between the parties, the delay in this case does not strike me as one that would offend the community's sense of decency and fairness. While I would not presume to fix a specified period for a reasonable delay, I am satisfied that the delay in this case was not so inordinate as to amount to an abuse of process.

133 As noted in the discussion pertaining to the application of s. 7 of the *Charter* (paras. 59 to 72), I am also concerned with the causal connection in this case. There must be more than merely a lengthy delay for an abuse of process; the delay

must have caused actual prejudice of such magnitude that the public's sense of decency and fairness is affected. While Mr. Blencoe and his family have suffered obvious prejudice since the various sexual harassment allegations against him were made public, as explained above, I am not convinced that such prejudice can be said to result directly from the delay in the human rights proceedings. As in the *Charter* analysis above, I have simply assumed without deciding, for the purpose of my analysis, that the delay caused by the Commission was a contributory cause of the respondent's prejudice.

VII. Conclusion

134 To summarize, it cannot be said that the respondent's s. 7 rights were violated nor that the conduct of the Commission amounted to an abuse of process. However, I emphasize that nothing in these reasons has any bearing on the merits of the case before the Tribunal.

135 Nevertheless, I am very concerned with the lack of efficiency of the Commission and its lack of commitment to deal more expeditiously with complaints. Lack of resources cannot explain every delay in giving information, appointing inquiry officers, filing reports, etc.; nor can it justify inordinate delay where it is found to exist. The fact that most human rights commissions experience serious delays will not justify breaches of the principles of natural justice in appropriate cases. In *R. v. Morin*, [1992] 1 S.C.R. 771 (S.C.C.), at p. 795, the Court stated that in the context of s. 11(*b*) of the *Charter*, the government "has a constitutional obligation to commit sufficient resources to prevent unreasonable delay". The demands of natural justice are apposite.

136 I would allow the appeal. The Court of Appeal decision is set aside and the Tribunal should proceed with the hearing of the Complaints on their merits. Considering the lack of diligence displayed by the Commission, I would nevertheless exercise the Court's discretion under s. 47 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, to award costs against the appellant Commission in favour of Robin Blencoe, Andrea Willis and Irene Schell.

***LeBel J.* (dissenting in part) (*Iacobucci*, *Binnie*, *Arbour JJ.* concurring):**

137 The reasons of Justice Bastarache fully review the judicial history and the factual background of this case, and I do not intend to summarize them again. I shall refer only to such elements of the evidence and of the history of this case, as may be required, for the purpose of my analysis.

I. The Issues

138 The parties have fought this case mainly on *Charter* issues. In the end, this approach turned into a constitutional problem, something that was not. The important and determinative issue should have been the role of judicial review and administrative law principles in the control of undue delay in administrative tribunal proceedings. Given that human rights commissions are administrative law creations, the first place we should look for solutions to problems in their processes is in the realm of administrative law. If the relevant administrative law remedy had been applied, the trial judge should have found that there had been undue delay in the process of the British Columbia Human Rights Commission (formerly the B.C. Council of Human Rights), that this delay was abusive, and that some form of remedy should have been granted to the respondent Blencoe.

139 Nevertheless, I agree that a stay of proceedings was not warranted in the circumstances of the case and should be lifted, as suggested by Bastarache J. Such a remedy took no consideration of the interest of the complainants Irene Schell and Andrea Willis in the proceedings of the British Columbia Human Rights Commission ("Commission"). *Nobody* benefits from delay, but the interests of innocent parties must influence our choice of remedy. The Court of Appeal seems to have dealt with this case as if it were a pure conflict between the respondent and the state, without taking into account that the complainants Schell and Willis also had an important interest in an efficient disposition of their allegations against Blencoe and in the correct and timely application of the appropriate administrative law remedies.

II. The Administrative Law Doctrine of Abuse of Process and the Control of Undue Delay

140 Unnecessary delay in judicial and administrative proceedings has long been an enemy of a free and fair society. At some point, it is a foe that has plagued the life of almost all courts and administrative tribunals. It's a problem that must be brought under control if we are to maintain an effective system of justice, worthy of the confidence of Canadians. The tools for this task are not to be found only in the *Canadian Charter of Rights and Freedoms*, but also in the principles of a flexible and evolving administrative law system.

141 The legal doctrines that have developed both under the common law and under the *Charter* to respond to delay are certainly not simple. But the facts of this case point to one inescapable conclusion: the respondent, Robin Blencoe, faced unreasonable delay that violated administrative law principles of fairness in the management of the process of an administrative tribunal or body. Those principles concern not only the fairness of the hearing and of the final decision, but the very conduct of the procedures leading to the disposition in the matter. In these reasons, I shall now examine those principles and the nature of the remedy that appears just and appropriate after giving due consideration to the interests of all parties concerned by this long and frustrating judicial debate.

III. The Application for Judicial Review

142 This case came before the courts when Blencoe brought a petition for judicial review. Lowry J., in the British Columbia Supreme Court, denied any remedy under administrative law principles because, in his opinion, Blencoe had not established any prejudice that related "directly to the ability to respond to the complaint in an evidentiary sense" ((1998), 49 B.C.L.R. (3d) 201, at para. 37). Judicial review would thus be essentially limited to assessing the impact of the delay on the hearing and the decision.

143 Some case law did support this approach. In *Nisbett v. Manitoba (Human Rights Commission)* (1993), 101 D.L.R. (4th) 744 (Man. C.A.), the Manitoba Court of Appeal searched for delay that caused prejudice to an individual's right to a fair and full hearing. In *Ford Motor Co. of Canada v. Ontario (Human Rights Commission)* (1995), 24 C.H.R.R. D/464 (Ont. Div. Ct.), at p. 466, the Ontario Divisional Court explicitly followed the *Nisbett* analysis.

144 However, these decisions seem to have been exceptions in an otherwise steady progression toward a broader vision of administrative law abuse of process doctrine and the remedies that it provides for unreasonable delay. Administrative law abuse of process doctrine is fundamentally about protecting people from unfair treatment by administrative agencies. In *Martineau v. Matsqui Institution (No. 2)* (1979), [1980] 1 S.C.R. 602 (S.C.C.), at p. 631, Dickson J. (as he then was) described the administrative law principle of fairness in these classic terms:

> In the final analysis, the simple question to be answered is this: Did the tribunal on the facts of the particular case act fairly toward the person claiming to be aggrieved? It seems to me that this is the underlying question which the courts have sought to answer in all the cases dealing with natural justice and fairness.

When we ask whether there has been an administrative law abuse of process, we ask the same fundamental question: has an administrative agency treated people inordinately badly?

IV. Historical Context

145 This question, however, does not exist outside of a legal historical context, through which we must trace the role of courts on these kinds of questions up to the present day. Two fundamental aspects of the common law's history are relevant to the rules in this area: (1) the common law system's abhorrence of delay; and (2) the common law's development as to the power of courts to monitor the processes of administrative bodies.

146 The notion that justice delayed is justice denied reaches back to the mists of time. In *Magna Carta* in 1215, King John promised: "To none will we sell, to none will we deny, *or delay*, right or justice" (emphasis added). As La Forest J. put it, the right to a speedy trial has been "a right known to the common law ... for more than 750 years" (*R. v. Rahey*, [1987] 1 S.C.R. 588 (S.C.C.), at p. 636). In criminal law cases, this Court had no difficulty determining in *R. v. Askov*,

[1990] 2 S.C.R. 1199 (S.C.C.), at p. 1227, that "the right to be tried within a reasonable time is an aspect of fundamental justice protected by s. 7 of the *Charter*". Outside the criminal law context, legislators have devised limitation periods, and courts have developed equitable doctrines such as that of laches. For centuries, those working with our legal system have recognized that unnecessary delay strikes against its core values and have done everything within their powers to combat it, albeit not always with complete success.

147 Under the common law, courts have gradually developed the power to monitor the processes of administrative bodies and their legality. There is today no doubt that "[t]he superior courts have the inherent power to review the legality of administrative actions" (D.P. Jones and A.S. de Villars, *Principles of Administrative Law* (3rd ed. 1999), at p. 6). Unnecessary delay is not excluded from the scope of judicial review.

148 This supervisory power over administrative processes developed from the very beginnings of the prerogative writ most apropos in the case before us. Mandamus is a storied writ. At its origins, it empowered the Court of King's Bench to order a court or an administrative body to do its duty: Sir W. Holdsworth, *A History of English Law* (7th ed. 1956), vol. I, at p. 229; Sir W. Blackstone, *Commentaries on the Law of England*, Book III, at p. 110. In the original cases that recognized it, the writ was used largely to prevent the procedurally illegitimate exclusion of citizens who were members of certain disliked groups from municipal offices: see *Bagg's Case, Re* (1615), 11 Co. Rep. 93b, 77 E.R. 1271 (Eng. K.B.); and *Andover Case* (1701), Holt. K.B. 441, 90 E.R. 1143 (Eng. K.B.), at p. 1143. But there was always the possibility of something much greater in the writ, and Lord Mansfield would go so far as to announce its prospective use "upon all occasions where the law has established no specific remedy, and where in justice and good government there *ought* to be one" (*R. v. Barker* (1762), 3 Burr. 1265, 97 E.R. 823 (Eng. K.B.), at pp. 824-25 (emphasis added). Cf. *Bagg's Case, Re*, at pp. 1277-78, referring generally to "misgovernment".) The writ always promised the possibility of ensuring that governmental officers would not shirk their duty to keep processes operating efficiently. Perhaps significantly, the very words of the original form of the writ referred to "debitam et festinam justiciam" — due and speedy justice (Holdsworth, *supra*, app. XV, at p. 659).

V. Modern Developments

149 Today, there is no doubt that mandamus may be used to control procedural delays. In the middle of the last century, a British Columbia Court of Appeal judgment recognized the principles behind mandamus, stating that "[t]he high prerogative writ of mandamus was brought into being to supply defects in administering justice" (*R. v. British Columbia (Workmen's Compensation Board)*, [1942] 2 D.L.R. 665 (B.C. C.A.), at p. 678). It went on to note that the granting of mandamus was "to be governed by considerations which tend to the speedy and inexpensive as well as efficacious administration of justice" (at p. 678, cited with approval in *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561 (S.C.C.)). Members of our Court have on occasion alluded to the use of mandamus specifically to control delay. (See notably: *R. v. Bradley*, [1941] S.C.R. 270 (S.C.C.), at p. 277, *per* Duff C.J.; *R. v. Rourke* (1977), [1978] 1 S.C.R. 1021 (S.C.C.), at p. 1027, *per* Laskin C.J.; and *R. v. Rahey*, [1987] 1 S.C.R. 588 (S.C.C.), at pp. 624-25, *per* Wilson J., and p. 631, *per* La Forest J.) And there exists a specific line of case law in the administrative context of immigration law that endorses just such a development, particularly where delay creates hardship: e.g., *Muia v. Canada (Minister of Citizenship & Immigration)* (1996), 113 F.T.R. 234 (Fed. T.D.); *Dass v. Canada (Minister of Employment & Immigration)*, [1996] 2 F.C. 410 (Fed. C.A.), at para. 24; *Dee v. Canada (Minister of Citizenship & Immigration)* (1998), 46 Imm. L.R. (2d) 278 (Fed. T.D.); and *Kiani v. Canada (Minister of Citizenship & Immigration)* (1999), 50 Imm. L.R. (2d) 81 (Fed. T.D.), at para. 34. In such a context in *Bhatnager v. Canada (Minister of Employment & Immigration)*, [1985] 2 F.C. 315 (Fed. T.D.), at p. 317, Strayer J. offers this widely quoted statement:

> But *mandamus* can issue to require that some decision be made. Normally this would arise where there has been a specific refusal to make a decision, but it may also happen where there has been a long delay in the making of a decision without adequate explanation. [Emphasis added.]

150 The common law system has always abhorred delay. In our system's development of the courts' supervisory role over administrative processes through mandamus, we see a crystallizing potential to compel government officers to do

their duty and, in so doing, to avoid delay in administrative processes. The historical context in which our case law is rooted is a soil of well-established principles. This ground's more modern seedlings must now be examined.

VI. Undue Delay and Procedural Fairness

151 English case law began in the last decades to bring these old streams of the common law together. In *R. v. Secretary of State for the Home Department* (1975), [1976] Q.B. 606 (Eng. C.A.), the English Court of Appeal was prepared to act against unreasonable delay based on the *Magna Carta* itself, as reinforced by the *European Convention on Human Rights*. In *Preston v. Inland Revenue Commissioners*, [1985] A.C. 835 (U.K. H.L.), the House of Lords made clear that there could be judicial review of any delay amounting to an abuse of power or breach of natural justice. In *R. v. Chief Constable of Merseyside Police*, [1986] 1 Q.B. 424 (Eng. C.A.), the English Court of Appeal applied this to a lengthy delay in notifying police officers of disciplinary charges against them. In the judgment of May L.J., at pp. 439-40, this was abusive and a breach of fairness because it disregarded the possibility of prejudice accruing to the officers on account of the delay. Unreasonable delay in administrative processes triggers the ancient rights of individuals who suffer prejudice as a result, and it gives the courts good reason to intervene against injustice. The modern English position, stated by W. Wade and C. Forsyth, *Administrative Law* (7th ed.1994), at p. 649, is clear: "A statutory duty must be performed without unreasonable delay, and this may be enforced by mandamus" (emphasis added).

152 With the few exceptions I noted at the outset of these reasons, modern Canadian courts have begun building on those historical principles and the developments in the English case law discussed above to develop a framework within which they may assess unreasonable delay. First, courts have linked the idea of procedural fairness with a bar on abuse of process through unreasonable delay: e.g., *Misra v. College of Physicians & Surgeons (Saskatchewan)* (1988), 52 D.L.R. (4th) 477 (Sask. C.A.) (leave to appeal to SCC granted, (1989), 79 Sask. R. 80n (S.C.C.), but appeal later discontinued, (January 27, 1992), Doc. 21140 (S.C.C.)). Second, even on a traditional analysis, courts have expressed their preparedness to consider different kinds of adverse effects of delay, such as damage to individuals' reputations or other aspects of their lives, in conjunction with the traditionally recognized effects on the hearing: see, e.g., *Brown v. Assn. of Professional Engineers & Geoscientists (British Columbia)* (September 16, 1994), Doc. Vancouver A933892 (B.C. S.C. [In Chambers]); and *Stefani v. College of Dental Surgeons (British Columbia)* (1996), 44 Admin. L.R. (2d) 122 (B.C. S.C.).

153 Third, these two evolutions have become fused along with a realization that other adverse effects can create an abusive situation *independently* of evidentiary prejudice. In *Ratzlaff v. British Columbia (Medical Services Commission)* (1996), 17 B.C.L.R. (3d) 336 (B.C. C.A.), at para. 22, Hollinrake J.A. set out a theoretical framework within which the courts may consider unreasonable delay, along with some of the relevant factors in assessing it:

> Abuse of power is a broader notion, akin to oppression. It encompasses procedural unfairness, conduct equivalent to breach of contract or of representation, and, in my view, unjust delay. I should add that not all lengthy delays are unjust; regard must be had to the causes of delay, and to resulting reasonable changes of position. [Emphasis added.]

This analytical method, in which unreasonable delay is assimilated to a type of abuse, helped Hollinrake J.A. to recognize that adverse effects other than on hearing fairness can be considered independently. He writes at para. 19, "where the delay is so egregious that it amounts to an abuse of power or can be said to be oppressive, the fact that the hearing itself will be a fair one is of little or no consequence".

154 Abusive administrative delay is wrong and it doesn't matter if it wrecks only your life and not your hearing. The cases that have been part of this evolution have sometimes expressed the point differently, but the key consideration is this: administrative delay that is determined to be unreasonable based on its length, its causes, and its effects is abusive and contrary to the administrative law principles that exist and should be applied in a fair and efficient legal system.

155 Unreasonable delay is not limited to situations that bring the human rights system into disrepute either by prejudicing the fairness of a hearing or by otherwise rising above a threshold of shocking abuse. Otherwise, there would not be any remedy for an individual suffering from unreasonable delay unless this same individual were unlucky enough

to have suffered sufficiently to meet an additional, external test of disrepute resulting to the human rights system. Such a limitation may arise from a fear that the main remedy available would be the blunt instrument of the stay of proceedings. However, as we will see below, a remedy other than a stay may be appropriate in other cases where ongoing delay is abusive. It is true that some of the cases that have most developed the doctrine of abusive delay involved lengthier periods of time that, in conjunction with other factors, warranted stays of proceedings. (see, e.g., the cases cited by Bastarache J. at paras. 117-118 [*R. v. Askov* (1990), 79 C.R. (3d) 273 (S.C.C.); *R. v. Jewitt*, [1985] 6 W.W.R. 127 (S.C.C.); *R. v. Power* (1994), 29 C.R. (4th) 1 (S.C.C.); *R. v. Young* (1984), 40 C.R. (3d) 289 (Ont. C.A.); *R. v. Potvin* (1993), 23 C.R. (4th) 10 (S.C.C.)]). They were cases that passed the highest threshold of abusiveness. Because of this, they did not discuss a lower threshold of unreasonable delay that might warrant some kind of judicial action and different, less radical, remedies than a stay in the administrative proceedings.

VII. Assessing Unreasonable Delay

156 The authorities and policy considerations that have been reviewed thus far confirm that modern administrative law is deeply averse to unreasonable delay. But nobody suggests the elimination of all delay *per se* — and with good reason. At the limit, a prohibition on delay *per se* would ban any and all delay. This would be an absurd result that would undermine rather than uphold a fair judicial system. Such an approach would, for example, deny parties on both sides the chance to prepare for the hearing (cf. *R. v. Conway*, [1989] 1 S.C.R. 1659 (S.C.C.), at p. 1694). Thus, unreasonable delays must be identified within the specific circumstances of every case.

157 In assessing a particular delay in the process of a specific administrative body, we must keep in mind two principles: (1) not all delay is the same; and (2) not all administrative bodies are the same. First, there are different kinds of delay. There are two kinds of delay in an administrative context: general delay and individual delay. Each of these, in turn, may encompass both necessary and unnecessary delay. General delay may include certain kinds of delay due to substantive and procedural complexities inherent in the kind of matter the tribunal deals with, but it may also include delays from systemic problems. Individual delay may relate to the special complexity of a particular decision, but it may also include delays from inattention to a particular file. (See generally: S. N. McMurtrie, "The Waiting Game — The Parliamentary Commissioner's Response to Delay in Administrative Procedures", [1997] *Public Law* 159; and L. S. Skiffington, "Federal Administrative Delay: Judicial Remedies and Application in the Natural Resource Context" (1982), 28 *Rocky Mtn. Min. L. Inst.* 671.)

158 Second, not all administrative bodies are the same. Indeed, this is an understatement. At first glance, labour boards, police commissions, and milk control boards may seem to have about as much in common as assembly lines, cops, and cows! Administrative bodies do, of course, have some common features, but the diversity of their powers, mandate and structure is such that to apply particular standards from one context to another might well be entirely inappropriate. Thus, inevitably, a court's assessment of a particular delay in a particular case before a particular administrative body has to depend on a number of contextual analytic factors.

159 In order to differentiate reasonable and unreasonable delay, a balancing exercise becomes necessary. Courts must, indeed, remain alive not only to the needs of administrative systems under strain, but also to their good faith efforts to provide procedural protections to alleged wrongdoers. One must approach matters with some common sense and ask whether a lengthy delay that profoundly harms an individual's life is really justified in the circumstances of a given case.

160 As indicated above, the central factors toward which the modern administrative law cases as a whole propel us are length, cause, and effects. Approaching these now with a more refined understanding of different kinds and contexts of delay, we see three main factors to be balanced in assessing the reasonableness of an administrative delay:

> (1) the time taken compared to the inherent time requirements of the matter before the particular administrative body, which would encompass legal complexities (including the presence of any especially complex systemic issues) and factual complexities (including the need to gather large amounts of information or technical data), as well as reasonable periods of time for procedural safeguards that protect parties or the public;

(2) the causes of delay beyond the inherent time requirements of the matter, which would include consideration of such elements as whether the affected individual contributed to or waived parts of the delay and whether the administrative body used as efficiently as possible those resources it had available; and

(3) the impact of the delay, considered as encompassing both prejudice in an evidentiary sense and other harms to the lives of real people impacted by the ongoing delay. This may also include a consideration of the efforts by various parties to minimize negative impacts by providing information or interim solutions.

(See generally: *Ratzlaff, supra*, at p. 346; *Saskatchewan (Human Rights Commission) v. Kodellas* (1989), 60 D.L.R. (4th) 143 (Sask. C.A.); *R. v. Morin*, [1992] 1 S.C.R. 771; McMurtrie, *supra*; and Skiffington, *supra*.) Obviously, considering all of these factors imposes a contextual analysis. Thus, our Court should avoid setting specific time limits in such matters. A judge should consider the specific content of the case he or she is hearing and make an assessment that takes into account the three main factors that have been identified above.

161 A number of parties have raised the objection that the consideration of some of those factors may extend "special treatment" to certain kinds of individuals, whether these be people who commit more stigmatizing wrongs or who are more susceptible to harms like damage to their reputations. Some interveners were afraid that the application of such factors might indeed require preferential treatment for powerful and influential people. These objections and fears are misplaced. It appears sound administrative practice for decision-making bodies to recognize the relevance of the identified factors while deciding how to process a particular case. For example, task forces analysing delay report that it is simply a good case management practice to send to different tracks cases of differing levels of complexity: see, e.g., Brookings Task Force on Civil Justice Reform, *Justice for All: Reducing Costs and Delay in Civil Litigation* (1989), at p. 3. Similarly, it only makes sense for administrative bodies seeking to minimize their negative impacts on real people to consider the ramifications of their failure to act expeditiously. In any event, every case should be processed with due dispatch.

VIII. Delays Before the British Columbia Human Rights Commission in This Case

162 Unreasonable delay in administrative proceedings is illegal under administrative law. It is a breach of the duty to conduct administrative proceedings fairly. Because of the highly contextual nature of any assessment of delay, I turn now to an analysis of the identified factors in the case at bar. I eventually conclude that inefficiency in the Commission's handling of this matter has led to abuse of process that must be addressed with the appropriate remedies in the circumstances of the case and in consideration of the interests of the complainants.

A. Length of Delay

163 The first factor to be considered is the time taken relative to the inherent time requirements of the matter. In the Court of Appeal, McEachern C.J.B.C. characterized the allegations in the case at bar as "relatively simple complaints" ((1998), 49 B.C.L.R. (3d) 216 (B.C. C.A.), at para. 37), stated that "[t]hese kinds of disputes are quickly resolved by courts and tribunals all the time, and there are no complex legal or factual issues" (para. 37), and concluded that "a week at the outside would have sufficed" (para. 51) for the investigation. Although McEachern C.J.B.C. perhaps puts matters a bit optimistically in suggesting that the investigation could have been wrapped up within a week, there is a good measure of truth in what he says.

164 At this point, a closer scrutiny of the facts is necessary in order to establish the inherent time requirements of the case. Different kinds of "allegations of sexual discrimination" may be more or less complex. A pay equity case might properly involve complex statistical analysis and innovative legal arguments and take time for those reasons. A case about other forms of well-concealed systemic discrimination might involve numerous witnesses and take time for that reason. But other cases that involve "allegations of sexual harassment" between individuals may have few complex legal or factual elements and thus appropriately should take much less time.

165 Considering the complexity of the allegations should not be seen to reflect in any way on their merits. This being said, the case at bar falls within a relatively less complex category. The allegations with respect to Willis, an aide to Blencoe, were that Blencoe made sexual overtures to her and inappropriately kissed her when she came to work one evening in August 1994 and that he had subsequently put his arm on her arm in a sexual manner in March 1995. The allegations with respect to Schell were that Blencoe in March 1993 had inappropriately kissed and hugged Schell, who worked for a sports organization deriving funding from Blencoe's ministry, and that he had subsequently on several occasions between July 1993 and July 1994 given her unwanted attention by inviting her for a drink. There were no other direct witnesses to any of the incidents, although there was some corroborating evidence from a small number of other witnesses. Blencoe denied some aspects of the allegations and admitted others.

166 Recognizing that this case is far less complex than many other sexual discrimination cases does not alleviate the seriousness of the allegations, but it is clear from the record that the allegations were not of a nature that could justify a prolonged investigation. Ultimately, the case was about a "he said / she said" scenario concerning which there should have been an adjudication. In this sense, there was little or nothing to investigate, and there was no reason for the pre-hearing investigation to take a long period of time.

167 Lowry J. expressed serious misgivings about the delays in this case. He wrote at para. 46:

> It may well be that the structure of the Commission should be such that, given the nature of the complaints made by Ms. Schell and Ms. Willis, two years would not be required to determine that they warrant a hearing. [Emphasis added.]

While Lowry J. went on to attribute the delay to a lack of resources, he questioned the effectiveness of the Commission, and his finding that two years was an inappropriately long time confirms my conclusion on this branch of the analysis. The inherent time requirements in this case were minimal.

168 By contrast, the time taken was anything but minimal. After five to six months spent on determining that it could hear the complaints, and once Blencoe had a chance to respond, the Commission then mysteriously took the *five months from April 1996 to September 1996 to appoint the same investigator who had been working on the file all along despite having told Blencoe that it expected to do so within two months* (AR 229). The investigation took some four months. The trial judge found at para. 44 that this investigation was concluded in January 1997. Given this finding, then after this conclusion of the investigation, it apparently took the investigator *another two months to write and forward a twelve-page report in early March 1997, and this only after letters from Blencoe's lawyer asking about the delay* (AR 322-335). After another four months, in July 1997, the Commission finally told Blencoe that the matter would proceed to a Tribunal hearing. It then took another two months to get a date set for the hearing, which was scheduled to be some six months later in March 1998. In all, the time for the Commission to make the determination that the complaints should go to a hearing was approximately two years. The time from the initial filing of the complaints to the scheduled hearing was approximately 32 months. While it is true that the Commission's decision to send the matter to a hearing involved a number of steps, every one of these steps involved a significant delay.

169 A particularly egregious example of the Commission's unacceptable lack of diligence may be found in the events during the period from October 16, 1995 to December 21, 1995. During that time, the Commission breached procedural fairness by failing to send to Blencoe Willis's October 16 response to his submissions on the timeliness of her complaint. In response to an inquiry, Blencoe received the Commission's letter dated December 21 on December 27. Although the December 21 letter denied that a decision had been made on this issue, a January 22, 1996 letter revealed that the Commission had actually already made the decision on December 18, before it even sent Blencoe the documents to which he had wished to reply and that the Commission had possessed for three months (see pp. 290-300 of the Appellants' Record). The Commission essentially failed even to keep those affected by its decisions up to date with what was going on.

170 Regardless of any arguments that parts of the time were necessary for procedural safeguards, the facts are that the Commission was slow at every step along the way. This eventually added up to a delay measured in years for a decision that was not inherently complex. Although a few letters back and forth might have been appropriate, nothing in the inherent time requirements of the case came close to requiring the delay that occurred.

B. Cause of the Delay

171 The second factor that we must consider is the cause of delay beyond the inherent time requirements of the matter. It is true that Blencoe sought to use those defences available to him, including an argument about whether the complaints had been correctly filed within the limitation period provided by the statute. But in so doing, he did not become responsible for the sheer inefficiency of the Commission in dealing with these and other matters.

172 A measure of Blencoe's determination to seek an end to the delay is that even after matters had been delayed to this point largely on account of the Commission's failures to comply with basic procedural fairness, he offered to forego the investigative stage of the complaints to bring them to a hearing. In so doing, we may infer that he made clear to the Commission that he was seeking a way past the delay and red tape in which his life had become bound. In his request, he was rebuffed, as the Commission would have required him to make major concessions on the existence of a *prima facie* case against him, if he wanted to proceed to the hearing. (Although Blencoe made the offer only on the Willis complaint, this seems to be explained by the fact that he was simultaneously trying to find out whether a decision on the timeliness issue in the Schell complaint had been made without notification as had occurred with the Willis complaint (see the Appellants' Record at pp. 220 and 301).) On numerous other occasions as well, Blencoe asked about when there would be a decision on the complaints. Indeed, Blencoe's inquiries of this nature comprise a significant number of the letters in the record. There can be no doubt that there was serious delay on both complaints and that Blencoe tried to find a way to end it. After being thus rebuffed, his counsel was under no obligation to beg and cry for an expedited hearing to demonstrate to the Human Rights Commission the seriousness of his requests.

173 A further measure of the Commission's behaviour with respect to delay is that even at the Supreme Court of Canada, the Commission admits that it cannot explain what was going on for five months of the time that it was dealing with the allegations against Blencoe. On a matter that ideally should not even have taken five months, a five-month period of *unexplained* delay remains surprising and troubling. Lowry J. characterized this period as a "five-month hiatus when there appears to have been no activity in relation to the complaints" (para. 47). After the gap, the Commission sent Blencoe a letter dated September 6, 1996 to advise him that it was appointing the same person as investigator as had up to that point been dealing with the pre-investigation report. In other words, *in five months, nothing happened*. This five-month lapse is just the high mark of the Commission's ineptitude.

C. Impact of Delay on the Respondent

174 The third factor that we must consider is the harm accruing as a result of the delay. Although Lowry J. found "that no clear case of prejudice in terms of an inability to defend has been made out" (para. 10), there is no doubt that Blencoe and his family suffered serious harm in other ways. Lowry J. went so far as to write at para. 50:

> There is, however, substance to the contention that the hardship Mr. Blencoe, his wife, and his children have suffered, and continue to suffer, is markedly disproportionate to the value there can now be in an adjudicated resolution. [Emphasis added.]

175 There can be no doubt about the impact of the allegations on the respondent and his family. The respondent's career is finished. He and his family have been chased twice across the country in their attempts to make a new life. He was under medical care for clinical depression for many months. In the wake of the outstanding complaints before the Commission, even such a normal aspect of life as coaching his youngest son's soccer team has been denied to Blencoe, since he has faced stigmatization in the form of presumed guilt as a sexual harasser. As Lowry J. wrote at para. 13:

> The point need not be further stressed. The stigma attached to the outstanding complaints has certainly contributed in large measure to the very real hardship Mr. Blencoe has experienced. His public profile as a Minister of the Crown rendered him particularly vulnerable to the media attention that has been focused on him and his family, and the hardship has, in the result, been protracted and severe. [Emphasis added.]

176 Although I do not deny that Blencoe might have taken additional steps to make the Commission more fully aware of the impact on him of continued delay, he did try to move matters along. The Commission showed next to no regard for the possible impacts of its delays, often taking long periods of time even to respond to requests for information as to the progress of the file. It certainly did nothing to minimize the impact of the delay on the respondent.

177 It is true that administrative delay was not the only cause of the prejudice suffered by the respondent. Nevertheless, it contributed significantly to its aggravation. It must be added, though, that this delay also frustrated the complainants in their desire for a quick disposition of their complaints. Finally, the inefficient and delay-filled process at the Commission linked with the specific blunders made in the management of those particular complaints harmed all parties involved in this sorry process. Its flaws were such that it may rightly be termed to have been abusive in respect of the respondent. In this connection, I note that my colleague, Bastarache J., despite coming to the conclusion that the conduct of the Commission did not amount to an abuse of process, nevertheless found it necessary to award costs against the Commission in light of the "lack of diligence [it] displayed" (para. 135). In my view, this further demonstrates the tension in this appeal and the fact that the conduct of the Commission in dealing with this matter was less than acceptable.

IX. Administrative Remedy

178 In the end, the specific and unexplained delay entitles Blencoe to some kind of remedy. The choice of the appropriate redress requires, though, a careful analysis of the circumstances of the case, in order to identify the causes and nature of the delay and its impact on the process, because the courts always have some discretion on orders of remedies founded on the old prerogative writs. The selection of an appropriate remedy may also impose a delicate balancing exercise between competing interests. In proceedings like those that gave rise to this appeal, we must factor in the interest of the respondent, that of the complainants themselves and finally, the public interest of the community itself which wants basic rights enforced efficiently but fairly. As we have seen above, the courts must also consider the stage of the proceedings which has been affected by the delay. A distinction must be drawn between the process leading to the hearing and the hearing itself. A different balance between conflicting interests may have to be found at different stages of the administrative process.

179 Several kinds of remedies are available either to prevent or remedy abusive delay within an administrative process. The main forms of redress that we need address here are a stay of proceedings, orders for an expedited hearing and costs.

180 Whoever asks for a stay of proceedings carries a heavy burden. In a human rights proceeding, such an order not only stops the proceedings and negates the public interest in the enforcement of human rights legislation, but it also affects, in a radical way, the interest of the complainants who lose the opportunity to have their complaints heard and dealt with. The stay of proceedings should not generally appear as the sole or even the preferred form of redress: see *R. v. O'Connor*, [1995] 4 S.C.R. 411 (S.C.C.), at para. 68. A more prudent approach would limit it to those situations that compromise the very fairness of the hearing and to those cases where the delay in the conduct of the process leading to it would amount to a gross or shocking abuse of the process. In those two situations, the interest of the respondent and the protection of the integrity of the legal system become the paramount considerations. The interest of the complainants would undoubtedly be grievously affected by a stay, but the prime concern in such cases becomes the safeguarding of the basic rights of the respondent engaged in a human rights proceeding and the preservation of the essential fairness of the process itself: see *Ratzlaff*, *supra*, at para. 19. Whatever its consequences, a stay may thus become the sole appropriate remedy in those circumstances.

181 I note that my approach on the matter of a stay here is consistent with the approach that our Court has adopted in the slightly different context in *Canada (Minister of Citizenship & Immigration) v. Tobiass*, [1997] 3 S.C.R. 391 (S.C.C.). There, the Court, following O'Connor, supra, recognized a stay as appropriate in situations where the fairness of the hearing had been compromised as well as in situations falling within a residual category. For a residual case to give rise to a stay, the Court held in *Tobiass*, at paras. 90-91 that a stay could be granted where it was the only reasonable means of stopping an abuse that would be perpetuated and aggravated through the conduct of a trial. For a stay to be appropriate as a remedy for an abuse that has already occurred, the abuse must rise to a level such that the mere carrying forward of the case will offend society's sense of justice (*Tobiass*, at para. 91): i.e., in my analysis, where there is a gross or shocking abuse, or where the societal interest in proceeding does not outweigh the considerations I have enumerated.

182 The approach of the courts should change when it appears that the hearing will remain fair, in spite of the delay and when the delay has not risen to the level of a shocking abuse, notwithstanding its seriousness. More limited and narrowly focused remedies would then become appropriate. In the context of a judicial review procedure akin to mandamus, the first objective of any intervention by a court should be to make things happen, where the administrative process is not working adequately. An order for an expedited hearing within such time frame and with such conditions as the Court might set would be the most practical and effective means of judicial action. Used at the right moment, such a remedy may safeguard the interest of all parties to the process. A litigant who believes he or she is facing undue delay should probably take that route rather than letting the process decay in the hope of stopping the old process on some future date.

183 An order for costs is a third kind of remedy. It will not address the delay directly, but some of its consequences. If a party must resort to the courts to secure a timely hearing or to speed up the process in which he or she is engaged, some form of compensation for costs should at least be considered by the courts in their discretion. Whenever parties are compelled to seek judicial interventions to safeguard their rights, costs must be considered to compensate at least in part the time, money and efforts expended in obtaining redress. Even if costs cannot indemnify the party for all the losses and prejudice arising from administrative delay, they afford at least a measure of compensation.

184 In the present appeal, the remedy of a pure stay of proceeding appears both excessive and unfair. First, in spite of the seriousness of the problems faced by Blencoe, the delay does not seem to compromise the fairness of the hearing. As the trial judge found at para. 10, the respondent has not established that the delay has deprived him of evidence or information important to his defence. The delay rather concerns the process leading to the hearing. It arises from a variety of causes that do not evince an intent from the Commission to harm him wilfully, but rather demonstrate grave negligence and important structural problems in the processing of the complaints. Second, a stay of proceedings in a situation that does not compromise the fairness of the hearing and does not amount to shocking or gross abuse requires the consideration of the interest of the complainants in the choice of the proper remedy (*Tobiass*, *supra*, at para. 92). In the present matter, the judgment of the Court of Appeal completely omitted any consideration of this interest (see para. 39). The lifting of the stay is thus both justified and necessary.

185 However, rejecting the stay as a proper remedy in the present case does not mean that Blencoe should be deprived of any redress. On the contrary, an order for an expedited hearing should have been considered as the remedy of choice. There will be some irony in granting such a remedy more than five years after the proceedings began. Such an outcome offers the respondent little solace. Nevertheless, in spite of its rather symbolic value, at the present stage of the proceedings, it appears as a critically important remedy that should have been used at an earlier stage to prod the Commission along and to control the inefficiency of its process.

186 In spite of the partial success of this appeal, as I agree that the stay should be lifted, Blencoe is entitled to some compensation in the form of costs in our Court and in the courts below. Section 47 of the *Supreme Court Act*, R.S.C., 1985, c. S-26, grants our Court broad discretion when awarding costs. In the present case, it would be both fair and appropriate to use this power as the respondent has established that the process initiated against him was deeply flawed and that its defects justified his search for a remedy, at least in administrative law. He had to fight for his rights, and it would be unfair for him to bear the costs personally. Although ultimately unsuccessful in his application for a stay,

Blencoe brought to the attention of the courts the grave deficiency of the administrative processes of the Commission. He should at least not be penalized for this mixture of success and failure (e.g., *Schachter v. Canada*, [1992] 2 S.C.R. 679 (S.C.C.), at p. 726).

X. Section 7 of the *Charter*

187 The application of the general principles of administrative law would have justified the intervention of the trial court without any need to demonstrate a breach of an interest protected by s. 7 of the *Charter*. As I think that this matter should have been resolved on the basis of administrative law principles, I do not think I have to express a definite opinion on the application of s. 7 of the *Charter* in the present case.

188 We must remember though that s. 7 expresses some of the basic values of the *Charter*. It is certainly true that we must avoid collapsing the contents of the *Charter* and perhaps of Canadian law into a flexible and complex provision like s. 7. But its importance is such for the definition of substantive and procedural guarantees in Canadian law that it would be dangerous to freeze the development of this part of the law. The full impact of s. 7 will remain difficult to foresee and assess for a long while yet. Our Court should be alive to the need to safeguard a degree of flexibility in the interpretation and evolution of s. 7 of the *Charter*. At the same time, the Court should remind litigants that not every case can be reduced to a *Charter* case.

189 Assuming that the *Charter* must solve every legal problem would be a recipe for freezing and sterilizing the natural and necessary evolution of the common law and of the civil law in this country. In the present appeal, the absence of a *Charter* remedy does not mean that administrative law remedies could not have been identified and applied, as we have seen above.

XI. Disposition

190 For these reasons, I would allow the appeal in part, lift the stay of proceedings and order an expedited hearing of the complainants Schell and Willis. I would also order the appellant British Columbia Human Rights Commission to pay costs on a party-to-party basis to the respondent Blencoe in this Court and in the British Columbia courts.

Appeal allowed.

Pourvoi accueilli.

Footnotes

* A corrigendum issued by the court on November 1, 2000 has been incorporated herein.

TAB 3

2013 ONSC 1078
Ontario Superior Court of Justice [Commercial List]

Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.

2013 CarswellOnt 3361, 2013 ONSC 1078, 100 C.B.R. (5th) 30, 227 A.C.W.S. (3d) 930, 37 C.P.C. (7th) 135

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 Sino-Forest Corporation, Applicant

The Trustees of the Labourers' Pension Fund of Central and Eastern Canada, The Trustees of the International Union of Operating Engineers Local 793 Pension Plan for Operating Engineers in Ontario, Sjunde Ap-Fonden, David Grant and Robert Wong, Plaintiffs and Sino-Forest Corporation, Ernst & Young LLP, BDO Limited (Formerly Known as BDO McCabe Lo Limited), Allen T.Y. Chan, W. Judson Martin, Kai Kit Poon, David J. Horsley, William E. Ardell, James P. Bowland, James M.E. Hyde, Edmund Mak, Simon Murray, Peter Wang, Garry J. West, Pöyry (Beijing) Consulting Company Limited, Credit Suisse Securities (Canada) In., TD Securities Inc., Dundee Securities Corporation, RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lunch Canada Inc., Canaccord Financial Ltd., Maison Placements Canada Inc., Credit Suisse Securities (USA) LLC and Merrill Lynch, Pierce, Fenner & Smith Incorporated (Successor by Merger to Banc of America Securities LLC), Defendants

Morawetz J.

Heard: February 4, 2013
Judgment: March 20, 2013
Docket: CV-12-9667-00CL, CV-11-431153-00CP

Counsel: Kenneth Rosenberg, Max Starnino, A. Dimitri Lascaris, Daniel Bach, Charles M. Wright, Jonathan Ptak, for Ad Hoc Committee of Purchasers including the Class Action Plaintiffs
Peter Griffin, Peter Osborne, Shara Roy, for Ernst & Young LLP, John Pirie and David Gadsden, for Pöyry (Beijing) Consulting Company Ltd.
Robert W. Staley for Sino-Forest Corporation
Won J. Kim, Michael C. Spencer, Megan B. McPhee for Objectors, Invesco Canada Ltd., Northwest & Ethical Investments LP and Comité Syndical National de Retraite Bâtirente Inc.
John Fabello Rebecca Wise, for Underwriters
Ken Dekker, Peter Greene for BDO Limited
Emily Cole, Joseph Marin for Allen Chan
James Doris for U.S. Class Action
Brandon Barnes for Kai Kit Poon
Robert Chadwick, Brendan O'Neill for Ad Hoc Committee of Noteholders
Derrick Tay, Cliff Prophet for Monitor, FTI Consulting Canada Inc.
Simon Bieber for David Horsley
James Grout for Ontario Securities Commission
Miles D. O'Reilly, Q.C. for Junior Objectors, Daniel Lam and Senthilvel Kanagaratnam

Subject: Insolvency; Civil Practice and Procedure; Corporate and Commercial; Securities

Headnote

Bankruptcy and insolvency --- Bankruptcy and insolvency jurisdiction — Jurisdiction of courts — Jurisdiction of general courts

To approve settlement in class proceedings — Representative plaintiffs were some of stakeholders who claimed defendant forestry company and other defendants misstated its financial results, misrepresented its timber rights, overstated value of its assets and concealed material information about its business operations from investors, causing collapse of artificially inflated share price — Representative plaintiffs began class proceedings against forestry company, which was comprised of components related to shareholders and noteholders — Forestry company entered protection under Companies' Creditors Arrangement Act — Settlement reached between representative plaintiffs and particular defendant — Representative plaintiffs brought motion for approval of settlement — Motion granted — Proceedings were appropriate for approval of settlement, and court had jurisdiction in respect of both Companies' Creditors Arrangement Act and Class Proceeding Act — CCAA proceedings could not be ignored despite any ill-effect on opt-out rights in class proceedings — Claim fell within the Companies' Creditors Arrangement Act, and could be subject of settlement and could include claims of all creditors in class — Until settlement was concluded and proceeds paid, there could be no distribution of settlement proceeds to parties entitled to receive them, and approval of release in settlement was necessary to effect any distribution.

Bankruptcy and insolvency --- Proposal — Approval by court — General principles

Where class proceedings ongoing — Representative plaintiffs were some of stakeholders who claimed defendant forestry company and other defendants misstated its financial results, misrepresented its timber rights, overstated value of its assets and concealed material information about its business operations from investors, causing collapse of artificially inflated share price — Representative plaintiffs began class proceedings against forestry company, which was comprised of components related to shareholders and noteholders — Forestry company entered protection under Companies' Creditors Arrangement Act — Settlement reached between representative plaintiffs and particular defendant — Representative plaintiffs brought motion for approval of settlement — Motion granted — Claims in release were rationally related to purpose of the plan in Companies' Creditors Arrangement Act and were necessary for it — Without approval of settlement, objectives of plan remained unfulfilled due to practical inability to distribute settlement proceeds — Defendant made significant monetary contribution to plan -- Plan benefited claimants in form of tangible distribution -- Release was fair and reasonable and not overly broad or offensive to public policy — Clear that claims asserted against forestry company had to be addressed as part of restructuring — Unencumbered participation of forestry company's subsidiaries is crucial to restructuring.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Orders, awards and related procedures — Termination of proceedings

Settlement — Representative plaintiffs were some of stakeholders who claimed defendant forestry company and other defendants misstated its financial results, misrepresented its timber rights, overstated value of its assets and concealed material information about its business operations from investors, causing collapse of artificially inflated share price — Representative plaintiffs began class proceedings against forestry company, which was comprised of components related to shareholders and noteholders — Forestry company entered protection under Companies' Creditors Arrangement Act — Settlement reached between representative plaintiffs and particular defendant — Representative plaintiffs brought motion for approval of settlement — Motion granted — Claims in release were rationally related to purpose of the plan in Companies' Creditors Arrangement Act and were necessary for it — Without approval of settlement, objectives of plan remained unfulfilled due to practical inability to distribute settlement proceeds — Defendant made significant monetary contribution to plan -- Plan benefited claimants in form of tangible distribution -- Release was fair and reasonable and not overly broad or offensive to public policy — Clear that claims asserted against forestry company had to be addressed as part of restructuring — Unencumbered participation of forestry company's subsidiaries is crucial to restructuring.

Table of Authorities

Cases considered by *Morawetz J.*:

Allen-Vanguard Corp., Re (2011), 2011 ONSC 5017, 2011 CarswellOnt 8984, 81 C.B.R. (5th) 270 (Ont. S.C.J. [Commercial List]) — referred to

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 92 O.R. (3d) 513, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123 (Ont. C.A.) — considered

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

Durling v. Sunrise Propane Energy Group Inc. (2011), 2011 ONSC 266, 2011 CarswellOnt 77, 10 C.P.C. (7th) 188 (Ont. S.C.J.) — referred to

Eidoo v. Infineon Technologies AG (2012), 2012 CarswellOnt 16498, 2012 ONSC 7299 (Ont. S.C.J.) — referred to

Fischer v. IG Investment Management Ltd. (2012), 2012 ONCA 47, 2012 CarswellOnt 635, 287 O.A.C. 148, 109 O.R. (3d) 498, 346 D.L.R. (4th) 598, 15 C.P.C. (7th) 81 (Ont. C.A.) — referred to

Grace Canada Inc., Re (2008), 50 C.B.R. (5th) 25, 2008 CarswellOnt 6284 (Ont. S.C.J. [Commercial List]) — referred to

Mangan v. Inco Ltd. (1998), 1998 CarswellOnt 801, 16 C.P.C. (4th) 165, 38 O.R. (3d) 703, 27 C.E.L.R. (N.S.) 141 (Ont. Gen. Div.) — referred to

Muscletech Research & Development Inc., Re (2007), 30 C.B.R. (5th) 59, 2007 CarswellOnt 1029 (Ont. S.C.J. [Commercial List]) — referred to

Nortel Networks Corp., Re (2010), 63 C.B.R. (5th) 44, 81 C.C.P.B. 56, 2010 CarswellOnt 1754, 2010 ONSC 1708 (Ont. S.C.J. [Commercial List]) — considered

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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

Statutes considered:

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Generally — referred to

s. 9 — referred to

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

Generally — referred to

s. 2(1) "equity claim" — considered

MOTION by representative plaintiffs for approval of settlement in class proceeding.

***Morawetz J.*:**

Introduction

1 The Ad Hoc Committee of Purchasers of the Applicant's Securities (the "Ad Hoc Securities Purchasers' Committee" or the "Applicant"), including the representative plaintiffs in the Ontario class action (collectively, the

"Ontario Plaintiffs"), bring this motion for approval of a settlement and release of claims against Ernst & Young LLP [the "Ernst & Young Settlement", the "Ernst & Young Release", the "Ernst & Young Claims" and "Ernst & Young", as further defined in the Plan of Compromise and Reorganization of Sino-Forest Corporation ("SFC") dated December 3, 2012 (the "Plan")].

2 Approval of the Ernst & Young Settlement is opposed by Invesco Canada Limited ("Invesco"), Northwest and Ethical Investments L.P. ("Northwest"), Comité Syndical National de Retraite Bâtirente Inc. ("Bâtirente"), Matrix Asset Management Inc. ("Matrix"), Gestion Férique and Montrusco Bolton Investments Inc. ("Montrusco") (collectively, the "Objectors"). The Objectors particularly oppose the no-opt-out and full third-party release features of the Ernst & Young Settlement. The Objectors also oppose the motion for a representation order sought by the Ontario Plaintiffs, and move instead for appointment of the Objectors to represent the interests of all objectors to the Ernst & Young Settlement.

3 For the following reasons, I have determined that the Ernst & Young Settlement, together with the Ernst & Young Release, should be approved.

Facts

Class Action Proceedings

4 SFC is an integrated forest plantation operator and forest productions company, with most of its assets and the majority of its business operations located in the southern and eastern regions of the People's Republic of China. SFC's registered office is in Toronto, and its principal business office is in Hong Kong.

5 SFC's shares were publicly traded over the Toronto Stock Exchange. During the period from March 19, 2007 through June 2, 2011, SFC made three prospectus offerings of common shares. SFC also issued and had various notes (debt instruments) outstanding, which were offered to investors, by way of offering memoranda, between March 19, 2007 and June 2, 2011.

6 All of SFC's debt or equity public offerings have been underwritten. A total of 11 firms (the "Underwriters") acted as SFC's underwriters, and are named as defendants in the Ontario class action.

7 Since 2000, SFC has had two auditors: Ernst & Young, who acted as auditor from 2000 to 2004 and 2007 to 2012, and BDO Limited ("BDO"), who acted as auditor from 2005 to 2006. Ernst & Young and BDO are named as defendants in the Ontario class action.

8 Following a June 2, 2011 report issued by short-seller Muddy Waters LLC ("Muddy Waters"), SFC, and others, became embroiled in investigations and regulatory proceedings (with the Ontario Securities Commission (the "OSC"), the Hong Kong Securities and Futures Commission and the Royal Canadian Mounted Police) for allegedly engaging in a "complex fraudulent scheme". SFC concurrently became embroiled in multiple class action proceedings across Canada, including Ontario, Quebec and Saskatchewan (collectively, the "Canadian Actions"), and in New York (collectively with the Canadian Actions, the "Class Action Proceedings"), facing allegations that SFC, and others, misstated its financial results, misrepresented its timber rights, overstated the value of its assets and concealed material information about its business operations from investors, causing the collapse of an artificially inflated share price.

9 The Canadian Actions are comprised of two components: first, there is a shareholder claim, brought on behalf of SFC's current and former shareholders, seeking damages in the amount of $6.5 billion for general damages, $174.8 million in connection with a prospectus issued in June 2007, $330 million in relation to a prospectus issued in June 2009, and $319.2 million in relation to a prospectus issued in December 2009; and second, there is a noteholder claim, brought on behalf of former holders of SFC's notes (the "Noteholders"), in the amount of approximately $1.8 billion. The noteholder claim asserts, among other things, damages for loss of value in the notes.

10 Two other class proceedings relating to SFC were subsequently commenced in Ontario: *Smith et al. v. Sino-Forest Corporation et al.*, which commenced on June 8, 2011; and *Northwest and Ethical Investments L.P. et al. v. Sino-Forest Corporation et al.*, which commenced on September 26, 2011.

11 In December 2011, there was a motion to determine which of the three actions in Ontario should be permitted to proceed and which should be stayed (the "Carriage Motion"). On January 6, 2012, Perell J. granted carriage to the Ontario Plaintiffs, appointed Siskinds LLP and Koskie Minsky LLP to prosecute the Ontario class action, and stayed the other class proceedings.

CCAA Proceedings

12 SFC obtained an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") on March 30, 2012 (the "Initial Order"), pursuant to which a stay of proceedings was granted in respect of SFC and certain of its subsidiaries. Pursuant to an order on May 8, 2012, the stay was extended to all defendants in the class actions, including Ernst & Young. Due to the stay, the certification and leave motions have yet to be heard.

13 Throughout the CCAA proceedings, SFC asserted that there could be no effective restructuring of SFC's business, and separation from the Canadian parent, if the claims asserted against SFC's subsidiaries arising out of, or connected to, claims against SFC remained outstanding.

14 In addition, SFC and FTI Consulting Canada Inc. (the "Monitor") continually advised that timing and delay were critical elements that would impact on maximization of the value of SFC's assets and stakeholder recovery.

15 On May 14, 2012, an order (the "Claims Procedure Order") was issued that approved a claims process developed by SFC, in consultation with the Monitor. In order to identify the nature and extent of the claims asserted against SFC's subsidiaries, the Claims Procedure Order required any claimant that had or intended to assert a right or claim against one or more of the subsidiaries, relating to a purported claim made against SFC, to so indicate on their proof of claim.

16 The Ad Hoc Securities Purchasers' Committee filed a proof of claim (encapsulating the approximately $7.3 billion shareholder claim and $1.8 billion noteholder claim) in the CCAA proceedings on behalf of all putative class members in the Ontario class action. The plaintiffs in the New York class action filed a proof of claim, but did not specify quantum of damages. Ernst & Young filed a proof of claim for damages and indemnification. The plaintiffs in the Saskatchewan class action did not file a proof of claim. A few shareholders filed proofs of claim separately. No proof of claim was filed by Kim Orr Barristers P.C. ("Kim Orr"), who represent the Objectors.

17 Prior to the commencement of the CCAA proceedings, the plaintiffs in the Canadian Actions settled with Pöyry (Beijing) Consulting Company Limited ("Pöyry") (the "Pöyry Settlement"), a forestry valuator that provided services to SFC. The class was defined as all persons and entities who acquired SFC's securities in Canada between March 19, 2007 to June 2, 2011, and all Canadian residents who acquired SFC securities outside of Canada during that same period (the "Pöyry Settlement Class").

18 The notice of hearing to approve the Pöyry Settlement advised the Pöyry Settlement Class that they may object to the proposed settlement. No objections were filed.

19 Perell J. and Émond J. approved the settlement and certified the Pöyry Settlement Class for settlement purposes. January 15, 2013 was fixed as the date by which members of the Pöyry Settlement Class, who wished to opt-out of either of the Canadian Actions, would have to file an opt-out form for the claims administrator, and they approved the form by which the right to optout was required to be exercised.

20 Notice of the certification and settlement was given in accordance with the certification orders of Perell J. and Émond J. The notice of certification states, in part, that:

> IF YOU CHOOSE TO OPT OUT OF THE CLASS, YOU WILL BE OPTING OUT OF THE **ENTIRE** PROCEEDING. THIS MEANS THAT YOU WILL BE UNABLE TO PARTICIPATE IN ANY FUTURE SETTLEMENT OR JUDGMENT REACHED WITH OR AGAINST THE REMAINING DEFENDANTS.

21 The opt-out made no provision for an opt-out on a conditional basis.

22 On June 26, 2012, SFC brought a motion for an order directing that claims against SFC that arose in connection with the ownership, purchase or sale of an equity interest in SFC, and related indemnity claims, were "equity claims" as defined in section 2 of the CCAA, including the claims by or on behalf of shareholders asserted in the Class Action Proceedings. The equity claims motion did not purport to deal with the component of the Class Action Proceedings relating to SFC's notes.

23 In reasons released July 27, 2012 [*Sino-Forest Corp., Re*, 2012 ONSC 4377 (Ont. S.C.J. [Commercial List])], I granted the relief sought by SFC (the "Equity Claims Decision"), finding that "the claims advanced in the shareholder claims are clearly equity claims". The Ad Hoc Securities Purchasers' Committee did not oppose the motion, and no issue was taken by any party with the court's determination that the shareholder claims against SFC were "equity claims". The Equity Claims Decision was subsequently affirmed by the Court of Appeal for Ontario on November 23, 2012 [*Sino-Forest Corp., Re*, 2012 ONCA 816 (Ont. C.A.)].

Ernst & Young Settlement

24 The Ernst & Young Settlement, and third party releases, was not mentioned in the early versions of the Plan. The initial creditors' meeting and vote on the Plan was scheduled to occur on November 29, 2012; when the Plan was amended on November 28, 2012, the creditors' meeting was adjourned to November 30, 2012.

25 On November 29, 2012, Ernst & Young's counsel and class counsel concluded the proposed Ernst & Young Settlement. The creditors' meeting was again adjourned, to December 3, 2012; on that date, a new Plan revision was released and the Ernst & Young Settlement was publicly announced. The Plan revision featured a new Article 11, reflecting the "framework" for the proposed Ernst & Young Settlement and for third-party releases for named third-party defendants as identified at that time as the Underwriters or in the future.

26 On December 3, 2012, a large majority of creditors approved the Plan. The Objectors note, however, that proxy materials were distributed weeks earlier and proxies were required to be submitted three days prior to the meeting and it is evident that creditors submitting proxies only had a pre-Article 11 version of the Plan. Further, no equity claimants, such as the Objectors, were entitled to vote on the Plan. On December 6, 2012, the Plan was further amended, adding Ernst & Young and BDO to Schedule A, thereby defining them as named third-party defendants.

27 Ultimately, the Ernst & Young Settlement provided for the payment by Ernst & Young of $117 million as a settlement fund, being the full monetary contribution by Ernst & Young to settle the Ernst & Young Claims; however, it remains subject to court approval in Ontario, and recognition in Quebec and the United States, and conditional, pursuant to Article 11.1 of the Plan, upon the following steps:

> (a) the granting of the sanction order sanctioning the Plan including the terms of the Ernst & Young Settlement and the Ernst & Young Release (which preclude any right to contribution or indemnity against Ernst & Young);
>
> (b) the issuance of the Settlement Trust Order;
>
> (c) the issuance of any other orders necessary to give effect to the Ernst & Young Settlement and the Ernst & Young Release, including the Chapter 15 Recognition Order;
>
> (d) the fulfillment of all conditions precedent in the Ernst & Young Settlement; and

(e) all orders being final orders not subject to further appeal or challenge.

28 On December 6, 2012, Kim Orr filed a notice of appearance in the CCAA proceedings on behalf of three Objectors: Invesco, Northwest and Bâtirente. These Objectors opposed the sanctioning of the Plan, insofar as it included Article 11, during the Plan sanction hearing on December 7, 2012.

29 At the Plan sanction hearing, SFC's counsel made it clear that the Plan itself did not embody the Ernst & Young Settlement, and that the parties' request that the Plan be sanctioned did not also cover approval of the Ernst & Young Settlement. Moreover, according to the Plan and minutes of settlement, the Ernst & Young Settlement would not be consummated (*i.e.* money paid and releases effective) unless and until several conditions had been satisfied in the future.

30 The Plan was sanctioned on December 10, 2012 with Article 11. The Objectors take the position that the Funds' opposition was dismissed as premature and on the basis that nothing in the sanction order affected their rights.

31 On December 13, 2012, the court directed that its hearing on the Ernst & Young Settlement would take place on January 4, 2013, under both the CCAA and the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA"). Subsequently, the hearing was adjourned to February 4, 2013.

32 On January 15, 2013, the last day of the opt-out period established by orders of Perell J. and Émond J., six institutional investors represented by Kim Orr filed opt-out forms. These institutional investors are Northwest and Bâtirente, who were two of the three institutions represented by Kim Orr in the Carriage Motion, as well as Invesco, Matrix, Montrusco and Gestion Ferique (all of which are members of the Pöyry Settlement Class).

33 According to the opt-out forms, the Objectors held approximately 1.6% of SFC shares outstanding on June 30, 2011 (the day the Muddy Waters report was released). By way of contrast, Davis Selected Advisors and Paulson and Co., two of many institutional investors who support the Ernst & Young Settlement, controlled more than 25% of SFC's shares at this time. In addition, the total number of outstanding objectors constitutes approximately 0.24% of the 34,177 SFC beneficial shareholders as of April 29, 2011.

Law and Analysis

Court's Jurisdiction to Grant Requested Approval

34 The Claims Procedure Order of May 14, 2012, at paragraph 17, provides that any person that does not file a proof of claim in accordance with the order is barred from making or enforcing such claim as against any other person who could claim contribution or indemnity from the Applicant. This includes claims by the Objectors against Ernst & Young for which Ernst & Young could claim indemnity from SFC.

35 The Claims Procedure Order also provides that the Ontario Plaintiffs are authorized to file one proof of claim in respect of the substance of the matters set out in the Ontario class action, and that the Quebec Plaintiffs are similarly authorized to file one proof of claim in respect of the substance of the matters set out in the Quebec class action. The Objectors did not object to, or oppose, the Claims Procedure Order, either when it was sought or at any time thereafter. The Objectors did not file an independent proof of claim and, accordingly, the Canadian Claimants were authorized to and did file a proof of claim in the representative capacity in respect of the Objectors' claims.

36 The Ernst & Young Settlement is part of a CCAA plan process. Claims, including contingent claims, are regularly compromised and settled within CCAA proceedings. This includes outstanding litigation claims against the debtor and third parties. Such compromises fully and finally dispose of such claims, and it follows that there are no continuing procedural or other rights in such proceedings. Simply put, there are no "opt-outs" in the CCAA.

37 It is well established that class proceedings can be settled in a CCAA proceeding. See *Robertson v. ProQuest Information & Learning Co.*, 2011 ONSC 1647 (Ont. S.C.J. [Commercial List]) [*Robertson*].

38 As noted by Pepall J. (as she then was) in *Robertson*, para. 8:

> When dealing with the consensual resolution of a CCAA claim filed in a claims process that arises out of ongoing litigation, typically no court approval is required. In contrast, class proceedings settlements must be approved by the court. The notice and process for dissemination of the settlement agreement must also be approved by the court.

39 In this case, the notice and process for dissemination have been approved.

40 The Objectors take the position that approval of the Ernst & Young Settlement would render their opt-out rights illusory; the inherent flaw with this argument is that it is not possible to ignore the CCAA proceedings.

41 In this case, claims arising out of the class proceedings are claims in the CCAA process. CCAA claims can be, by definition, subject to compromise. The Claims Procedure Order establishes that claims as against Ernst & Young fall within the CCAA proceedings. Thus, these claims can also be the subject of settlement and, if settled, the claims of all creditors in the class can also be settled.

42 In my view, these proceedings are the appropriate time and place to consider approval of the Ernst & Young Settlement. This court has the jurisdiction in respect of both the CCAA and the CPA.

Should the Court Exercise Its Discretion to Approve the Settlement

43 Having established the jurisdictional basis to consider the motion, the central inquiry is whether the court should exercise its discretion to approve the Ernst & Young Settlement.

CCAA Interpretation

44 The CCAA is a "flexible statute", and the court has "jurisdiction to approve major transactions, including settlement agreements, during the stay period defined in the Initial Order". The CCAA affords courts broad jurisdiction to make orders and "fill in the gaps in legislation so as to give effect to the objects of the CCAA." [*Nortel Networks Corp., Re*, 2010 ONSC 1708 (Ont. S.C.J. [Commercial List]), paras. 66-70 ("*Re Nortel*")); *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299, 72 O.T.C. 99 (Ont. Gen. Div. [Commercial List]), para. 43]

45 Further, as the Supreme Court of Canada explained in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.), para. 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 described 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 (internal citations omitted). ...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.

46 It is also established that third-party releases are not an uncommon feature of complex restructurings under the CCAA [*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.) ("*ATB Financial*"); *Nortel Networks Corp., Re*, *supra*; *Robertson*, *supra*; *Muscletech Research & Development Inc., Re* (2007), 30 C.B.R. (5th) 59, 156 A.C.W.S. (3d) 22 (Ont. S.C.J. [Commercial List]) ("*Muscle Tech*"); *Grace Canada Inc., Re* (2008), 50 C.B.R. (5th) 25 (Ont. S.C.J. [Commercial List]); *Allen-Vanguard Corp., Re*, 2011 ONSC 5017 (Ont. S.C.J. [Commercial List])].

47 The Court of Appeal for Ontario has specifically confirmed that a third-party release is justified where the release forms part of a comprehensive compromise. As Blair J. A. stated in *ATB Financial*, *supra*:

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 ...

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 ...

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.

. . .

78. ... 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.

. . .

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.

48 Furthermore, in *ATB Financial*, *supra*, para. 111, the Court of Appeal confirmed that parties are entitled to settle allegations of fraud and to include releases of such claims as part of the settlement. It was noted that "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".

Relevant CCAA Factors

49 In assessing a settlement within the CCAA context, the court looks at the following three factors, as articulated in *Robertson*, *supra*:

(a) whether the settlement is fair and reasonable;

(b) whether it provides substantial benefits to other stakeholders; and

(c) whether it is consistent with the purpose and spirit of the CCAA.

50 Where a settlement also provides for a release, such as here, courts assess whether there is "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". Applying this "nexus test" requires consideration of the following factors: [*ATB Financial*, *supra*, para. 70]

(a) Are the claims to be released rationally related to the purpose of the plan?

(b) Are the claims to be released necessary for the plan of arrangement?

(c) Are the parties who have claims released against them contributing in a tangible and realistic way? and

(d) Will the plan benefit the debtor and the creditors generally?

Counsel Submissions

51 The Objectors argue that the proposed Ernst & Young Release is not integral or necessary to the success of Sino-Forest's restructuring plan, and, therefore, the standards for granting thirdparty releases in the CCAA are not satisfied. No one has asserted that the parties require the Ernst & Young Settlement or Ernst & Young Release to allow the Plan to go forward; in fact, the Plan has been implemented prior to consideration of this issue. Further, the Objectors contend that the $117 million settlement payment is not essential, or even related, to the restructuring, and that it is concerning, and telling, that varying the end of the Ernst & Young Settlement and Ernst & Young Release to accommodate opt-outs would extinguish the settlement.

52 The Objectors also argue that the Ernst & Young Settlement should not be approved because it would vitiate opt-out rights of class members, as conferred as follows in section 9 of the CPA: "Any member of a class involved in a class proceeding may opt-out of the proceeding in the manner and within the time specified in the certification order." This right is a fundamental element of procedural fairness in the Ontario class action regime [*Fischer v. IG Investment Management Ltd.*, 2012 ONCA 47 (Ont. C.A.), para. 69], and is not a mere technicality or illusory. It has been described as absolute [*Durling v. Sunrise Propane Energy Group Inc.*, 2011 ONSC 266 (Ont. S.C.J.)]. The opt-out period allows persons to pursue their self-interest and to preserve their rights to pursue individual actions [*Mangan v. Inco Ltd.* (1998), 16 C.P.C. (4th) 165, 38 O.R. (3d) 703 (Ont. Gen. Div.)].

53 Based on the foregoing, the Objectors submit that a proposed class action settlement with Ernst & Young should be approved solely under the CPA, as the Pöyry Settlement was, and not through misuse of a third-party release procedure under the CCAA. Further, since the minutes of settlement make it clear that Ernst & Young retains discretion not to accept or recognize normal opt-outs if the CPA procedures are invoked, the Ernst & Young Settlement should not be approved in this respect either.

54 Multiple parties made submissions favouring the Ernst & Young Settlement (with the accompanying Ernst & Young Release), arguing that it is fair and reasonable in the circumstances, benefits the CCAA stakeholders (as evidenced by the broad-based support for the Plan and this motion) and rationally connected to the Plan.

55 Ontario Plaintiffs' counsel submits that the form of the bar order is fair and properly balances the competing interests of class members, Ernst & Young and the non-settling defendants as:

> (a) class members are not releasing their claims to a greater extent than necessary;
>
> (b) Ernst & Young is ensured that its obligations in connection to the Settlement will conclude its liability in the class proceedings;
>
> (c) the non-settling defendants will not have to pay more following a judgment than they would be required to pay if Ernst & Young remained as a defendant in the action; and
>
> (d) the non-settling defendants are granted broad rights of discovery and an appropriate credit in the ongoing litigation, if it is ultimately determined by the court that there is a right of contribution and indemnity between the co-defendants.

56 SFC argues that Ernst & Young's support has simplified and accelerated the Plan process, including reducing the expense and management time otherwise to be incurred in litigating claims, and was a catalyst to encouraging many parties, including the Underwriters and BDO, to withdraw their objections to the Plan. Further, the result is precisely the type of compromise that the CCAA is designed to promote; namely, Ernst & Young has provided a tangible and significant contribution to the Plan (notwithstanding any pitfalls in the litigation claims against Ernst & Young) that has enabled SFC to emerge as Newco/NewcoII in a timely way and with potential viability.

57 Ernst & Young's counsel submits that the Ernst & Young Settlement, as a whole, including the Ernst & Young Release, must be approved or rejected; the court cannot modify the terms of a proposed settlement. Further, in deciding whether to reject a settlement, the court should consider whether doing so would put the settlement in "jeopardy of being unravelled". In this case, counsel submits there is no obligation on the parties to resume discussions and it could be that the parties have reached their limits in negotiations and will backtrack from their positions or abandon the effort.

Analysis and Conclusions

58 The Ernst & Young Release forms part of the Ernst & Young Settlement. In considering whether the Ernst & Young Settlement is fair and reasonable and ought to be approved, it is necessary to consider whether the Ernst & Young Release can be justified as part of the Ernst & Young Settlement. See *ATB Financial*, *supra*, para. 70, as quoted above.

59 In considering the appropriateness of including the Ernst & Young Release, I have taken into account the following.

60 Firstly, although the Plan has been sanctioned and implemented, a significant aspect of the Plan is a distribution to SFC's creditors. The significant and, in fact, only monetary contribution that can be directly identified, at this time, is the $117 million from the Ernst & Young Settlement. Simply put, until such time as the Ernst & Young Settlement has been concluded and the settlement proceeds paid, there can be no distribution of the settlement proceeds to parties entitled to receive them. It seems to me that in order to effect any distribution, the Ernst & Young Release has to be approved as part of the Ernst & Young Settlement.

61 Secondly, it is apparent that the claims to be released against Ernst & Young are rationally related to the purpose of the Plan and necessary for it. SFC put forward the Plan. As I outlined in the Equity Claims Decision, the claims of Ernst & Young as against SFC are intertwined to the extent that they cannot be separated. Similarly, the claims of the Objectors as against Ernst & Young are, in my view, intertwined and related to the claims against SFC and to the purpose of the Plan.

62 Thirdly, although the Plan can, on its face, succeed, as evidenced by its implementation, the reality is that without the approval of the Ernst & Young Settlement, the objectives of the Plan remain unfulfilled due to the practical inability to distribute the settlement proceeds. Further, in the event that the Ernst & Young Release is not approved and the litigation continues, it becomes circular in nature as the position of Ernst & Young, as detailed in the Equity Claims Decision, involves Ernst & Young bringing an equity claim for contribution and indemnity as against SFC.

63 Fourthly, it is clear that Ernst & Young is contributing in a tangible way to the Plan, by its significant contribution of $117 million.

64 Fifthly, the Plan benefits the claimants in the form of a tangible distribution. Blair J.A., at paragraph 113 of *ATB Financial*, *supra*, referenced two further facts as found by the application judge in that case; namely, the voting creditors who approved the Plan did so with the knowledge of the nature and effect of the releases. That situation is also present in this case.

65 Finally, the application judge in *ATB Financial*, *supra*, held that the releases were fair and reasonable and not overly broad or offensive to public policy. In this case, having considered the alternatives of lengthy and uncertain litigation, and the full knowledge of the Canadian plaintiffs, I conclude that the Ernst & Young Release is fair and reasonable and not overly broad or offensive to public policy.

66 In my view, the Ernst & Young Settlement is fair and reasonable, provides substantial benefits to relevant stakeholders, and is consistent with the purpose and spirit of the CCAA. In addition, in my view, the factors associated with the *ATB Financial* nexus test favour approving the Ernst & Young Release.

67 In *Nortel Networks Corp., Re*, *supra*, para. 81, I noted that the releases benefited creditors generally because they "reduced the risk of litigation, protected Nortel against potential contribution claims and indemnity claims and reduced the risk of delay caused by potentially complex litigation and associated depletion of assets to fund potentially significant litigation costs". In this case, there is a connection between the release of claims against Ernst & Young and a distribution to creditors. The plaintiffs in the litigation are shareholders and Noteholders of SFC. These plaintiffs have claims to assert against SFC that are being directly satisfied, in part, with the payment of $117 million by Ernst & Young.

68 In my view, it is clear that the claims Ernst & Young asserted against SFC, and SFC's subsidiaries, had to be addressed as part of the restructuring. The interrelationship between the various entities is further demonstrated by Ernst & Young's submission that the release of claims by Ernst & Young has allowed SFC and the SFC subsidiaries to contribute their assets to the restructuring, unencumbered by claims totalling billions of dollars. As SFC is a holding company with no material assets of its own, the unencumbered participation of the SFC subsidiaries is crucial to the restructuring.

69 At the outset and during the CCAA proceedings, the Applicant and Monitor specifically and consistently identified timing and delay as critical elements that would impact on maximization of the value and preservation of SFC's assets.

70 Counsel submits that the claims against Ernst & Young and the indemnity claims asserted by Ernst & Young would, absent the Ernst & Young Settlement, have to be finally determined before the CCAA claims could be quantified. As such, these steps had the potential to significantly delay the CCAA proceedings. Where the claims being released may take years to resolve, are risky, expensive or otherwise uncertain of success, the benefit that accrues to creditors in having them settled must be considered. See *Nortel Networks Corp., Re*, *supra*, paras. 73 and 81; and *Muscletech*, *supra*, paras. 19-21.

71 Implicit in my findings is rejection of the Objectors' arguments questioning the validity of the Ernst & Young Settlement and Ernst & Young Release. The relevant consideration is whether a proposed settlement and third-party release sufficiently benefits all stakeholders to justify court approval. I reject the position that the $117 million settlement payment is not essential, or even related, to the restructuring; it represents, at this point in time, the only real monetary consideration available to stakeholders. The potential to vary the Ernst & Young Settlement and Ernst & Young Release to accommodate opt-outs is futile, as the court is being asked to approve the Ernst & Young Settlement and Ernst & Young Release as proposed.

72 I do not accept that the class action settlement should be approved solely under the CPA. The reality facing the parties is that SFC is insolvent; it is under CCAA protection, and stakeholder claims are to be considered in the context of the CCAA regime. The Objectors' claim against Ernst & Young cannot be considered in isolation from the CCAA proceedings. The claims against Ernst & Young are interrelated with claims as against SFC, as is made clear in the Equity Claims Decision and Claims Procedure Order.

73 Even if one assumes that the opt-out argument of the Objectors can be sustained, and optout rights fully provided, to what does that lead? The Objectors are left with a claim against Ernst & Young, which it then has to put forward in the CCAA proceedings. Without taking into account any argument that the claim against Ernst & Young may be affected by the claims bar date, the claim is still capable of being addressed under the Claims Procedure Order. In this way, it is again subject to the CCAA fairness and reasonable test as set out in *ATB Financial*, *supra*.

74 Moreover, CCAA proceedings take into account a class of creditors or stakeholders who possess the same legal interests. In this respect, the Objectors have the same legal interests as the Ontario Plaintiffs. Ultimately, this requires consideration of the totality of the class. In this case, it is clear that the parties supporting the Ernst & Young Settlement are vastly superior to the Objectors, both in number and dollar value.

75 Although the right to opt-out of a class action is a fundamental element of procedural fairness in the Ontario class action regime, this argument cannot be taken in isolation. It must be considered in the context of the CCAA.

76 The Objectors are, in fact, part of the group that will benefit from the Ernst & Young Settlement as they specifically seek to reserve their rights to "opt-in" and share in the spoils.

77 It is also clear that the jurisprudence does not permit a dissenting stakeholder to opt-out of a restructuring. [*Sammi Atlas Inc., Re* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List])).] If that were possible, no creditor would take part in any CCAA compromise where they were to receive less than the debt owed to them. There is no right to opt-out of any CCAA process, and the statute contemplates that a minority of creditors are bound by the plan which a majority have approved and the court has determined to be fair and reasonable.

78 SFC is insolvent and all stakeholders, including the Objectors, will receive less than what they are owed. By virtue of deciding, on their own volition, not to participate in the CCAA process, the Objectors relinquished their right to file a claim and take steps, in a timely way, to assert their rights to vote in the CCAA proceeding.

79 Further, even if the Objectors had filed a claim and voted, their minimal 1.6% stake in SFC's outstanding shares when the Muddy Waters report was released makes it highly unlikely that they could have altered the outcome.

80 Finally, although the Objectors demand a right to conditionally opt-out of a settlement, that right does not exist under the CPA or CCAA. By virtue of the certification order, class members had the ability to opt-out of the class action. The Objectors did not opt-out in the true sense; they purported to create a conditional opt-out. Under the CPA, the right to opt-out is "in the manner and within the time specified in the certification order". There is no provision for a conditional opt-out in the CPA, and Ontario's single opt-out regime causes "no prejudice...to putative class members". [CPA, section 9; *Osmun v. Cadbury Adams Canada Inc.* (2009), 85 C.P.C. (6th) 148 (Ont. S.C.J.), paras. 43-46; and *Eidoo v. Infineon Technologies AG*, 2012 ONSC 7299 (Ont. S.C.J.).]

Miscellaneous

81 For greater certainty, it is my understanding that the issues raised by Mr. O'Reilly have been clarified such that the effect of this endorsement is that the Junior Objectors will be included with the same status as the Ontario Plaintiffs.

Disposition

82 In the result, for the foregoing reasons, the motion is granted. A declaration shall issue to the effect that the Ernst & Young Settlement is fair and reasonable in all the circumstances. The Ernst & Young Settlement, together with the Ernst & Young Release, is approved and an order shall issue substantially in the form requested. The motion of the Objectors is dismissed.

Motion granted.

End of Document

TAB 4

2015 ONSC 7538
Ontario Superior Court of Justice

1511419 Ontario Inc., Re

2015 CarswellOnt 20336, 2015 ONSC 7538, 262 A.C.W.S. (3d) 582, 33 C.B.R. (6th) 110

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 1511419 Ontario Inc., Formerly Known as the Cash Store Financial Services, 1545688 Alberta Inc., Formerly Known as the Cash Store Inc., 986301 Alberta Inc., Formerly Known as TCS Cash Store Inc., 1152919 Alberta Inc., Formerly Known as Instaloans Inc., 7252331 Canada Inc., 5515433 Manitoba Inc., 1693926 Alberta Ltd. doing business as "the Title Store"

G.B. Morawetz R.S.J.

Heard: November 19, 2015
Judgment: December 23, 2015
Docket: CV-14-10518-00CL

Counsel: Jonathan Foreman, Lindsay Merrifield, for Ontario Consumers Class Action
James Harnum (Agent), for Harrison Pensa
David Mann, Robert Kennedy, for DirectCash in CCAA Proceedings
Eric R. Hoaken, for DirectCash in Class Action Proceedings
Peter Griffin, Matthew Lerner, for Gordon Reykdal
Jeff Galway, for N. Bland
Mark Polley, Eric Brousseau, for National Money Mart Company
Andrew Faith, Jeff Haylock, for 1573568 Alberta Ltd.
Geoff R. Hall, Stephen Fulton, for Monitor (FTI Consulting Canada Inc.)
Patrick Riesterer, for Chief Restructuring Officer of the Applicants
Michael Byers, for Craig Warnock
Serge Khallughlian, Charles Wright, for Ad Hoc Committee of Purchasers of Applicants' Securities, including the Plaintiff in the Ontario Securities Class Actions
Mary Margaret Fox, for ACE Insurance Company
Doug McInnis, for Axis Reinsurance Company
Brendan O'Neill, Carolyn Descours, for Ad Hoc Committee of Noteholders
Rebecca Wise, for Albert Mondor, Michael Shaw, Ron Chicoyne, William Dunn and Robert Gibson
Ilan Ishai, for McCann Entities
David Hoffner, for Monitor in Chapter 15 Proceedings

Subject: Civil Practice and Procedure; Insolvency

Headnote

Civil practice and procedure --- Disposition without trial — Settlement — General principles

In securities class actions plaintiffs alleged that defendants made false and misleading statements regarding defendant company's financial results, assets, business structure and transactions, which caused company's securities to trade at artificially inflated prices — Defendants agreed to pay $13,779,167 in settlement of securities class actions — Plaintiffs brought motion for approval of settlement — Motion granted — Settlement was fair and reasonable in circumstances and provided substantial benefit to stakeholders — Release of defendants was fair and reasonable in circumstances and was justified as part of compromise or arrangement between debtors and creditors.

Table of Authorities

Cases considered by *G.B. Morawetz R.S.J.*:

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 92 O.R. (3d) 513 (Ont. C.A.) — considered

Dabbs v. Sun Life Assurance Co. of Canada (1998), 1998 CarswellOnt 5823 (Ont. Gen. Div.) — referred to

Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp. (2013), 2013 ONSC 1078, 2013 CarswellOnt 3361, 100 C.B.R. (5th) 30, 37 C.P.C. (7th) 135 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

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

Generally — referred to

MOTION by plaintiffs for approval of settlement in securities class action.

***G.B. Morawetz R.S.J.*:**

1 On November 19, 2015, the record was endorsed as follows:

> The Settlement is approved. Allocation issues adjourned on terms set out on the typed attachment. Order signed. Reasons will follow.

2 These are the reasons.

3 The terms of the adjournment are:

> 1. The motion to approve the Plan of Allocation in the *Fortier* class action is adjourned with an endorsement on consent to the effect that:
>
> > Despite the approval of the Plan of Arrangement and Settlement Agreement at Schedule "C", and despite sections 4.2(e) and 4.4(a) and any other section or schedule of the Plan of Arrangement, the Plan of Allocation at Schedule "D" and any allocation in accordance with it is not approved and the motion for approval of the Plan of Allocation is adjourned to a date to be determined at a case conference before Morawetz R.S.J.
>
> 2. The case conference shall be heard at the earliest possible date.
>
> 3. The purpose of the case conference shall be to determine the form and substance of the adjourned motion for approval of the Plan of Allocation, and the schedule of any steps pursuant to that motion.
>
> 4. No further steps in the motion for approval of the Plan of Allocation shall be taken by any party until a schedule is established at a case conference before Morawetz R.S.J.
>
> 5. There shall be a standstill of any proceeding of Cash Store against any of the group of clients until the hearing of the motion for approval of the Plan of Allocation.
>
> 6. For greater certainty, nothing in this order shall prohibit any person from filing claims for compensation from the D&O/Insurer Securities Class Action Settlement Amount (as defined in the Plan) or RicePoint Administration Inc. from receiving and processing claims before the motion for approval of the Plan of Allocation, provided that no determination of any class member's entitlement to distribution shall be made, and no distribution shall be made, until the issue of the Plan of Allocation is determined by the Court.

4 The Ad Hoc Committee of Purchasers of the Applicants Securities, including the Plaintiff in the Ontario Securities Class Action ("Securities Plaintiffs") move for an order approving:

a. The Settlement between the Plaintiffs and Defendants in the Securities Class Actions ("Securities Settlement") as reflected in the Settlement Agreement; and

b. The proposed plan for allocating and distributing the proceeds of the Settlement Agreement payable to the Securities Class Members ("Plan of Allocation").

5 As noted, the portion of the motion relating to the Plan of Allocation has been adjourned.

6 The Plaintiffs in the Securities Class Actions allege, among other things, that 1511419 Ontario Inc., formerly known as The Cash Store Financial Services Inc. ("Cash Store"), Nancy Bland, Gordon J. Reykdal, Craig Wornock, J. Albert Mondor, Ron Chicoyne and Michael M. Shaw (collectively, "Defendants") made false and misleading statements regarding Cash Store's financial results, assets, business structure and transactions, which caused Cash Store's securities to trade at artificially inflated prices.

7 Under the terms of the Settlement Agreement, the Defendants have agreed to pay $13,779,167 in settlement of the Securities Class Actions.

8 Counsel to the Securities Plaintiffs submit that the Securities Settlement is the product of hard-fought and protracted negotiations which were conducted by counsel having extensive experience in securities class actions in both Canada and the United States.

9 Counsel further submits that the Securities Settlement is fair, reasonable, and in the best interests of the Securities Class Members. In particular:

a. The Securities Settlement is the product of arms-length negotiations over the course of two formal mediations before The Honourable George Adams;

b. The Securities Settlement represents a substantial recovery for the Securities Class Members; and

c. There are a number of legal impediments to recovery from the Defendants, which weigh in favour of the Securities Settlement.

10 The factual background to the Securities Class Actions is summarized in the comprehensive factum submitted by counsel to the Securities Plaintiffs. The factual summary was not challenged and the motion for approval was not opposed.

11 It is also noted that Notice of the D&O/Insurer Global Settlement Agreement has been delivered to the Securities Class Members in accordance with the Notice and Representation Order. Representative Counsel has received no objections regarding the quantum of the Settlement amount for the approval of Securities Settlement as a whole.

12 The key terms of the Securities Settlement are as follows:

a. The Securities Class Action Settlement Amount of Cdn. $13,779,167 shall be allocated to the Securities Class Members, with Cdn. $4,875,000 assigned to Shareholder Class Members and Cdn. $8,904,167 assigned to Noteholder Class Members.

b. The Securities Class Action Settlement amount shall be distributed pursuant to a Plan of Allocation to be approved by the Court. No portion of the Securities Class Action Settlement shall revert back to the Defendants, regardless of the quantity of claims filed or amount of funds remaining after all eligible claimants have been paid pursuant to Plan of Allocation.

c. In consideration of the Securities Class Action Settlement amount, the Defendants shall receive a Full and Final Release in respect of all Securities Class Actions claims against them.

13 The issue is whether the Settlement Agreement should be approved.

14 In assessing a settlement within the CCAA context, the court looks at three factors:

a. Whether the settlement is fair and reasonable;

b. Whether it provides substantial benefit to other stakeholders; and

c. Whether it is consistent with the purpose and spirit of the CCAA.

(See: *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.*, 2013 ONSC 1078 (Ont. S.C.J. [Commercial List])).

15 Further, where a settlement also provides for a release, courts assess whether there is "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." Applying this "Nexus" test requires consideration of the following factors:

a. Are the claims to be released rationally related to the purpose of the Plan?

b. Are the claims to be released necessary for the Plan of Arrangement?

c. Are the parties who have claims released against them contributing in a tangible and realistic way?

d. Will the Plan benefit the debtor and the creditors generally?

(See: *Labourers' Pension Fund of Central and Eastern Canada*, *supra* at para. 50 and *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.))

16 The test for whether a class action settlement ought to be approved is similar to the test for approval of a settlement under the CCAA.

17 Counsel submits that to approve a class action settlement, the test is whether "in all the circumstances, the settlement is fair, reasonable, and in the best interest of those affected by it" (See: *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Ont. Gen. Div.)). Counsel submits that the class action cases have established the following additional principles are relevant on the settlement approval motion:

a. The resolution of complex litigation through the compromise of claims is encouraged by the court and favoured by public policy;

b. There is a strong initial presumption of fairness when a proposed settlement, which was negotiated at arms-length by counsel for the class, is presented for court approval;

c. To reject the terms of a settlement and require the litigation to continue, a court must conclude that the settlement does not fall within a range of reasonableness;

d. A court must be assured that the settlement secures appropriate consideration for the class in return for the surrender of litigation rights against the defendants; and

e. It is not the court's function to substitute its judgment for that of the parties or to attempt to renegotiate a proposed settlement.

18 In this case, the Settlement Agreement provides for a total payment of Cdn. $13,779,167 in settlement of all claims against the Defendants in relation to the Securities Class Actions.

19 Having reviewed the record and hearing submissions, I am satisfied that the Securities Settlement is fair and reasonable under all of the circumstances and provides substantial benefit to other stakeholders.

20 Further, I am satisfied that the Release of the Defendants is also fair and reasonable in the circumstances and that the Release is "justified as part of the compromise or arrangement between the debtors and its creditors... . The facts were not challenged. I am satisfied that there is a reasonable connection between the third party claim being compromised in the Plan the restructuring achieved by the Plan." (See: *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, *Supra*). Further, in order to effect any distribution, the Defendants' Release must be approved as part of the Settlement Agreement.

21 The Settlement Agreement is approved and the order to give effect to the foregoing has been signed.

Motion granted.

End of Document

TAB 5

2015 ONSC 622
Ontario Superior Court of Justice

Cline Mining Corp., Re

2015 CarswellOnt 3285, 2015 ONSC 622, 23 C.B.R. (6th) 194, 252 A.C.W.S. (3d) 8

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 and Arrangement of Cline Mining Corporation, New ELK Coal Company LLC and North Central Energy Company

G.B. Morawetz R.S.J.

Heard: January 27, 2015
Judgment: January 30, 2015
Docket: CV-14-10781-00CL

Counsel: Robert J. Chadwick, Logan Willis for Applicants, Cline Mining Corporation et al.
Michael DeLellis, David Rosenblatt for FTI Consulting Canada Inc., Monitor of the Applicants
Jay Swartz for Secured Noteholders

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

Insolvent mining companies (applicants) were involved in Companies' Creditors Arrangement Act proceedings — Applicants brought motion to approve plan of arrangement which involved release of certain claims and recapitalization of applicants — Motion granted — Plan was fair and reasonable in circumstances — Plan represented compromise and treated affected creditors fairly — Third party releases were rationally related to purpose of plan and were necessary for successful restructuring — Release of directors and officers was appropriate — Monitor supported applicants' position and plan had unanimous support from creditors.

Table of Authorities

Cases considered by *G.B. Morawetz R.S.J.*:

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 92 O.R. (3d) 513, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123 (Ont. C.A.) — referred to

Cline Mining Corp., Re (2014), 2014 CarswellOnt 18943, 2014 ONSC 6998 (Ont. S.C.J.) — considered

Sino-Forest Corp., Re (2012), 2012 ONSC 7050, 2012 CarswellOnt 15913 (Ont. S.C.J. [Commercial List]) — referred to

Sino-Forest Corp., Re (2013), 2013 ONCA 456, 2013 CarswellOnt 8896 (Ont. C.A.) — referred to

SkyLink Aviation Inc., Re (2013), 2013 ONSC 2519, 2013 CarswellOnt 7670, 3 C.B.R. (6th) 83 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

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

Generally — referred to

s. 5.1(2) [en. 1997, c. 12, s. 122] — considered

s. 6(1) — considered

s. 11.02(2) [en. 2005, c. 47, s. 128] — considered

s. 19(2) — considered

MOTION by insolvent companies for approval or plan of arrangement and other relief.

***G.B. Morawetz R.S.J.*:**

1 Cline Mining Corporation, New Elk Coal Company LLC and North Central Energy Company (collectively, the "Applicants") seek an order (the "Sanction Order"), among other things:

> a. sanctioning the Applicants' Amended and Restated Plan of Compromise and Arrangement dated January 20, 2015 (the "Plan") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"); and
>
> b. extending the stay, as defined in the Initial Order granted December 3, 2014 (the "Initial Order"), to and including April 1, 2015.

2 Counsel to the Applicants submits that the Recapitalization is the result of significant efforts by the Applicants to achieve a resolution of their financial challenges and, if implemented, the Recapitalization will maintain the Applicants as a unified corporate enterprise and result in an improved capital structure that will enable the Applicants to better withstand prolonged weakness in the global market for metallurgical coal.

3 Counsel submits that the Applicants believe that the Recapitalization achieves the best available outcome for the Applicants and their stakeholders in the circumstances and achieves results that are not attainable under any other bankruptcy, sale or debt enforcement scenario.

4 The position of the Applicants is supported by the Monitor, and by Marret, on behalf of the Secured Noteholders.

5 The Plan has the unanimous support from the creditors of the Applicants. The Plan was approved by 100% in number and 100% in value of creditors voting in each of the Secured Noteholders Class, the Affected Unsecured Creditors Class and the WARN Act Plaintiffs Class.

6 The background giving rise to (i) the insolvency of the Applicants; (ii) the decision to file under the CCAA; (iii) the finding made that the court had the jurisdiction under the CCAA to accept the filing; (iv) the finding of insolvency; and (v) the basis for granting the Initial Order and the Claims Procedure Order was addressed in *Cline Mining Corp., Re*, 2014 ONSC 6998 (Ont. S.C.J.) and need not be repeated.

7 The Applicants report that counsel to the WARN Act Plaintiffs in the class action proceedings (the "Class Action Counsel") submitted a class proof of claim on behalf of the 307 WARN Act Plaintiffs in the aggregate amount of U.S. $3.7 million. Class Action Counsel indicated that the WARN Act Plaintiffs were not prepared to vote in favour of the Plan dated December 3, 2014 (the "Original Plan") without an enhancement of the recovery. The Applicants report that after further discussions, agreement was reached with Class Action Counsel on the form of a resolution that provides for an enhanced recovery for the WARN Act Plaintiffs Class of $210,000 (with $90,000 paid on the Plan implementation date) as opposed to the recovery offered in the Original Plan of $100,000 payable in eight years from the Plan implementation date.

8 As a result of reaching this resolution, the Original Plan was amended to reflect the terms of the WARN Act resolution.

9 The Applicants served the Amended Plan on the Service List on January 20, 2015.

10 The Plan provides for a full and final release and discharge of the Affected Claims and Released Claims, a settlement of, and consideration for, all Allowed Affected Claims and a recapitalization of the Applicants.

11 Equity claimants will not receive any consideration or distributions under the Plan.

12 The Plan provides for the release of certain parties (the "Released Parties"), including:

(i) the Applicants, the Directors and Officers and employees of contractors of the Applicants; and

(ii) the Monitor, the Indenture Trustee and Marret and their respective legal counsel, the financial and legal advisors to the Applicants and other parties employed by or associated with the parties listed in sub-paragraph (ii), in each case in respect of claims that constitute or relate to, *inter alia*, any Claims, any Directors/Officer Claims and any claims arising from or connected to the Plan, the Recapitalization, the CCAA Proceedings, the Chapter 15 Proceedings, the business or affairs of the Applicants or certain other related matter (collectively, the "Released Claims").

13 The Plan does not release:

(i) the right to enforce the Applicants' obligations under the Plan;

(ii) the Applicants from or in respect of any Unaffected Claim or any Claim that is not permitted to be released pursuant to section 19(2) of the CCAA; or

(iii) any Director or Officer from any Director/Officer Claim that is not permitted to be released pursuant to section 5.1(2) of the CCAA.

14 The Plan does not release Insured Claims, provided that any recourse in respect of such claims is limited to proceeds, if any, of the Applicants' applicable Insurance Policies.

15 The Meetings Order authorized the Applicants to convene a meeting of the Secured Noteholders, a meeting of Affected Unsecured Creditors and a meeting of WARN Act Plaintiffs to consider and vote on the Plan.

16 The Meetings were held on January 21, 2015. At the Meetings, the resolution to approve the Plan was passed unanimously in each of the three classes of creditors.

17 None of the persons with Disputed Claims voted at the Meetings, in person or by proxy. Consequently, the results of the votes taken would not change based on the inclusion or exclusion of the Disputed Claims in the voting results.

18 Pursuant to section 6(1) of the CCAA, the court has the discretion to sanction a plan of compromise or arrangement where the requisite double-majority of creditors has approved the plan. The effect of the court's approval is to bind the company and its creditors.

19 The general requirements for court approval of the CCAA Plan are well established:

a. there must be strict compliance with all statutory requirements;

b. all materials filed and procedures carried out must be examined to determine if anything has been done or purported to have been done, which is not authorized by the CCAA; and

c. the plan must be fair and reasonable.

(see *SkyLink Aviation Inc., Re*, 2013 ONSC 2519 (Ont. S.C.J. [Commercial List]))

20 Having reviewed the record and hearing submissions, I am satisfied that the foregoing test for approval has been met in this case.

21 In arriving at my conclusion that the Plan is fair and reasonable in the circumstances, I have taken into account the following:

a. the Plan represents a compromise among the Applicants and the Affected Creditors resulting from discussions among the Applicants and their creditors, with the support of the Monitor;

b. the classification of the Applicants' creditors into three voting classes was previously approved by the court and the classification was not opposed at any time;

c. the results of the Sale Process indicate that the Secured Noteholders would suffer a significant shortfall and there would be no residual value for subordinate interests;

d. the Recapitalization provides a limited recovery for unsecured creditors and the WARN Act Plaintiffs;

e. all Affected Creditors that voted on the Plan voted for its approval;

f. the Plan treats Affected Creditors fairly and provides for the same distribution among the creditors within each of the Secured Noteholders Class, the Affected Unsecured Creditors Class and the WARN Act Plaintiffs Class;

g. Unaffected Claims, which include, *inter alia*, government and employee priority claims, claims not permitted to be compromised pursuant to sections 19(2) and 5.1(2) of the CCAA and prior ranking secured claims, will not be affected by the Plan;

h. the treatment of Equity Claims under the Plan is consistent with the provisions of the CCAA; and

i. the Plan is supported by the Applicants (Marret, on behalf of the Secured Noteholders), the Monitor and the creditors who voted in favor of the Plan at the Meetings.

22 The CCAA permits the inclusion of third party releases in a plan of compromise or arrangement where those releases are reasonably connected to the proposed restructuring (see: *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.) ("*ATB Financial*"); *SkyLink*, *supra;* and *Sino-Forest Corp., Re*, 2012 ONSC 7050 (Ont. S.C.J. [Commercial List]), leave to appeal denied, 2013 ONCA 456 (Ont. C.A.)).

23 The court has the jurisdiction to sanction a plan containing third party releases where the factual circumstances indicate that the third party releases are appropriate. In this case, the record establishes that the releases were negotiated as part of the overall framework of the compromises in the Plan, and these releases facilitate a successful completion of the Plan and the Recapitalization. The releases cover parties that could have claims of indemnification or contribution against the Applicants in relation to the Recapitalization, the Plan and other related matters, whose rights against the Applicants have been discharged in the Plan.

24 I am satisfied that the releases are therefore rationally related to the purpose of the Plan and are necessary for the successful restructuring of the Applicants.

25 Further, the releases provided for in the Plan were contained in the Original Plan filed with the court on December 3, 2014 and attached to the Meetings Order. Counsel to the Applicants submits that the Applicants are not aware of any objections to the releases provided for in the Plan.

26 The Applicants also contend that the releases of the released Directors/Officers are appropriate in the circumstances, given that the released Directors and Officers, in the absence of the Plan releases, could have claims for indemnification

or contribution against the Applicants and the release avoids contingent claims for such indemnification or contribution against the Applicants. Further, the releases were negotiated as part of the overall framework of compromises in the Plan. I also note that no Director/Officer Claims were asserted in the Claims Procedure.

27 The Monitor supports the Applicants' request for the sanction of the Plan, including the releases contained therein.

28 I am satisfied that in these circumstances, it is appropriate to grant the releases.

29 The Plan provides for certain alterations to the Cline Articles in order to effectuate certain corporate steps required to implement the Plan, including the consolidation of shares and the cancellation of fractional interests of the Cline Common Shares. I am satisfied that these amendments are necessary in order to effect the provisions of the Plan and that it is appropriate to grant the amendments as part of the approval of the Plan.

30 The Applicants also request an extension of the stay until April 1, 2015. This request is made pursuant to section 11.02(2) of the CCAA. The court must be satisfied that:

(i) circumstances exist that make the order appropriate; and

(ii) the applicant has acted, and is acting in good faith and with due diligence.

31 The record establishes that the Applicants have made substantial progress toward the completion of the Recapitalization, but further time is required to implement same. I am satisfied that the test pursuant to section 11.02(2) has been met and it is appropriate to extend the stay until April 1, 2015.

32 Finally, the Monitor requests approval of its activities and conduct to date and also approval of its Pre-Filing Report, the First Report dated December 16, 2014 and the Second Report together with the activities described therein. No objection was raised with respect to the Monitor's request, which is granted.

33 For the foregoing reasons, the motion is granted and an order shall issue in the form requested, approving the Plan and providing certain ancillary relief.

Motion granted.

End of Document

TAB 6

2008 CarswellOnt 6284
Ontario Superior Court of Justice [Commercial List]

Grace Canada Inc., Re

2008 CarswellOnt 6284, [2008] O.J. No. 4208, 170 A.C.W.S. (3d) 692, 50 C.B.R. (5th) 25

IN THE MATTER OF S. 18.6 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF GRACE CANADA, INC.

Morawetz J.

Heard: September 30, 2008
Judgment: October 23, 2008
Docket: 01-CL-4081

Counsel: Derrick C. Tay, Orestes Pasparakis, Jennifer Stam for Grace Canada Inc.
Keith J. Ferbers for Raven Thundersky
Alexander Rose for Sealed Air (Canada)
Michel Bélanger, David Thompson, Matthew G. Moloci for CDN ZAI Claimants
Jacqueline Dais-Visca, Carmela Maiorino for Attorney General of Canada

Subject: Insolvency; Civil Practice and Procedure

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Faced with product liability suits U.S. parent of applicant G Inc. filed for Chapter 11 re-organization — G Inc. spun off subsidiary SA and provided SA with indemnities relating to asbestos liabilities arising from attic insulation — G Inc commenced proceedings under Act seeking ancillary relief to facilitate and coordinate U.S. proceedings in Canada — Several proposed class actions were commenced in Canada and by court order were enjoined and brought within restructuring process — Representative counsel were appointed to represent claimants in restructuring — Minutes of settlement were reached settling all Canadian claims — Minutes contained provisions for relief in favour of SA and Crown — Crown objected to language of release removing claim over for contribution and indemnity — Minutes were submitted for court approval — The minutes were approved — Representative counsel had been given broad powers by court order to negotiate on behalf of Canadian claimants so had authority to enter the minutes of settlement — Court had power to approve material agreements including settlement agreements before filing of any plan of compromise or arrangement — SA had contributed to settlement funds — Release not only necessary and essential but fair — Crown's release also necessary otherwise G Inc. could become indirectly liable through contribution and indemnity claims — Minutes released any claims for which Crown had right of contribution or indemnity — Since company released from claims Crown had no need to claim over — Minutes were to be approved or rejected as whole — Approval of minutes fair and reasonable especially given that company could have defended on limitation period and that U.S. bankruptcy court had determined that attic insulation did not pose unreasonable risk — Court awarded compensation to representative counsel, claims administrator and qualified expert in amount of $3,250,000.

Table of Authorities

Cases considered by *Morawetz J.*:

Association des consommateurs pour la qualité dans la construction v. Canada (Attorney General) (2005), 2005 CarswellQue 10587 (C.S. Que.) — referred to

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]) — referred to

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 296 D.L.R. (4th) 135, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123 (Ont. C.A.) — referred to

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 CarswellOnt 5432, 2008 CarswellOnt 5433 (S.C.C.) — referred to

Calpine Canada Energy Ltd., Re (2007), 2007 CarswellAlta 1050, 2007 ABQB 504, 35 C.B.R. (5th) 1, 415 A.R. 196, 33 B.L.R. (4th) 68 (Alta. Q.B.) — considered

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

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]) — considered

Muscletech Research & Development Inc., Re (2007), 30 C.B.R. (5th) 59, 2007 CarswellOnt 1029 (Ont. S.C.J. [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

s. 18.6(3) [en. 1997, c. 12, s. 125] — considered

s. 18.6(4) [en. 1997, c. 12, s. 125] — considered

MOTION to seek approval of minutes of settlement.

***Morawetz J.*:**

1 Grace Canada Inc. ("Grace Canada" and with the U.S. debtors, "Grace") bring this motion to seek approval of the Minutes of Settlement ("the Minutes") in respect of claims against Grace relating to the manufacture and sale of Zonolite Attic Insulation ("ZAI") in Canada (the "CDN ZAI Claims").

2 Under the Minutes, Grace agrees to:

(a) fund a broad multimedia notice programme across Canada;

(b) establish a trust with $6.5 million for the payment of Canada ZAI property damage claims; and

(c) channel any Canadian ZAI personal injury claims to a U.S. asbestos trust which will have in excess of US $1.5 billion in funding.

3 In consideration, Grace would be discharged of any liability in connection with CDN ZAI Claims.

4 Although there was no direct opposition to the terms of the Minutes as being fair and reasonable, certain parties proposed amendments to the form of order sought by Grace.

5 Grace submits that the Minutes ought to be approved in the form submitted. Counsel submitted that Grace's significant settlement contribution is manifestly fair and reasonable, given Grace's defences to CDN ZAI Claims and, in particular, the judicial determination by the U.S. Bankruptcy Court (the "U.S. Court") that ZAI does not pose an unreasonable risk of harm.

6 Further, counsel to Grace submits that the Minutes are an important step towards the successful reorganization of Grace and with this settlement, these insolvency proceedings, which were filed in April 2001, are nearing completion.

7 W. R. Grace & Co. and its 61 subsidiaries (the "U.S. Debtors") have filed a joint Chapter 11 plan of reorganization (the "Plan") with the U.S. Court and expect to commence a confirmation hearing for the Plan in early 2009. The Plan incorporates the terms of the settlement before this Court and if confirmed, sees Grace emerging from Chapter 11 protection in 2009.

8 The chain of events that resulted in the Minutes began in 1963 with Grace's purchase of the assets of the Zonolite Company ("Zonolite"). Zonolite mined and processed vermiculite from a mine near Libby, Montana (the "Libby Mine"). Vermiculite is an insulator which apparently has no known toxic properties. However, the vermiculite ore from the Libby Mine contained impurities, including asbestiform minerals.

9 One of the products made from the U.S. Debtors' vermiculite was ZAI. ZAI was installed in attics of homes. Some ZAI contained trace amounts of asbestos.

10 In addition, 40 years ago the U.S. Debtors manufactured a product known as monokote-3 ("MK-3") which had chrysotile asbestos added during the manufacturing process.

11 Grace stopped manufacturing MK-3 in Canada by 1975 and ceased production of ZAI in 1984 and closed the Libby Mine in 1990.

12 By the 1970s, the U.S. Debtors began to be named in asbestos-related lawsuits. These included both asbestos-related personal injury claims ("PI Claims") and property damage claims relating to ZAI.

13 Due to a rise in the number of PI Claims in 2000 and 2001, the U.S. Debtors filed for protection under Chapter 11 of the *United States Bankruptcy Code* on April 2, 2001.

14 Grace Canada was incorporated in 1997. According to the affidavit of Mr. Finke, it had no direct involvement in any historic use of asbestos.

15 Rather, Grace's historic business operations in Canada were undertaken by a company now known as Sealed Air (Canada) Co./CIE ("Sealed Air Canada"). Sealed Air Canada is the successor to the Canadian companies with past involvement in the sale and distribution of ZAI and asbestos containing products such as MK-3.

16 Sealed Air Canada was spun-off from Grace in 1998 and as part of the transaction, Grace Canada and the U.S. Debtors provided certain indemnities to Sealed Air Canada and its parent, Sealed Air Corporation, relating to historic asbestos liabilities.

17 On April 4, 2001, two days after the Chapter 11 proceedings had been commenced, Grace Canada commenced these proceedings. The Canadian CCAA proceedings were commenced seeking ancillary relief to facilitate and coordinate the U.S. proceedings in Canada. An initial order was granted by this Court pursuant to s.18.6(4) of the CCAA (the "Initial Order").

18 By 2005, despite the Initial Order, 10 proposed class actions (the "Proposed Class Actions") were commenced across Canada in relation to the manufacture, distribution and sale of ZAI. Grace Canada, some of the U.S. Debtors and Sealed Air Canada were named as defendants, as was the Attorney General of Canada (the "Crown").

19 The allegations in the Proposed Class Actions include both ZAI PI Claims as well as damages for the cost of removing ZAI from homes across Canada ("CDN ZAI PD Claims").

20 On November 14, 2005, an order was issued (the "November 14th Order") enjoining the Proposed Class Actions against the U.S. Debtors, Sealed Air Canada and the Crown.

21 As a result, the Proposed Class Actions were brought within the overall restructuring process.

22 By order of February 8, 2006 (the "Representation Order"), Lauzon Bélanger S.E.N.C. ("Lauzon") and Scarfone Hawkins LLP ("Scarfone") (jointly, "Representative Counsel") were appointed to act as the single representative on behalf of all of the holders of Canadian ZAI Claims ("CDN ZAI Claimants") to advocate their interests in the restructuring process.

23 No one has taken issue with the authority of the Representative Counsel to represent all CDN ZAI Claimants in the U.S. Court, this Court or at any of the mediations. The Representation Order provided that Representative Counsel would, among other things, have authority to negotiate a settlement with Grace.

24 After a long history of negotiations, on June 2, 2008, Grace, Representative Counsel and the Crown announced to the U.S. Court that they had reached an agreement in principle that remained subject to the Crown's acceptance. The Crown was not able to obtain firm instructions on whether to participate in the settlement.

25 On September 2, 2008, Grace and Representative Counsel signed the Minutes resolving all CDN ZAI Claims against Grace and Sealed Air Canada.

26 On April 7, 2008, the U.S. Debtors reached an agreement effectively settling all present and future PI Claims (the "PI Settlement") and under this agreement, the U.S. Debtors agreed to pay into trust various assets, including US $250 million, warrants to acquire common stock, proceeds of insurance, certain litigation and deferred payments and it estimates that the total value of the settlement is in excess of US$1.5 billion. Sealed Air Canada is making a contribution to the settlement in excess of $500 million, plus 18 million shares of stock.

27 On September 21, 2008, the U.S. Debtors filed their draft Plan with the U.S. Court and confirmation hearings are scheduled for early in 2009.

28 The Minutes contemplate a settlement of all CDN ZAI Claims, both personal injury ("CDN ZAI PI Claims") and property damage, on the following terms:

> (a) Grace agrees to provide in its Plan for the creation of a separate class of CDN ZAI PD Claims and to establish the CDN ZAI PD Claims Fund, which shall make payments in respect of CDN ZAI Claims;
>
> (b) on the effective date of Grace's Plan, Grace will contribute $6,500,000 through a U.S. PD Trust to the CDN ZAI PD Claims Fund;
>
> (c) Grace's Plan provides that any holder of a CDN ZAI PI Claim ("CDN ZAI PI Claimant") shall be entitled to file his or her claim with the Asbestos Personal Injury Trust to be created for all PI Claims and funded in accordance with the US$1.5 billion PI Settlement;
>
> (d) Representative Counsel shall vote, on behalf of CDN ZAI Claimants, in favour of the Plan incorporating the settlement; and
>
> (e) Representative Counsel shall be entitled to bring a fee application within the U.S. proceedings and any such payments received would reduce the amount otherwise payable to Representative Counsel under the Settlement.

In addition, Grace has agreed to fund a broad based media notice programme across Canada and an extended claims bar procedure for CDN ZAI PD Claims and Grace has also agreed to give direct notice to any known claimant.

29 Under the Minutes, the bar date for CDN ZAI PD Claims is not less than 180 days from substantial completion of the CDN ZAI Claims Notice Program. The period for filing ZAI PD Claims in the U.S. is considerably shorter and Grace has scheduled a motion with the U.S. Court on October 20, 2008 to approve the CDN ZAI PD Claims bar date.

Grace has indicated that if granted, recognition of the U.S. order will be sought from this Court. There will be no bar date for CDN ZAI PI Claims.

30 Grace has indicated that it has contemplated that monies will be distributed out of the CDN ZAI PD Claims Fund based on a claimant's ability to prove that his or her property contained ZAI and that monies were expended to contain or remove ZAI from the property. Based on proof of ZAI in the home and the remediation measures taken by a claimant, that claimant may recover $300 or $600 per property.

31 The issues for consideration were stated by counsel to Grace as follows:

> (a) Does Representative Counsel have the authority to enter into the Minutes on behalf of all CDN ZAI Claimants?
>
> (b) Does the CCAA Court have the jurisdiction to approve the Minutes, including the relief in favour of Sealed Air Canada and the Crown?
>
> (c) Are the Minutes fair and reasonable? In particular, is their prejudice to the key constituencies?

32 The Representation Order is clear. It gives Representative Counsel broad powers, including the ability to negotiate on behalf of CDN ZAI Claimants. No party has objected to or taken issue with the Representation Order or with the authority of Representative Counsel to represent all CDN ZAI Claims.

33 I am satisfied that Lauzon and Scarfone have the authority, as Representative Counsel, to enter the Minutes of Settlement on behalf of all CDN ZAI Claimants.

34 I am also satisfied that the CCAA Court may approve material agreements, including settlement agreements, before the filing of any plan of compromise or arrangement. See *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) and *Calpine Canada Energy Ltd., Re* (2007), 35 C.B.R. (5th) 1 (Alta. Q.B.), leave to appeal denied (2007), 35 C.B.R. (5th) 27 (Alta. C.A. [In Chambers]).

35 It is noted that, in this case, the Plan will be voted on by creditors in the U.S. proceedings.

36 With respect to relief in favour of Sealed Air, Grace has agreed to indemnify Sealed Air Canada for certain liabilities in connection with ZAI. As part of the settlement, Grace seeks to ensure that the release of the CDN ZAI Claims includes a release for the benefit of Sealed Air Canada.

37 Counsel submits that such release is not only necessary and essential, but also fair given Sealed Air Canada's contribution to the PI Settlement under the Plan in excess of $500 million. I am satisfied that, in these circumstances, the release for the benefit of Sealed Air Canada is fair and reasonable.

38 The Minutes also provide a limited release in favour of the Crown. Pursuant to the Minutes, the Crown's claims for contribution and indemnity against Grace (being CDN ZAI Claims) are released. Counsel submits that the corollary is that the Crown is relieved of any joint liability it shares with Grace for CDN ZAI Claims.

39 Counsel to Grace again submits that such a release of the Crown is necessary. Otherwise, Grace could become indirectly liable through contribution and indemnity claims.

40 Counsel for Grace submits that, in certain circumstances, this Court has ordered third party releases where they are necessary and connected to a resolution of the debtor's claims, will benefit creditors generally, and are not overly broad or offensive to public policy. (See: *Muscletech Research & Development Inc., Re* (2007), 30 C.B.R. (5th) 59 (Ont. S.C.J. [Commercial List]) and *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 43 C.B.R. (5th) 269 (Ont. S.C.J. [Commercial List]), aff'd. 2008 ONCA 587 (Ont. C.A.) ("Metcalfe"), leave to appeal to S.C.C. denied. [2008 CarswellOnt 5432 (S.C.C.)])

41 Subsections 18.6(3) and (4) of the CCAA, allow the Ontario Court to make orders with respect to foreign insolvency proceedings, on such terms and conditions as the Court considers appropriate.

42 In assessing whether to grant its approval, the Court has to consider whether the Minutes are fair and reasonable in all of the circumstances.

43 It is the submission of Grace that the Minutes are fair and reasonable, and that resolutions of the CDN ZAI Claims in particular do not prejudice the Crown, CDN ZAI PD Claimants or, CDN ZAI PI Claimants.

44 Grace also submits that, given the strong defences which it believes are available, the Minutes provide a substantial compromise by Grace, considering the circumstances in which it believes it has no liability for CDN ZAI Claims.

45 Early in the insolvency proceedings, the U.S. Court held a hearing to determine, as a threshold scientific issue, whether the presence of ZAI in a home created an unreasonable risk of harm. The opinion of the U.S. Court was filed as part of the record. Grace states that the U.S. Court came to the conclusion that ZAI did not pose an unreasonable risk of harm. The background and conclusions of the U.S. Court have been summarized at paragraphs 72 to 85 of the Grace factum.

46 I have been persuaded by and accept these submissions.

47 In addition, even if ZAI had been found to pose an unreasonable risk of harm, Grace submits that it still has a complete defence to any claims under Canadian law for the reasons set out at paragraphs 86 to 97 of the factum.

48 Further, the passage of time is such that Grace submits that many cases would be dismissed outright based on the expiry of the limitation period.

49 With respect to the issue of prejudice to the Crown, on the one hand, the Crown has asserted claims against Grace. The Crown has estimated that over 2,000 homes located on military bases have been remediated to contain vermiculite attic insulation or ZAI from homes built by the Canadian military. Under the Settlement, the Crown, as a CDN ZAI Claimant, would receive $300 per unit for the sealing of ZAI. Based on the Crown's records, the Crown would potentially have a claim against the Fund for up to $660,000 and if it chose to pursue this claim, the Crown would recover approximately 50% of its remediation expenditures.

50 On the other hand, the Crown is also a defendant in the Proposed Class Actions. Through the Minutes, the Crown will release its CDN ZAI Claims against Grace, but at the same time, counsel to Grace submits that the Crown is effectively released from any joint liability it may share with Grace. Grace submits that the Crown will be relieved from all CDN ZAI Claims except those for which it is severally responsible.

51 It is with respect to the release language that the Crown takes exception.

52 The Crown acknowledges that Representative Counsel has the authority to negotiate on behalf of ZAI Claimants. However, the Crown disputes the authority of Representative Counsel to purport to negotiate away the Crown's Chapter 11 "claim over" for contribution and indemnity.

53 The Crown supports the approval of the Settlement insofar as it purports to resolve all of Grace's liability with respect to CDN ZAI PD and PI Claims, provided that the approval order expressly recognizes that the Crown's protective "claim over" for contribution and indemnity against Grace is unimpaired by the Settlement and provided that the Approval Order expressly allows the Crown to third party Grace in ZAI related actions where the Crown is sued on a several basis.

54 Counsel to the Crown submits that to interpret the authority of Representative Counsel to have the power to release the Crown's "claim over" against Grace while they simultaneously reserve the right to pursue the claims against

the Crown would conflict with the clear direction in the Representation Order. They submit that CCAA Representative Counsel does not represent the Crown's interest with respect to the contribution and indemnity claim, and would be in conflict of interest with respect to the members of the group it represents if it attempted to do so. They further submit that it has always been the position of the Crown that all ZAI related damages give rise to a contribution and indemnity claims against Grace and that no independent claim lies against the Crown; hence, the Crown has and will continue to assert a contribution and indemnity claim against Grace for the totality of the damages.

55 At the hearing, the argument of the Crown was presented without the benefit of a factum. I requested and received a factum from the Crown which was then responded to by counsel to Grace and by Representative Counsel.

56 In my view, the response of Grace is a complete answer to the Crown's submissions. Counsel to Grace notes that the Crown purports to support the Order sought on the proviso that its contribution and indemnity claims against Grace are unimpaired. However, the Minutes do impair the Crown's contribution claims, and with the Order, the Crown will have no claims for contribution and indemnity against Grace.

57 It is Grace's position that Representative Counsel has the authority to resolve and release all CDN ZAI Claims, including Crown claims for contribution and indemnity. Further, in any event, there is no prejudice to the Crown as pursuant to the Minutes, CDN ZAI Claimants have agreed that they cannot pursue the Crown for claims for which Grace is ultimately responsible. Consequently, the Crown has no contribution claims to assert against Grace. Simply put, as submitted by counsel to Grace, there is nothing left.

58 The Representation Order applies to all claims "arising out of or in any way connected to damages or loss suffered, directly or indirectly, from the manufacture, sale or distribution of Zonolite attic insulation products in Canada".

59 It seems to me that the wording of the Representation Order is clear. Representative Counsel have the authority to resolve and release all CDN ZAI Claims, including Crown claims for contribution and indemnity.

60 With respect to the Release itself, the Minutes release any claims or causes of action for which the Crown has a right of contribution and indemnity. As submitted by counsel to Grace, Representative Counsel may not pursue the Crown in respect of claims for which Grace is ultimately liable.

61 Paragraph 13(b)(iii) of the Minutes provides for a release of:

> ...any claims or causes of action asserted against the Grace Parties as a result of the Canadian ZAI Claims advanced by CCAA Representative Counsel against the Crown as a result of which the Crown is or may become entitled to contribution or indemnity from the Grace Parties.

62 I accept the submission of counsel to Grace that the purpose of this provision is to protect Grace from indirect claims through the Crown. Since any claim for which Grace is ultimately liable cannot be pursued, the Crown has no need nor any ability to "claim over" against Grace.

63 The Crown also relied on an order of November 7, 2005 of Chaput J. of the Québec Superior Court in the [*Association des consommateurs pour la qualité dans la construction v. Canada (Attorney General)*, 2005 CarswellQue 10587 (C.S. Que.)] case which was one of the Proposed Class Actions. The Crown relied on the order of Chaput J. to argue that all claims against the Crown flow through Grace and that Grace is therefore ultimately responsible for any Crown liability.

64 I agree with the position being taken by Grace to the effect that this argument is misplaced. It was made quite clear at this hearing that the scope of any remaining Crown liability will need to be addressed at a future hearing.

65 Submissions were also made by counsel on behalf of Ms. Thundersky.

66 Counsel pointed out certain concerns and suggested that it was appropriate to alter the proposed form of order.

67 The first concern raised related to the issue of preservation of claims against the Crown and counsel submitted that paragraph 13(b)(iv) creates some ambiguity in this area. In my view, paragraph 13(b)(iv) of the Minutes is clear. The concluding words read as follows:

> For greater certainty, nothing contained in these Minutes shall serve to discharge, extinguish or release Canadian ZAI Claims asserted against the Crown and which claims seek to establish and apportion independent and/or several liability against the Crown.

68 I do not share counsel's concern. The issue does not require clarification. In my view, this paragraph is not ambiguous.

69 Counsel to Ms. Thundersky also raises concern that the draft order provides that all of the legal actions in Canada be "permanently stayed" until all of the actions have formally removed the Grace Parties as defendants which would not occur until the Effective Date of any approved Plan of Reorganization. In my view, this is not a significant concern. This Court retains jurisdiction over the matters before it in these proceedings and to the extent that further direction is required, the appropriate motion can be brought before me.

70 The third concern raised by counsel to Ms. Thundersky was with respect to the Asbestos PI Fund to be established in the U.S. process. Concerns were raised with respect to the uncertainty surrounding when and in what manner the eligibility criteria for the fund would be established. Counsel to Grace advised that Mr. Ferbers would have the opportunity to provide comment during the Plan process on this issue. I expect that this should be sufficient to alleviate any concerns but, if not, further direction can be sought from this Court.

71 Finally, concern was also raised with respect to the absence of a personal injury notice program. Counsel to Grace advised that this issue would be communicated to those involved in the U.S. Plan. In the circumstances, this would appear to be a pragmatic response to the concern raised by counsel to Ms. Thundersky.

72 Counsel to Ms. Thundersky acknowledged that it was difficult to propose a resolution which stayed within the four corners of the Minutes, but that Ms. Thundersky did wish to bring the foregoing concerns to the attention of the parties and the Court in the hopes that they could be taken into account.

73 Counsel to Grace and Representative Counsel are aware of these issues and will take them into account.

74 I indicated at the hearing that I was inclined to either approve the Minutes or to reject them. The Minutes are the product of extensive negotiation between the Representative Counsel and the Grace Parties. I am of the view that it is not appropriate for me to examine and evaluate the Minutes on a line-by-line basis, nor to amend or alter the agreement as reached between Representative Counsel and the Grace Parties.

75 In my view, to accept the submissions of the Crown and Ms. Thundersky would leave the Court in the position of having to reject the Minutes and refuse to approve the Settlement. Having considered all of the circumstances, I do not consider this to be an appropriate outcome.

76 I have been satisfied that the Minutes are fair and reasonable. The Minutes have been agreed to by Representative Counsel. In my view, the Minutes do not prejudice the interests of the Crown. I am also of the view that there is no prejudice to the ZAI PD Claimants who will have access to a significant fund to assist with their remediation costs. Their alternative is more litigation which, at the end of the day, would have a very uncertain outcome. I am also of the view that there is no prejudice to the ZAI PI Claimants who will have the opportunity to make a claim to the asbestos trust in the U.S. I am satisfied that the ZAI PI Claimants will be receiving treatment that is fair and equal with other PI Claimants. Further, it is noted that counsel to Grace advised that the Thundersky family are the only known ZAI PI Claimants. Their alternative is the continuation of a claim that on its face, would appear to have been statute barred in 1994.

77 I also accept the conclusions as put forth by counsel to Grace. This Settlement provides CDN ZAI PD Claimants with clear recourse to the CDN ZAI PD Claims Fund and CDN ZAI PI Claimants with recourse to the Asbestos Personal Injury Trust in situations where it is Grace's view that the Canadian claims have little or no value.

78 I am also satisfied that third party releases are, in the circumstances of this case, directly connected to the resolution of the debtor's claims and are necessary. The third party releases are not, in my view, overly broad nor offensive to public policy.

79 Counsel to Grace also submitted that Representative Counsel have been continuously active and diligent in both the U.S. and Canadian proceedings and Grace is of the view that it is appropriate that a portion of the funds paid under the settlement go towards compensation of Representative Counsel's fees. I accept this submission and specifically note that the Minutes provide for specified payments to Representative Counsel, a Claims Administrator and a qualified expert to assist in the claims process, in a total amount of approximately CDN$3,250,000.

80 In conclusion, the Minutes, in my view, represent an important component of the Plan. They provide a mechanism for the resolution of CDN ZAI Claims without the uncertainty and delay associated with ongoing litigation.

81 The Minutes are approved and an order shall issue in the form requested, as amended.

Order accordingly.

End of Document

TAB 7

2012 BCSC 1773
British Columbia Supreme Court [In Chambers]

Great Basin Gold Ltd., Re

2012 CarswellBC 3710, 2012 BCSC 1773, [2013] B.C.W.L.D. 1881, 224 A.C.W.S. (3d) 22, 99 C.B.R. (5th) 219

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

In the Matter of the Business Corporations Act, S.B.C. 2002, c. 57

In the Matter of Great Basin Gold Ltd. Petitioner

Fitzpatrick J.

Heard: November 20, 2012
Oral reasons: November 20, 2012
Docket: Vancouver S126583

Counsel: P.J. Reardon, J. Cockbill for Petitioner
J.R. Sandrelli, C. Cheuk for Certain Unaffiliated Holders of the Petitioner's Senior Unsecured Convertible Debentures (the "Noteholders")
P. Rubin for Credit Suisse, AG
J.I. McLean, Q.C. for Monitor, KPMG Inc.

Subject: Insolvency; Income Tax (Federal)

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous

Approval of settlement prior to arrangement — G Ltd. became insolvent and one of its creditors, CS, obtained approval of DIP facility — Ad Hoc Group of G Ltd.'s debenture holders ("Ad Hoc Group") launched appeal from order approving DIP facility — Ad Hoc Group and CS arrived at settlement that included guarantee for debenture holders from G Ltd.'s holding company and agreement by debenture holders not to challenge DIP facility — Parties proposed process by which debenture holders who were not members of Ad Hoc Group could approve proposed settlement — Approval process contemplated press release regarding proposed settlement, notifying debenture holders of order implementing proposed settlement, and allowing debenture holders 21 days to object — Ad Hoc Group brought application for order implementing proposed settlement — Application granted — Section 11 of Companies' Creditors Arrangement Act provides jurisdiction to approve settlement even before presentation of plan of arrangement — Proposed settlement was fair and reasonable in circumstances — Approval process was appropriate and would give any other debenture holder sufficient time to challenge order implementing proposed settlement — It was critical that proposed settlement be put in place as soon as possible so that funding for restructuring could proceed — It was of some significance that Ad Hoc Group, together with another debenture holder who supported application at bar, held in excess of two-thirds majority among debenture holders.

Table of Authorities

Cases considered by *Fitzpatrick J.*:

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

Great Basin Gold Ltd., Re (2012), 2012 BCSC 1459, 2012 CarswellBC 2996 (B.C. S.C.) — referred to

Nortel Networks Corp., Re (2010), 63 C.B.R. (5th) 44, 81 C.C.P.B. 56, 2010 CarswellOnt 1754, 2010 ONSC 1708 (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

Statutes considered:

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

Generally — referred to

s. 11 — considered

APPLICATION by debenture holders of insolvent corporation for order implementing settlement agreement with one of corporation's creditors.

***Fitzpatrick J.*, In chambers:**

1 Much of the history of this *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*") proceeding is outlined in my earlier reasons: *Great Basin Gold Ltd., Re*, 2012 BCSC 1459 (B.C. S.C.).

2 Broadly speaking, there were substantial issues joined between the principal combatants, Credit Suisse and the Ad Hoc Group, as defined in those reasons. Those issues principally related to the approval of the DIP loan facility that I had earlier granted in favour of Credit Suisse. The Ad Hoc Group disputed the granting of that DIP facility and launched an appeal of my October 1 order. I also understand that certain proceedings were commenced in the United States by the Ad Hoc Group towards a challenge of the granting of the guarantee and security by the U.S. companies of the group.

3 Following the issuance of those reasons on October 1, 2012, Credit Suisse and the Ad Hoc Group arrived at a tentative settlement of the issues arising between them. On October 16, 2012, I granted an order authorizing the petitioner to enter into this settlement agreement. The order also provided that the petitioner and the trustee under the trust indenture, Computershare Trust Company of Canada, were authorized to enter into such agreements as are required by the terms of the settlement. The members of the Ad Hoc Group are participants under the trust indenture.

4 An important aspect of the settlement negotiated by the Ad Hoc Group for the benefit of the entire debentureholders group is a guarantee from the U.S. holding company, Great Basin Gold Inc. ("GBGI"), and also certain subordinate security issued by GBGI in relation to that guarantee. From the debentureholder group's perspective, this settlement results in a substantial improvement of their current position. As with most settlement agreements, in return for these benefits, the debentureholder group must give up certain things. The agreements also provide that the debentureholder group will not proceed with certain challenges asserted to date, that being principally relating to the Credit Suisse guarantee and security that was approved by my earlier orders. The debentureholder group must also abandon the appeal proceedings and the U.S. proceedings which are referred to above. Finally, the debentureholder group must also agree to abandon the criminal interest rate issue, and other challenges to such matters as the KERP and the appointment of CIBC World Markets as the financial advisor.

5 Understandably, Credit Suisse requires that any settlement be approved by the entire debentureholders group and they also require an opinion from a lawyer to the effect that the documentation to evidence the settlement, including an intercreditor agreement, is binding upon the entire debentureholder group.

6 The significance of the settlement is that it buys peace between Credit Suisse and the Ad Hoc Group. At the present time, the Credit Suisse DIP facility is in default and further funding under the DIP facility is in limbo pending a finalization of the settlement. Accordingly, the finalization of the settlement is of tremendous significance in this case such that it will allow a continuation of the DIP financing to be advanced to the GBG Group who is desperately in need of these funds.

7 The difficulty that arises in terms of finalizing the settlement relates to how the parties can ensure that the entire debentureholder group will be bound by the settlement. The trust indenture does provide for the calling of meetings to consider resolutions by the debentureholder group. However, counsel for the Ad Hoc Group candidly points out that the full extent of what is intended to be agreed to by the debentureholder group under the settlement may not be within the specific terms of resolutions contemplated by the trust debenture.

8 In any event, I note that with respect to some matters at least, the trust indenture does provide for a meeting process by which a meeting may be held and written resolutions would be voted upon. I am also advised that those matters would require a special resolution, or in other words, a two-thirds majority.

9 It is of some significance on this application that the Ad Hoc Group, together with another debentureholder who is also in support of this application, hold in excess of a two-thirds majority from among the overall debentureholder group.

10 I am advised that it is not possible in the circumstances to even call a meeting that the debentureholders under the trust indenture given the exigencies of the situation in relation to the need for funding. Nevertheless, there has been some effort to engage the trustee under the trust indenture, Computershare. There have been ongoing discussions between the Ad Hoc Group and Computershare in that the trustee has been kept apprised of the settlement negotiations and the terms of the tentative settlement. I am advised that Computershare is fully supportive of the settlement and has no difficulty, subject to these issues relating to process, in proceeding with these transactions.

11 There have also been efforts to engage other debentureholders who are not represented by the Ad Hoc Group and the other debentureholder who supports the application. Following my earlier order on October 16, Computershare forwarded to the debentureholders copies of certain pleadings relating to this transaction which reference the terms of the proposed settlement. I am also advised by counsel for the Ad Hoc Group that their offices have fielded a number of calls from these other debentureholders. So it cannot be said that the other debentureholders are entirely in the dark in terms of what has been tentatively agreed to by the Ad Hoc Group and what is intended to be accomplished through the settlement agreement.

12 The issue in the first instance is whether I have the jurisdiction to provide the relief granted. The relief sought is not only an approval of the settlement agreement, but also an order authorizing the trustee, Computershare, to execute the various documents related to the settlement agreement such that these documents will be legal, valid and binding obligations of the trustee and all debentureholders.

13 The applicable statutory authority is s. 11 of the *CCAA* which endows the court with a wide statutory discretion to grant such orders as are "appropriate in the circumstances":

> **General power of court**
>
> 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.

14 As discussed by the Supreme Court of Canada in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.), the *CCAA* is a remedial statute and the court has "broad and flexible authority" to facilitate the reorganization of the debtor towards achieving the objectives of the *CCAA*, including avoiding the social and economic losses arising from restructuring proceedings: paras. 15-19. The exercise of the court's discretion was further discussed by the Court at paras. 59-72. In particular, the Court stated:

> [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.

15 The last paragraph of the above quote makes the point that the chances of achieving a successful restructuring proceeding increase where the parties can agree on certain issues. Settlement agreements between the parties in these types of proceedings are very much encouraged where resolutions take place in the boardroom, as opposed to the courtroom. There is every reason to encourage such settlements, with approval and implementation subject to appropriate judicial oversight.

16 There is ample authority to the effect that s. 11 of the CCAA provides the court with jurisdiction to approve settlements even before the presentation of a plan of arrangement: *Calpine Canada Energy Ltd., Re*, 2007 ABCA 266 (Alta. C.A. [In Chambers]) at para. 26, *Nortel Networks Corp., Re*, 2010 ONSC 1708 (Ont. S.C.J. [Commercial List]) at para. 71.

17 In *Nortel Networks*, Mr. Justice Morawetz sets out the test to be applied in approving a settlement agreement:

> [73] A Settlement Agreement can be approved if it is consistent with the spirit and purpose of the CCAA and is fair and reasonable in all circumstances. What makes a settlement agreement fair and reasonable is its balancing of the interests of all parties; its equitable treatment of the parries, including creditors who are not signatories to a settlement agreement; and its benefit to the Applicant and its stakeholders generally.

18 I have no difficulty in concluding that the settlement agreement between Credit Suisse, the Ad Hoc Group and the petitioner group is fair and reasonable in the circumstances. The crux of the issue here is whether it is fair and reasonable to those debentureholders who have not yet participated in this process and have not perhaps fully appreciated the import of the agreement, particularly as it relates to the benefits to be achieved by the debentureholder group and the rights that the group will be giving up as a result of the transactions.

19 I would emphasize again this settlement has arisen by extensive negotiations as between Credit Suisse and the Ad Hoc Group. While those negotiations have taken place on the part of the Ad Hoc Group towards its own interests, inevitably the gains will accrue to the debentureholder group as a whole. Having considered the terms of the overall settlement agreement, I would be astounded if any debentureholders who were fully aware of those matters were to take a contrary position towards opposing the settlement agreement. Again, it is of significance that as a result of this settlement, funding under the DIP facility will continue, which will be a benefit to all stakeholders.

20 Nevertheless, I agree that fairness and reasonableness dictate in these proceedings that those other debentureholders have some input. The process already undertaken by the Ad Hoc Group has addressed that matter to a certain extent. What is proposed is that a more fullsome notice of the settlement agreement be given to the debentureholder group as a whole.

21 Firstly, it is proposed that there be a press release which will include reference to not only the pleadings but the specific settlement documents which are posted on the Monitor's website. In addition, the press release will refer to counsel for the Ad Hoc Group, in Canada, the U.S. and South Africa, who are available to respond to any enquiries from debentureholders regarding the settlement agreement. Secondly, Computershare is to request that CDS send a notice to the debentureholders of the order sought today (called the "Settlement Implementation Order"). That notice will, as will the press release, highlight to the debentureholders that the deadline for any debentureholder to apply to vary, rescind or otherwise object to the Settlement Implementation Order will be within 21 days of the date of the Order. If there is

no objection with that 21-day period, the settlement agreement will be fully effective and will constitute legal, valid and binding obligations of Computershare and all of the debentureholders and the consequences of not applying to challenge this Order will also be brought specifically to the attention of those persons reading the press release and the notice.

22 The Monitor had earlier indicated its support of the settlement agreement in accordance with the Third Report which was considered on the earlier application. Counsel for the Monitor has again confirmed its support of the settlement agreement and the process by which notice is to be given to the other debentureholders outlined above. Not surprisingly, the GBG Group is also in support.

23 I am satisfied that this process is appropriate and will give any other debentureholder sufficient time to challenge the Order if they wish. Again, I would emphasize that it is a critical aspect of this restructuring that this settlement be put in place as soon as possible so that the funding for the restructuring can proceed. It has already been stalled to some extent and no doubt to the detriment of the stakeholders as a whole. It is time to put an end to this prejudice delay and more the restructuring forward. Accordingly, the order sought is granted.

Application granted.

TAB 8

2019 ONSC 1684
Ontario Superior Court of Justice

Imperial Tobacco Canada Limited, et al, Re

2019 CarswellOnt 4003, 2019 ONSC 1684, 303 A.C.W.S. (3d) 691, 68 C.B.R. (6th) 322

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 IMPERIAL TOBACCO CANADA LIMITED, AND IMPERIAL TOBACCO COMPANY LIMITED (Applicants)

McEwen J.

Heard: March 12, 2019
Judgment: March 15, 2019
Docket: CV-19-616077CL

Counsel: Deborah Glendinning, Marc Wasserman, John A. MacDonald, Michael De Lellis, for Applicants
David Byers, Maria Konyukhova, for British American Tobacco p.l.c, B.A.T. Industries p.l.c., and British American Tobacco (Investments) Limited
Jay Swartz, Robin Schwill, Natasha MacParland, for Proposed Monitor, FTI Consulting Canada Inc.
Jonathan Lisus, Matthew Gottlieb, for Proposed Tobacco Claimant Representative

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — General principles

In Quebec, action applicants and co-defendants were found liable for damages totalling approximately $13.5 billion — Quebec judgment would likely spell end of applicants' business because applicant I Ltd. did not have sufficient funds to satisfy judgment, and its share of judgment exceeded $9 billion — Applicants, I Ltd. and its subsidiary, applied for initial order for stay of proceedings pursuant to s. 11.02(1) of Companies' Creditors Arrangement Act (CCAA) — Application granted — Applicants were insolvent companies to which CCAA applied, and it was appropriate to grant stay of proceedings requested by applicants — I Ltd. could not pay amount of Quebec judgment and judgment was currently enforceable — Enforcement would cause applicants serious harm and it would also jeopardize tax revenue and legal trade in tobacco — All stakeholders would likely be detrimentally affected if Quebec judgment was enforced, and stakeholders included employees, retirees, customers, landlords, suppliers, provincial and federal governments, and contingent litigation creditors — Stay created level playing field amongst litigation claimants — Proposed monitor was suitable and should be appointed — Stay should be extended to non-applicants who were highly integrated with applicants, as failure to do so would undermine intent of stay — Administration charge of $5 million and tobacco claimant coordinator charge were fair and reasonable and they ranked as first charges pari passu given their importance — Directors' and officers' charge of $16 million should also be approved to ensure that applicants had ongoing stability during CCAA proceedings, and charge stood second in priority to administration and tobacco claim coordinator charges — Charge concerning sales and excise taxes of $580 million was also reasonable as third charge so that directors and officers did not face personal liability for taxes, and amount was fair and reasonable.

Table of Authorities

Cases considered by *McEwen J.*:

Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé (2019), 2019 QCCA 358, 2019 CarswellQue 1132 (C.A. Que.) — considered

Pacific Exploration & Production Corp., Re (2016), 2016 ONSC 5429, 2016 CarswellOnt 13733, 40 C.B.R. (6th) 64 (Ont. S.C.J. [Commercial List]) — referred to

Tamerlane Ventures Inc., Re (2013), 2013 ONSC 5461, 2013 CarswellOnt 12213, 6 C.B.R. (6th) 328 (Ont. S.C.J. [Commercial List]) — referred to

Statutes 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. 11.02 [en. 2005, c. 47, s. 128] — considered

s. 11.02(1) [en. 2005, c. 47, s. 128] — considered

s. 11.7 [en. 1997, c. 12, s. 124] — considered

s. 11.7(2) [en. 1997, c. 12, s. 124] — considered

APPLICATION for initial order for stay of proceedings.

***McEwen J.*:**

1 On March 12, 2019 I granted the Initial Order, as amended, with reasons to follow. I am now providing those reasons.

Background

2 Imperial Tobacco Canada Limited ("ITCAN") and its subsidiary Imperial Tobacco Company Limited ("ITCO") (together, the "Applicants") seek an Initial Order for a stay of all existing and prospective proceedings pursuant to s. 11.02(1) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"), primarily so that they can effect a global resolution of multiple claims that have been brought or may be brought against ITCAN and related companies in Canada. They also seek the same relief on behalf of their related companies.

3 The timing of this Application stems from the recent judgment of the Quebec Court of Appeal in *Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé*, 2019 QCCA 358 (C.A. Que.) (the "Quebec Appeal Judgment"), in which the Applicants and co-defendants were found liable for damages totalling approximately $13.5 billion. Based on the filed record, enforcement of the Quebec Appeal Judgment would likely spell the end of the Applicants' business because ITCAN does not have sufficient funds to satisfy the judgment. ITCAN's share of the judgment exceeds $9 billion.

4 Amongst other submissions, the Applicants stress that enforcement of the Quebec Appeal Judgment places in serious jeopardy the continued employment of the Applicants' 466 full-time and 98 contract employees across Canada who receive wages and salaries of approximately $70 million per year. The Applicants also point to the fact that they generate taxes payable to various levels of government across Canada totalling approximately $4 billion per year. They further stress that, based on industry publications, if the Applicants and other legal producers of tobacco products in Canada cease to operate then the illegal tobacco trade could expand to fill the void.

5 In addition to the Quebec Appeal Judgment, ITCAN (and in some cases related companies) face more than 20 large proceedings across Canada. In Ontario alone there are four actions claiming damages in excess of $330 billion. The actions across the country include government actions to recover healthcare costs incurred in connection with smoking related diseases; smoking and health class actions seeking damages on behalf of individuals; and a class action brought by Ontario tobacco growers in relation to certain pricing practices of ITCAN. Most of these cases are in the preliminary stages.

6 The Applicants submit that in the above circumstances the proposed Initial Order is necessary and reasonable as it seeks an overall solution with respect to the Quebec Appeal Judgment and other outstanding and potential proceedings.

Analysis

7 ITCAN and ITCO are incorporated pursuant to the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44. ITCO is a privately held subsidiary of ITCAN. Their registered head offices are located in Brampton, Ontario. Their liabilities clearly exceed $5 million as a result of the Quebec Appeal Judgment. According to the affidavit filed by Mr. Eric Thauvette, the vice- president and chief financial officer of ITCAN, the Applicants do not have sufficient funds to pay the Quebec Appeal Judgment that is currently payable.

8 Based on the above, the Applicants are insolvent companies to which the CCAA applies. I am also of the view that it is appropriate to grant the stay of proceedings requested by the Applicants. This court, pursuant to the provisions of s. 11.02 of the CCAA, may grant a stay of proceedings if it is satisfied that circumstances exist that make such an order appropriate.

9 It is settled law that the principal purpose of the CCAA is to maintain the *status quo* while a debtor company has the opportunity to consult with its creditors and stakeholders with a view to continue the company's operations. In the circumstances of this case, ITCAN cannot pay the amount of the Quebec Appeal Judgment and the Judgment is currently enforceable. Enforcement would cause the Applicants serious harm. As I have outlined above, it would also jeopardize tax revenue and legal trade in tobacco. It is therefore appropriate to grant the stay of proceedings requested by the Applicants as all stakeholders would likely be detrimentally affected if the Quebec Appeal Judgment was enforced. These stakeholders include employees, retirees, customers, landlords, suppliers, the provincial and federal governments, and contingent litigation creditors. Specifically, a stay creates a level playing field amongst the litigation claimants.

10 Insofar as the proposed monitor is concerned I am satisfied that FTI Consulting Canada Inc. ("FTI") is a suitable monitor and should be appointed in these proceedings pursuant to s. 11.7 of the CCAA. FTI is an experienced monitor who frequently acts in this capacity in CCAA proceedings. FTI is not subject to any of the restrictions set out in s. 11.7(2) of the CCAA.

11 I also agree with the Applicants that the CCAA extension should be extended to the non- Applicants British American Tobacco p.l.c. ("BAT") and B.A.T. International Finance p.l.c., B.A.T. Industries P.L.C., British American Tobacco (Investments) Limited, Carreras Rothmans Limited, and entities related to or affiliated with them (the "BAT Affiliates"), Liggett & Myers Tobacco Company of Canada Limited ("Liggett & Myers"), and other non-Applicant subsidiaries noted in the Application Record.

12 I have jurisdiction to extend the stay: *Tamerlane Ventures Inc., Re*, 2013 ONSC 5461 (Ont. S.C.J. [Commercial List]) and *Pacific Exploration & Production Corp., Re*, 2016 ONSC 5429 (Ont. S.C.J. [Commercial List]). In my view, it is reasonable to do so in circumstances where most of the outstanding proceedings against ITCAN also name BAT and the BAT Affiliates as co-defendants. Further, Liggett & Myers and the other non- Applicant subsidiaries are highly integrated with the Applicants and indispensable to the Applicants' business and restructuring. As submitted, certain of them hold trademarks or other assets of ITCAN, provide services to ITCAN, share the cash management system with ITCAN, and /or have guaranteed ITCAN debts from time to time. It is reasonable to extend the stay to these entities. Failure to do so would undermine the intent of the stay. Further, given the stay of proceedings that I have granted with respect to the Applicants, I see no prejudice to claimants in existing and potential proceedings if the stay is extended.

13 I am further satisfied that the charges requested below by the Applicants are reasonable and should be granted.

14 The Administration Charge in the amount of $5 million is fair and reasonable. The restructuring will be an extremely extensive and expensive undertaking. It will involve a great deal of effort by the professional advisors who are subject to this charge. I do not see any duplication of the roles. Furthermore, the Administration Charge is supported by the

Applicants' parent and other related companies, which are secured creditors. The amount is reasonable given the size of this matter.

15 I am further satisfied that the Tobacco Claimant Coordinator Charge is reasonable. I pause here to note that the Applicants had proposed that a Tobacco Claimant Coordinator be described as the "Tobacco Claimant Representative". To avoid any confusion that might suggest that the Honourable Warren K. Winkler, Q.C., whom I have appointed, may be seen to displace existing counsel, or to take some sort of role that may be considered binding in nature with respect to any of the litigants affected by this order, the title was amended to Tobacco Claimant Coordinator.

16 Given the immense size and complexity of this matter, I am of the view that a charge is reasonable with respect to the Honourable Warren K. Winkler, Q.C. as per the terms of the Interim Order so that he, along with others, can begin a claims process. It is also reasonable to allow him to retain the independent counsel requested and provide for a charge of $1 million.

17 It is reasonable that the Administration and Tobacco Claimant Coordinator Charges rank as first charges *pari passu* given their importance.

18 The Directors' and Officers' Charge sought should also be approved to ensure that the Applicants enjoy ongoing stability during these CCAA proceedings.

19 The directors and officers reasonably insist that a charge be put in place. I agree with their concerns. They also have significant knowledge and experience. The Applicants and related companies require that the directors and officers can continue on with the management of the businesses.

20 The proposed charge of $16 million, which stands second in priority to the aforementioned Administration and Tobacco Claim Coordinator Charges, is also reasonable.

21 Last, insofar as the charges are concerned, I am also satisfied that the charge concerning Sales and Excise Taxes in the maximum amount of $580 million is also reasonable as a third charge. It is important that this charge be granted so that the directors and officers do not face personal liability for the taxes. I reviewed the Applicants' record and I am satisfied that the amount is fair and reasonable.

22 All of the charges are supported by FTI.

23 In addition to the above specific comments, I am further satisfied that the remaining terms of the proposed Interim Order ought to be granted. The Applicants will be carrying on business during the CCAA proceedings. The filed materials demonstrate that the Applicants and their affiliated companies expect that the Applicants will continue to carry on their business in a profitable fashion and be able to meet both their pre-filing and post-filing obligations. It is in the best interests of all stakeholders to allow for the payment of these obligations.

24 BAT, the BAT Affiliates, and FTI all support the Applicants' position, including their intention and ability to meet their current payables in the ordinary course of conducting business.

25 For all of the reasons above, the Application was granted and the Interim Order was signed, as amended.

Application granted.

End of Document

TAB 9

2019 ONSC 2222
Ontario Superior Court of Justice

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

2019 CarswellOnt 6071, 2019 ONSC 2222

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 JTI-Macdonald Corp.

And In The Matter of a Plan of Compromise or Arrangement of Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited

And In The Matter of a Plan of Compromise or Arrangement of Rothmans, Benson & Hedges Inc.

McEwen J.

Heard: April 4, 2019
Judgment: April 23, 2019
Docket: CV-19-615862-00CL, CV-19-616077-00CL, CV-19-616779-00CL

Counsel: Robert I. Thornton, Leanne M. Williams, Rebecca L. Kennedy, for Applicant, JTI-Macdonald Corp.
Deborah Glendinning, Marc Wasserman, John MacDonald, for Imperial Tobacco
Paul Steep, James Gage, Heather Meredith, for Rothmans, Benson & Hedges
Avram Fishman, Mark E. Meland, Harvey Chaiton, George Benchetrit, for Quebec Class Action Plaintiffs, Conseil Québécois sur la tabac et la santé and Jean-Yves Blais and Cécilia Létourneau
Jacqueline Wall, Shahana Kar, Edmund Huang, for Her Majesty The Queen In Right of Ontario
Massimo Starnino, Lily Harmer, for Her Majesty The Queen In Right of Alberta and Newfoundland & Labrador
Jeffrey Leon, Michael Eizenga, Sean Zweig, for Consortium Provinces
Sheila Block, Scott Bommof, Adam Slavens, for Receiver of JTIM-MacDonald Corp. and JTIM Canada LCC
Patrick Flaherty, Bryan Mcleese, Justin Safayeni, Brian Gover, for RJ Reynolds Tobacco Co. and RJ Reynolds Tobacco International
David Byers, Maria Konyukhova, for British American Tobacco p.l.c., B.A.T. Industries p.l.c. and British American Tobacco (Investments) Limited
Clifton Prophet, for Philip Morris International Inc.
Steven Weisz, Amanda McInnis, for Grand River Enterprises Six Nations Ltd.
Ari Kaplan, for former Genstar US Retiree Group Committee
Wael Rostom, for Bank of Nova Scotia
Jay Swartz, Natasha MacParland, for Monitor (FTI)
Pam Huff, Linc Rogers, Chris Burr, for Deloitte Restructuring Inc., Monitor of JTIM MacDonald Inc.
Shayne Kukulowicz, Jane Dietrich, for Monitor of Rothmans, Benson & Hedges
Jonathan Lisus, Matthew P. Gottlieb, Andrew Winton, for Hon. Warren K. Winkler, in his capacity as Interim Tobacco Claimant Coordinator
Evatt Merchant, Q.C., for certain class action proceedings

Subject: Civil Practice and Procedure; Insolvency

2019 ONSC 2222, 2019 CarswellOnt 6071

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Proceedings subject to stay — Miscellaneous

Applicants J Corp., I Ltd., and R Inc. filed for protection pursuant to provisions of Companies' Creditors Arrangement Act (CCAA) — Timing of CCAA applications was triggered by judgment of Quebec Court of Appeal that largely upheld earlier trial decision and awarded approximately $13.5 billion to Quebec class action plaintiffs — In addition to that action, there were significant number of on-going proceedings against applicants including government-initiated litigation and other class actions — Initial Orders obtained by applicants in March 2019 granted applicants protection from creditors on interim basis and allowed for any interested party to apply to vary or amend Initial Order — J Corp. and R Inc. brought motion for orders permitting filing of Supreme Court of Canada (SCC) leave applications, but suspending all further proceedings before SCC; I Ltd. brought motion for stay of all proceedings by and against applicants and stay of any applicable limitation periods — Motions granted in part — Section 11 of CCAA provided jurisdiction to Ontario court to stay any and all actions including those before Quebec Court of Appeal and any future SCC leave application — Approach proposed by I Ltd. was fair, reasonable and sensible — I Ltd.'s approach provided for temporary pause that did not amend or usurp provisions of Supreme Court Act or Code of Civil Procedure — Further, I Ltd.'s Initial Order supported concept of deference that Ontario court must have to appeal courts by stipulating that Ontario Superior Court requested aid and recognition of those courts with respect to Initial Order — Order was granted staying any and all current proceedings by or against applicants and related entities, and staying any applicable limitation periods — Motions with respect to SCC leave applications were dismissed.

Table of Authorities

Cases considered by *McEwen J.*:

Air Canada, Re (2003), 2003 CarswellOnt 9109, 28 C.B.R. (5th) 52 (Ont. S.C.J. [Commercial List]) — considered

Mujagic v. Kamps (2015), 2015 ONCA 360, 2015 CarswellOnt 7272, 125 O.R. (3d) 715, 73 C.P.C. (7th) 229, 335 O.A.C. 195, 50 C.C.L.I. (5th) 54 (Ont. C.A.) — considered

Muscletech Research & Development Inc., Re (2006), 2006 CarswellOnt 3632 (Ont. S.C.J.) — referred to

OpenHydro Technology Canada Ltd. (Re) (2018), 2018 NSSC 283, 2018 CarswellNS 861, 65 C.B.R. (6th) 133 (N.S. S.C.) — considered

Scaffold Connection Corp., Re (2000), 2000 CarswellAlta 60, 15 C.B.R. (4th) 289, 2 C.L.R. (3d) 117, 79 Alta. L.R. (3d) 144, [2000] 7 W.W.R. 516, 2000 ABQB 35 (Alta. Q.B.) — referred to

ScoZinc Ltd., Re (2009), 2009 NSSC 162, 2009 CarswellNS 281, 277 N.S.R. (2d) 246, 882 A.P.R. 246, 55 C.B.R. (5th) 200 (N.S. S.C.) — referred to

U.S. Steel Canada Inc., Re (2016), 2016 ONCA 662, 2016 CarswellOnt 14104, 39 C.B.R. (6th) 173, 402 D.L.R. (4th) 450, 61 B.L.R. (5th) 1 (Ont. C.A.) — considered

Statutes considered:

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

s. 11 — considered

Code de procédure civile, RLRQ, c. C-25.01

en général — referred to

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

Generally — referred to

s. 11 — considered

s. 11.02(1) [en. 2005, c. 47, s. 128] — considered

s. 11.02(1)(b) [en. 2005, c. 47, s. 128] — considered

s. 11.02(1)(c) [en. 2005, c. 47, s. 128] — considered

Supreme Court Act, R.S.C. 1985, c. S-26

Generally — referred to

s. 58(1) — considered

s. 58(1)(a) — considered

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11

Generally — referred to

MOTION by applicants J Corp. and R Inc. for orders permitting filing of Supreme Court of Canada leave applications but suspending all further proceedings before Supreme Court of Canada; MOTION by applicant I Ltd. for stay of all proceedings by and against applicants and stay of any applicable limitation periods.

***McEwen J.*:**

OVERVIEW

1 JTI-Macdonald Corp. ("JTIM"), Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited ("Imperial"), and Rothmans, Benson & Hedges Inc. ("RBH") (collectively "the Applicants") nave filed for protection pursuant to the provisions of the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 (the "CCAA") seeking a resolution of the multiple, significant litigation claims that have been made against them.

2 The timing of the CCAA Applications was triggered as a result of the judgment of the Quebec Court of Appeal (the "QCCA") released March 1, 2019. That decision largely upheld the earlier trial decision and awarded approximately $13.5 billion to the Quebec Class Action Plaintiffs (the "Quebec Plaintiffs"). In addition to this action there are a significant number of ongoing proceedings against the three Applicants including government-initiated litigation and other class actions.

3 The three Initial Orders obtained by the Applicants in March 2019 granted the Applicants protection from their creditors on an interim basis and allowed for any interested party to apply to this court to vary or amend the Initial Order.

4 The parties attended before me on April 4 and 5, 2019 at the come-back hearing to deal with several issues. The parties were able to agree on certain orders and deferred other issues to be dealt with on a later date, if necessary.

5 These reasons deal solely with the terms of the Initial Orders that affect ongoing or new proceedings by or against the Applicants. In particular, these reasons also deal with any leave applications that the Applicants might make to the Supreme Court of Canada (the "SCC Leave Applications").

POSITIONS OF THE APPLICANTS

6 JTIM and RBH seek to obtain orders permitting them to file SCC Leave Applications but suspending all further proceedings before the SCC. JTIM and RBH essentially submit that it is in the best interests of all stakeholders, including the Applicants and the Quebec Plaintiffs, to preserve the status quo by allowing them to file their SCC Leave Applications but allow for no further steps. They claim this would afford all stakeholders an opportunity to try to resolve all of the outstanding litigation as against the Applicants.

7 Imperial does not seek leave to file an SCC Leave Application. Imperial states that it does not intend to pursue a SCC Leave Application unless it must do so to preserve its rights against the possibility that the CCAA proceeding fails. It seeks a stay of all proceedings by and against the Applicants along with a stay of any applicable limitation periods. Imperial submits that its proposal effects the best balance between all stakeholders and would entirely preserve the status quo without giving any particular stakeholder an advantage. This would allow all stakeholders to attempt to globally resolve all of the litigation claims. Imperial submits that a blanket stay has the best opportunity of achieving that goal.

8 Imperial's position is supported by the provinces of British Columbia, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island and Saskatchewan (the "Consortium"), as well as the provinces of Alberta and Newfoundland.

These provinces currently have actions underway to recover expended health care costs. Imperial is further supported by the law firm Merchant LLP, which has commenced a number of class action proceedings against the Applicants and others.

9 The relevant wording set out in the Initial Orders that the Applicants urge upon me to adopt is as follows:

• The JTIM Initial Order, at para. 20, states:

> [20] This court orders that, notwithstanding anything to the contrary in this Order, [JTIM] is authorized to continue, and the applicable Other Defendants are not stayed from continuing, to contest the Quebec Class Actions during the Stay Period (the "Further Quebec Class Action proceedings"), including without limitation by way of an application for leave to appeal to the Supreme Court of Canada and an appeal on the merits to the Supreme Court of Canada if leave is granted. Nothing in this Order shall prevent any Person from responding to the Further Quebec Class Action Proceedings, provided that during the Stay Period this paragraph does not without further order of this Court, permit the Applicant to post security or grant any security interest, or permit any Person to seek security from the Applicant in relation to the Further Quebec Class Action Proceedings.

• The RBH Initial Order, at para. 20, states:

> [20] This court orders that, notwithstanding anything to the contrary in this Order, [Rothmans] is authorized to serve and file an application for leave to appeal the Quebec Appellate Decision to the Supreme Court of Canada, but no further step or proceeding shall be taken by the Applicant or any other Person in respect of such application without further order of this Court

• The Imperial Initial Order, at paras. 18-20, states:

> [18] This court orders that until and including April 11, 2019, or such later date as mis Court may order (me "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), including but not limited to any Pending Litigation and any other Proceeding in relation to any other Tobacco Claim, shall be commenced, continued or take place against or in respect of the Applicants ... except with the written consent of the Applicants and the Monitor, or with leave of this Court, and any and all Proceedings currently under way or directed to take place against or in respect of any of the Applicants ... are hereby stayed and suspended pending further Order of this Court....
>
> [19] This court orders that, during the Stay Period, no Proceeding in Canada that relates in any way to a Tobacco Claim or to the Applicants ... including the Pending Litigation, shall be commenced, continued or take place ... except with me written consent of the Applicants and the Monitor, or with leave of this Court, and any and all such Proceedings currently underway or directed to take place ... are hereby stayed and suspended pending further Order of this Court.
>
> [20] This court orders that, to the extent any prescription, time or limitation period relating to any Proceeding against or in respect of the Applicants, the ITCAN Subsidiaries or any member of the BAT Group that is stayed pursuant to this Order may expire, the term of such prescription, time or limitation period shall hereby be deemed to be extended by a period equal to the Stay Period.

THE QUEBEC PLAINTIFFS' POSITION

10 The Quebec Plaintiffs firstly submit that this court does not have jurisdiction to amend the relevant provisions of the *Supreme Court Act,* R.S.C. 1985, c. S-26 or the *Code of Civil Procedure,* CQLR c. C-25.01. The Quebec Plaintiffs therefore argue that I specifically do not have jurisdiction to determine what steps are to be taken in an SCC Leave Application nor do I have jurisdiction to stay the effect of the QCCA decision. The Quebec Plaintiffs further state that

the inherent power of the CCAA court granted pursuant to s. 11, as per its wording, only supersedes the provisions of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 or the *Winding-up and Restructuring Act,* R.S.C. 1985, c. W-11.

11 The Quebec Plaintiffs therefore submit that if the Applicants wish to commence an SCC Leave Application they are free to do so but they must abide by whatever conditions that are imposed upon them by the QCCA or the SCC. The Quebec Plaintiffs seek an order that if any of the Applicants seek to file an SCC Leave Application that the CCAA proceedings ought to be immediately and automatically terminated. Alternatively, the stay of proceedings provided for in the JTIM Initial Order and the RBH Initial Order be partially lifted to allow the Quebec Plaintiffs to participate in any SCC Leave Application and seek the imposition of any conditions that the QCCA or the SCC deem appropriate.

12 The Quebec Plaintiffs seek the same relief against Imperial notwithstanding the different relief sought by Imperial.

13 The position of the Quebec Plaintiffs is supported by Her Majesty the Queen in Right of Ontario ("Ontario"), which also has a claim to recover expended health care costs.

ANALYSIS

14 For the reasons below I am satisfied that I have jurisdiction to deal with the QCCA proceeding. I am further persuaded that the proposal put forth by Imperial, as generally set out in paras. 18-20 of its Initial Order noted above, is the most sensible at this time and should be incorporated into all three Initial Orders.

Jurisdiction.

15 The parties agree that there are no cases directly on point with respect to the issue of whether s. 11 of the CCAA provides this court with jurisdiction to stay the effect of the QCCA decision and subsequently any SCC Leave Application. The parties provided the court, however, with case law that they submit is analogous and relevant This will be reviewed below.

16 A good starting point concerning the issue of jurisdiction involves the wording of s. 11 and s. 11.02(2)(b) of the CCAA. These sections provide this court with broad jurisdiction. They read as follows:

> **General power of court**
>
> 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. [Emphasis added]
>
> 11.02(1) 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 proceeding 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. [Emphasis added.]

17 As can be seen from the above, the broad jurisdiction of this court to "make any order that it considers appropriate in the circumstances" includes restraining further proceedings in "any action, suit or proceeding" against the Applicants.

18 This is consistent with the purpose of the CCAA, which is well set out in the decision in *U.S. Steel Canada Inc., Re*, 2016 ONCA 662, 402 D.L.R. (4th) 450 (Ont. C.A.), wherein the Court of Appeal noted that:

> [47] There is no dispute about the purpose of the *CCAA*. It describes itself as "An Act to facilitate compromises and arrangements between companies and their creditors". Its purpose is to avoid the devastating social and economic effects of commercial bankruptcies. It permits the debtor to continue to carry on business and allows me court to preserve the status quo while "attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all": *Century Services,* at para. 77....
>
> [49] The *CCAA* achieves its goals through a summary procedure for the compromise or arrangement of creditors' claims against the company. It was described in *Stelco Inc., Re* (2005), 75 O.R. (3d) 5 (Ont. C.A.), at para. 36, as:
>
> > a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders.

19 The above-noted purpose, in my respectful view, provides this court with jurisdiction to deal with proceedings other than those that simply arise before the Ontario Superior Court of Justice. The CCAA legislation is remedial in nature. In order to allow for the proper restructuring of debtor companies, or in this case settlement of multiple significant lawsuits, it would be undesirable to restrict the discretion of this court to matters at the Superior Court level. It would lead to a chaotic situation where only proceedings before the Superior Court and/or other provincial trial courts were stayed but proceedings that had reached the appeal courts were allowed to proceed. This would significantly hamper the stated purpose of the CCAA, which is to attempt to negotiate a compromised plan of arrangement.

20 A similar conclusion was reached by Farley J. in the decision *Air Canada, Re* (2003), 28 C.B.R. (5th) 52 (Ont. S.C.J. [Commercial List]). Although he was dealing with motions brought by Federal Regulators, who argued that this court did not have inherent jurisdiction to impose a stay upon them, I believe his words are instructive wherein he held [at para. 12]:

> Indeed there are no such restrictive words on proceedings nor are there any words which denote that the jurisdiction to grant a stay is only to deal with economic, financial, business or commercial matters. I would note that Parliament has had ample opportunity over the past two decades to amend section 11(3)(b) and (c) in the way urged on me by the Regulators if it felt that desirable; that could have been done in the 1992 and 1997 amendments pursuant to the five year review procedure. Amendments were made at those times in various areas; however, it appears that Parliament recognized that, with respect to the types of applicants which could apply for restructuring protection under the CCAA, it was undesirable to restrict the direction of the court to deal with matters which involve delicate balancing of various interests with a view to ensuring that productive resources were utilized to the maximum degree for the overall benefit to Canada's social and economic values. Of course that discretion is not without restraint - rather that discretion is to be judicially exercised according to the circumstances applicable in any particular case. [Emphasis added.]

21 Farley J., in the above passage, recognized the broad jurisdiction of this court in any particular case, subject to the proper exercise of judicial discretion. Once again, this recognizes the useful purposes of the CCAA in attempting to allow stakeholders to negotiate a compromise. It bears noting that one of the aspects of proper judicial discretion includes the fact that any stay of proceedings in these Applications would be without prejudice to any party's right to bring a motion to lift the stay. This focuses the stakeholders on bona fide negotiations and allows this court the discretion to terminate the stay if need be.

22 I acknowledge that I have adopted the view that the aforementioned provisions of s. 11 provide me jurisdiction to stay any and all actions including those before the QCCA and any future SCC Leave Application. I respectfully conclude

that such an outcome is contemplated by the CCAA to allow for a successful global resolution without benefiting one stakeholder over the other. Otherwise, as noted, chaotic situations could develop.

23 Accordingly, the approach proposed by Imperial is fair, reasonable and sensible and one that this court has jurisdiction to make. It provides for a temporary pause that does not amend or usurp the provisions of the *Supreme Court Act* or the *Code of Civil Procedure*. Further, para. 61 of Imperial's Initial Order also supports the concept of deference that this court must have to the appeal courts by stipulating that the Ontario Superior Court requests the aid and recognition of those courts with respect to the Initial Order.

24 Last, I believe that such an outcome is contemplated by s. 58(1) of the *Supreme Court Act,* which provides as follows:

> **Time periods for appeals**
>
> 58(1) Subject to this Act or any other Act of Parliament, the following provisions with respect to time periods apply to proceedings in appeals:
>
> > (a) in the case of an appeal for which leave to appeal is required, the notice of application for leave to appeal and all materials necessary for the application shall be served on all other parties to the case and filed with the Registrar of the Court within sixty days after the date of the judgment appealed from; [Emphasis added.]

25 Section 58(1) appears to be broad enough to include the jurisdiction of the CCAA to stay the QCCA proceeding and any further SCC Leave Applications at this time. Given the above and the broad jurisdiction conferred upon this court by s. 11, it is my view that the *Supreme Court Act* does not oust this court's jurisdiction that is conferred upon it by the CCAA.

26 I should note that the Quebec Plaintiffs rely on a number of decisions to support its position that I do not have jurisdiction. Primarily, they rely upon the decision of the Ontario Court of Appeal in *Mujagic v. Kamps*, 2015 ONCA 360, 125 O.R. (3d) 715 (Ont. C.A.) and the decision of the Supreme Court of Nova Scotia in *OpenHydro Technology Canada Ltd. (Re)*, 2018 NSSC 283, 65 C.B.R. (6th) 133 (N.S. S.C.). In my view, however, these cases are distinguishable given the broad nature of the authority conferred upon this court by the CCAA and the significant nature of the undertaking that is being pursued by all stakeholders to attempt a global resolution of the multiple, significant claims against the Applicants. Also, *OpenHydro* deals with existing *in rem* proceedings solely within the jurisdiction of the Federal Court

27 I also accept Imperial's submission that I have jurisdiction to extend any prescription, time or limitation period relating to any proceeding for or against the Applicants or related entities that may expire. Such provisions are common in CCAA proceedings and have been granted in Initial Orders in a number of decisions: *Muscletech Research & Development Inc., Re* [2006 CarswellOnt 3632 (Ont. S.C.J.)], 2006 CanLII 20084, at para. 5; *ScoZinc Ltd., Re*, 2009 NSSC 162, 277 N.S.R. (2d) 246 (N.S. S.C.) (Claims Officer), at para. 5; and *Scaffold Connection Corp., Re*, 2000 ABQB 35, 79 Alta. L.R. (3d) 144 (Alta. Q.B.), at para. 26. In my view, this result is sensible and desirable. Since all proceedings and future proceedings, including those brought by or against the Applicants, are stayed, the interests of all stakeholders are protected.

28 No party took the position at the motion that I did not have the jurisdiction to stay an existing or pending action and accordingly extend the limitation period. Specifically, neither JTIM nor RBH took issue with Imperial's submissions in this regard. In any event, if I was to grant the relief they sought, I would be in a similar position where I would have to stay the limitation period concerning the Quebec Plaintiffs' ability to respond to the SCC Leave Application.

Implementing the Stay

29 In accepting that the orders proposed by Imperial ought to go in all three Applications I am convinced that this would best preserve the status quo as it existed at the time of the filings and provide for the level playing field needed to attempt a resolution of all claims.

30 The proposal put forth by JTIM and RBH would alter the status quo in their favour. If they were allowed to file SCC Leave Applications and then obtain a stay it would be to the prejudice of the Quebec Plaintiffs. These Applicants would be allowed to formally present all of their grounds for appeal, including the alleged flaws in the reasoning of the QCCA, without permitting the Quebec Plaintiffs to reply. This not only would affect the status quo but add an impediment to resolution. It would distract these Applicants from the resolution process they claim is so important by focusing their attention on the merits of their appeal from a five-member decision of the QCCA.

31 Further, it is not only the relationship between the Applicants and the Quebec Plaintiffs that must be taken into consideration. If I was to partially lift the stay to allow the Quebec Plaintiffs to respond and therefore allow the SCC Leave Application to proceed in earnest, as requested by the Quebec Plaintiffs in their alternative relief, this would tilt the playing field in favour of the Quebec Plaintiffs as against the other stakeholders who have had their actions stayed. Not only would this allow the Quebec Plaintiffs to move further ahead and closer to resolution when the other actions are stayed, but it would further allow the Quebec Plaintiffs to seek farther conditions from the QCCA or SCC concerning the SCC Leave Application.

32 Approximately $1 billion has already been deposited in Quebec subsequent to the trial decision in order that the Applicants could pursue appeals to the QCCA. Any further, similar orders would be detrimental to other stakeholders who seek a fair process with the CCAA proceedings. These other stakeholders include the provinces who have significant actions concerning the health recovery costs and the other class actions. In fact, two of the provinces' claims - Ontario and New Brunswick - are edging towards trial. This does not seem fair as it would allow the Quebec Plaintiffs a benefit not available to other plaintiffs.

33 Furthermore, if I was to partially lift the stay as requested by the Quebec Plaintiffs so that the SCC Leave Application and a subsequent potential appeal could proceed it would undermine the CCAA proceeding. It would allow for a significant parallel proceeding to commence. Not only would this create a shift in the level playing field as noted above, it would no doubt greatly distract the Applicants and the Quebec Plaintiffs from the important purposes of the CCAA. Enormous resources would be diverted to the litigation. This would cause delay and lessen the chances of achieving a global resolution.

34 The CCAA case law clearly establishes the significant need to preserve the status quo between all stakeholders to preserve a level playing field and maximize the chances of obtaining resolution.

35 Last, I note that the Quebec Plaintiffs also submitted that the "well-documented reprehensible behaviour" set out in the trial decision and QCCA decision should also be taken into consideration on this motion. I reviewed the relevant portions of the aforementioned decisions. No doubt significant criticism was leveled in various portions of the judgments. In my view, however, insofar as the CCAA process is concerned, the past behaviour of the Applicants should not be allowed to undermine attempts to reach a global resolution to the benefit of all stakeholders.

DISPOSITION

36 The motions of JTIM, RBH and the Quebec Plaintiffs with respect to the SCC Leave Application are dismissed.

37 An order shall go staying any and all current proceedings by or against the Applicants and related entities and prohibiting the commencement of any further proceedings by or against them except with the leave of this court. It is further ordered that, to the extent of any prescription, time or limitation period relating to any proceeding against the Applicants that is stayed pursuant to this order may expire, the term of such prescription, time or limitation period shall thereby be deemed to be extended by a period equal to the Stay Period.

Motions granted in part.

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TAB 10

2019 ONSC 2611
Ontario Superior Court of Justice

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

2019 CarswellOnt 6533, 2019 ONSC 2611, 305 A.C.W.S. (3d) 18

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 JTI-Macdonald Corp.

And In The Matter of a Plan of Compromise or Arrangement of Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited

And In The Matter of a Plan of Compromise or Arrangement of Rothmans, Benson & Hedges Inc.

McEwen J.

Heard: April 25, 2019
Judgment: May 1, 2019
Docket: CV-19-615862-00CL, CV-19-616077-00CL, CV-19-616779-00CL

Counsel: Robert I. Thornton, Leanne M. Williams, Rebecca L. Kennedy, for Applicant, JTI-Macdonald Corp.
Deborah Glendinning, Marc Wasserman, John MacDonald, for Imperial Tobacco
Paul Steep, James Gage, Heather Meredith, for Rothmans, Benson & Hedges
Avram Fishman, Mark E. Meland, Harvey Chaiton, George Benchetrit, for Conseil Québécois sur la tabac et la santé and Jean-Yves Blais and Cécilia Létourneau, Quebec Class Action Plaintiffs
Jacqueline Wall, Shahana Kar, Edmund Huang, for Her Majesty The Queen in right of Ontario
Massimo Starnino, Lily Harmer, for Her Majesty The Queen in right of Alberta and Newfoundland & Labrador
Jeffrey Leon, Michael Eizenga, Sean Zweig, for Consortium Provinces
Sheila Block, Scott Bommof, Adam Slavens, for Receiver of JTIM-MacDonald Corp. and JTIM Canada LCC
Patrick Flaherty, Bryan Mcleese, Justin Safayeni, Brian Gover, for RJ Reynolds Tobacco Co. and RJ Reynolds Tobacco International
David Byers, Maria Konyukhova, for British American Tobacco p.l.c., B.A.T. Industries p.l.c. and British American Tobacco (Investments) Limited
Clifton Prophet, for Philip Morris International Inc.
Steven Weisz, Amanda McInnis, for Grand River Enterprises Six Nations Ltd.
Ari Kaplan, for former Genstar US Retiree Group Committee
Wael Rostom, for Bank of Nova Scotia
Jay Swartz, Natasha MacParland, for Monitor (FTI)
Pam Huff, Linc Rogers, Chris Burr, for Deloitte Restructuring Inc., Monitor of JTIM MacDonald Inc.
Shayne Kukulowicz, Jane Dietrich, for Monitor of Rothmans, Benson & Hedges
Jonathan Lisus, Matthew P. Gottlieb, Andrew Winton, for Hon. Warren K. Winkler, in his capacity as Interim Tobacco Claimant Coordinator
Evatt Merchant, Q.C., for Certain Class Action Proceedings
Eduard Popov, for AIG Insurance
Vern DaRe, Robert Cunningham, for Canadian Cancer Society

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Lifting of stay

Ontario brought action seeking to recover expended health care costs with respect to smoking-related diseases from tobacco companies — Three of defendants had sought protection under Companies' Creditors Arrangement Act (CCAA), and all proceedings against companies and related entities were stayed — Ontario brought motion seeking order lifting stay of its action — Motion dismissed — Ontario action had been ongoing for approximately 10 years, it was extremely significant lawsuit, it would take one year or more of trial time and Ontario sought $330 billion in damages — It was critical to preserve status quo as it existed at time of filings for CCAA protection to provide level playing field needed to attempt to resolve several significant claims, and Ontario's proposal would alter status quo in its favour and would add enormous impediment to resolution — CCAA process was at its very early stages, and it must be given opportunity to evolve and succeed without multiple, significant, expensive distractions — Balance of convenience between all stakeholders favoured keeping status quo in place — Balancing of relative prejudice tipped scales against Ontario, as relative prejudice that might be suffered by all stakeholders far exceeded relative prejudice to Ontario — It would be inappropriate to favour interests of Ontario above all others — Other provinces had outstanding actions against companies, and there was no principled basis to distinguish Ontario action from any of other outstanding actions which had all been stayed.

Table of Authorities

Statutes considered:

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

Generally — referred to

MOTION by Ontario seeking order lifting stay of its action.

***McEwen J.*:**

1 On April 26, 2019, I released a handwritten endorsement, with reasons to follow, dismissing the motion brought by Her Majesty the Queen in right of Ontario ("Ontario") which sought an order lifting the stay of its action (the "Ontario Action") against the three applicants, JTI-MacDonald Corp. ("JTIM"), Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited ("Imperial"), and Rothmans, Benson & Hedges Inc. ("RBH") (collectively "the Applicants") and eleven other defendants [1] . The Ontario Action seeks to recover expended health care costs.

2 I am now providing those reasons.

3 Ontario submits that it should be allowed to proceed with the Ontario Action on the condition that it would agree to, at least temporarily, stay the effects of any judgment that it might receive at the conclusion of trial.

4 Ontario is supported in its position by the Quebec Class Action Plaintiffs (the "Quebec Plaintiffs") along with the provinces of Alberta and Newfoundland & Labrador. The Canadian Cancer Society, which is not a party in any litigation, attended at the motion to express its support for Ontario's position.

5 The Applicants oppose the motion. They are supported by the provinces of British Columbia, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island and Saskatchewan ("the Consortium").

6 On April 23, 2019, I released Reasons for Decision (the "Previous Reasons") in which I stayed any and all current proceedings by or against the Applicants and related entities and further stayed any prescription, time or limitation periods. Many of the views I expressed in the Previous Reasons resonate in this motion.

7 The Ontario Action has been on-going for approximately ten years. Ontario has recently obtained court approval to amend its statement of claim to seek damages of $330 billion.

8 By anyone's estimate it is an extremely significant lawsuit. It will take approximately one year or more of trial time. It raises the issue as to whether provinces can recover damages for health care costs expended with respect to smoking-related diseases. The other provinces also have litigation pending seeking the same relief, all of which are currently stayed.

9 Ontario primarily submits that the stay ought to be lifted from the Ontario Action, subject to the above condition, for the following reasons:

- The balance of convenience favours Ontario.
- The balancing of relative prejudice to Ontario versus the Applicants tips the scale in Ontario's favour.
- Ontario has a meritorious claim.
- The dynamics of the Ontario Action are such that the eleven co-defendants cannot be compelled to participate in the CCAA proceedings and, specifically, any settlement discussions with the court appointed mediator The Hon. Mr. Warren Winkler, Q.C. As such, settlement of the Ontario Action is unlikely.

10 I disagree.

11 First, as I set out in the Previous Reasons, it is critical to preserve the status quo as it existed at the time of the filings for CCAA protection to provide a level playing field needed to attempt to resolve the several, significant claims.

12 The proposal put forward by Ontario would alter the status quo in its favour. Ontario would be allowed to advance its action while the other proceedings, including the other claims by the provinces seeking the same or similar relief, were stayed.

13 Further, once again, as in the case of the Quebec Plaintiffs whose action I previously stayed, this would not only affect the status quo but add an enormous impediment to resolution.

14 If Ontario was allowed to proceed to trial with an anticipated trial date, perhaps as early as 2021, it would significantly distract Ontario and the Applicants from the CCAA proceedings. There is no doubt that the pre-trial and trial processes would be very expensive exercises which would divert significant time and resources away from settlement discussions.

15 This CCAA process is at its very early stages. It must be given an opportunity to evolve and succeed without multiple, significant, expensive distractions.

16 Certainly the balance of convenience as between all stakeholders favours keeping the status quo in place. I reject Ontario's submissions that none of the Applicants have disclosed any meaningful or proposed restructuring plan that will be put at risk if Ontario is permitted to continue. Such a submission is entirely premature in light of the stated goal of the Applicants to use their best efforts to resolve the claims against them. While one can argue that the *bona fides* of this intention remains to be seen, it is entirely premature to dismiss it at this time.

17 Furthermore, at this stage at least, the balancing of relative prejudice tips the scales against Ontario. The relative prejudice that may be suffered by all stakeholders far exceeds the relative prejudice to Ontario. It would be inappropriate to favour the interests of Ontario above all others.

18 It may be that Ontario ultimately has a meritorious claim against the Applicants and the other eleven defendants. While it is premature to review the merits of any pending claim, it is fair to say at this time that Ontario's claim is seemingly no more or less meritorious than the other outstanding actions.

19 In this regard it bears repeating that six of the provinces oppose Ontario's position on this motion and wish to give the CCAA process an opportunity to succeed. Overall, there is simply no principled basis to distinguish the Ontario Action from any of the other outstanding actions, all of which have been stayed.

20 I also do not accept Ontario's position that this court has no authority to compel the other eleven defendants to participate in the CCAA proceedings and in settlement discussions. I do not propose to decide this issue at this time, however, since the other defendants are not before me. It may well be, in any event, that they are entirely motivated to attend and participate in the mediation process. It is difficult to see why they would not be interested. This is particularly so where many of the co-defendants are companies related to the Applicants.

21 I repeat, again, the sentiments set out in the Previous Reasons wherein I stated that the CCAA case law clearly establishes a significant need to preserve the status quo between all stakeholders and preserve a level playing field to maximize the chances of obtaining a resolution. This read rings particularly true with respect to the Ontario Action where Ontario seeks to pursue a highly complex lawsuit against multiple defendants seeking $330 billion in damages while the other lawsuits remain stayed.

22 For the reasons above, I dismiss Ontario's motions to lift the stays, as proposed, in all three Applications.

Motion dismissed.

Footnotes

1 Rothmans Inc., British American Tobacco (Investments) Limited, B.A.T. Industries p.l.c, Carreras Rothmans Limited, R.J. Reynolds Tobacco Company, R.J. Reynolds Tobacco International Inc., Altria Group, Inc., Philip Morris U.S.A. Inc., Philip Morris International, Inc., Canadian Tobacco Manufacturers' Council.

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TAB 11

2009 CarswellOnt 4465
Ontario Superior Court of Justice [Commercial List]

Indalex Ltd., Re

2009 CarswellOnt 4465, [2009] O.J. No. 3165, 179 A.C.W.S. (3d) 267, 55 C.B.R. (5th) 64, 79 C.C.P.B. 104

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD., 6326765 CANADIAN INC. AND NOVAR INC. (Applicants)

Morawetz J.

Heard: July 2, 2009
Judgment: July 2, 2009
Written reasons: July 24, 2009
Docket: CV-09-8122-00CL

Counsel: Linc Rogers, Katherine McEachern, Jackie Moher for Applicants
Ashley Taylor, Lesley Mercer for Monitor, FTI Consulting Canada ULC
Paul Macdonald, Jeff Levine for JPMorgan (DIP Lender)
Kenneth D. Kraft for SAPA Holding AB
Andrew Hatnay, Demetrios Yiokaris, Andrew Mckinnon for Keith Carruthers and SERP Retirees
B. Empey for Sun Indalex Finance LLC
John D. Leslie for U.S. Unsecured Creditors' Committee
G. Finlayson for U.S. Bank as Trustee for the Noteholders

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Pension plan — Members of supplemental executive retirement plan ("SERP") had contractual entitlement to pension benefits under supplement retirement plan ("supplemental plan") for executive employees of I and associated companies — Supplemental plan was unfunded and non-registered supplemental pension plan — Supplemental pension benefits were stopped after I applicants filed for protection under Companies' Creditors Arrangement Act ("CCAA") — SERP group brought motion for order requiring I applicants to reinstate payment of supplemental pension benefits — Motion was opposed by I applicants, noteholders and DIP lender — Motion dismissed — SERP payments were based on services provided to I prior to CCAA filing and obligations were pre-filing obligations — Breach of SERP payment obligations gave rise to unsecured claim of SERP group against I applicants but SERP group was stayed from enforcing those payment obligations — SERP group did not establish that they were entitled to any priority with respect to benefits and there was no basis in principle to treat SERP group differently than any other unsecured creditor — Reinstatement of SERP payments would represent improper re-ordering of existing priority regime — SERP payments were not required to carry on business and therefore I was not authorized to pay monthly SERP payments.

Table of Authorities

Cases considered by *Morawetz J.*:

Doman Industries Ltd., Re (2004), 45 B.L.R. (3d) 78, 29 B.C.L.R. (4th) 178, 2004 CarswellBC 1262, 2004 BCSC 733, 1 C.B.R. (5th) 7 (B.C. S.C.) — distinguished

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 3583 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to
Forest Act, R.S.B.C. 1996, c. 157
Generally — referred to

MOTION by members of retirement plan for order to reinstate payment of supplemental pension benefits.

***Morawetz J.*:**

1 I heard argument in this matter on July 2, 2009 at the conclusion of which I dismissed the motion with reasons to follow. These are those reasons.

2 Members of the Indalex Supplemental Executive Retirement Plan or "SERP", (referred to collectively as the "SERP Group") brought this motion for an order requiring the Indalex Applicants to reinstate payment of supplemental pension benefits retroactive to April 2009.

3 The motion is opposed by the Indalex Applicants, the Noteholders and by the DIP Lender. Counsel to the DIP Lender submits that if these payments are made, they would constitute an event of default under the DIP Agreement. Such payments would need the consent or waiver from the DIP Lender which counsel submits, is not forthcoming.

4 The SERP Group have a contractual entitlement to pension benefits under the Supplemental Retirement Plan for executive employees of Indalex Limited and associated companies (the "Supplemental Plan").

5 The Supplemental Plan is an unfunded and non-registered supplemental pension plan. Benefits under the Supplemental Plan are paid out of the general revenues of the Indalex Applicants.

6 Immediately after filing for CCAA protection on April 3, 2009, the Indalex Applicants informed the SERP Group that their supplemental pension benefits were being stopped.

7 The situation confronting members of the SERP Group is very similar to that faced by certain former employees of Nortel Networks ("Former Nortel Employees") who recently brought a motion requesting an order requiring the Applicants in Nortel's CCAA proceedings (the "Nortel Applicants") to make payments which the Nortel Applicants were contractually obligated to pay to Former Nortel Employees, relating to the Transitional Retirement Allowance and any pension benefit payments Former Nortel Employees were entitled to receive in excess of the pension plan. The motion was dismissed. (See *Nortel Networks Corp., Re*, 2009 CarswellOnt 3583 (Ont. S.C.J. [Commercial List]).

8 The reasons provided for the dismissal of the motion of the Former Nortel Employees are applicable to this case.

9 SERP payments are based on services provided to Indalex prior to April 2009. These obligations are, in my view, pre-filing unsecured obligations. A breach of the SERP payment obligations gives rise to an unsecured claim of the SERP Group against the Indalex Applicants. The SERP Group is stayed from enforcing these payment obligations.

10 The SERP Group has not established that they are entitled to any priority with respect to their SERP benefits and there is, in my view, no basis in principle, to treat the SERP Group differently than any other unsecured creditors of the Indalex Applicants. The reinstatement of the SERP payments would, in my view, represent an improper re-ordering of the existing priority regime.

11 The Amended and Restated Order authorizes the Indalex Applicants to pay all reasonable expenses incurred by the Indalex Applicants in carrying on their business in the ordinary course. SERP payments are not, in my view, payments required to carry on the business and, accordingly, the Indalex Applicants are not authorized to pay the monthly SERP payments.

12 In certain CCAA proceedings, the court has granted relief to permit payment of pre-filing unsecured debt. However, in these cases, such payments have for the most part, been considered to be crucial to the ongoing business of the debtor company. In this case, the Indalex Applicants are seeking a going concern solution for the benefit of all stakeholders and their resources should be used for such purposes. I have not been persuaded that the SERP payments are crucial to the ongoing business of the Indalex Applicants and such payments offer no apparent benefit to the Indalex Applicants. (*Re Nortel*, *supra*, at paragraphs 80 and 86.)

13 The SERP Group submits that there are hardship issues that should be taken into account. In Nortel, a hardship exception was made. However, the Nortel exception was predicated, in part, on the reasonable expectation that there will be a meaningful distribution to unsecured creditors, including the Former Nortel Employees. The Nortel hardship exception recognizes that any distribution would represent an advance on the general distribution. The situation facing the Indalex Applicants is different. The Indalex Applicants have significant secured creditors and unlike the situation in Nortel, it is premature to comment on the prospects of any meaningful distribution to unsecured creditors.

14 Counsel to SERP Group also submitted that CCAA protection in this case had been obtained for a company that was liquidating its assets. Counsel for the SERP Group submitted that Indalex had put itself up for sale and commenced a "marketing process" and as such it was not restructuring, rather, it was selling itself. This led to the submission that the cutting of benefits payable to the SERP Group was not necessary or justified for the sale of the company under the CCAA.

15 I fail to see the relevance of this submission. At the present time, the Applicants are properly under CCAA protection. No motion has been brought to challenge the appropriateness of the CCAA proceedings and, in my view, nothing in the CCAA precludes the ability of a debtor applicant to sell its assets. See *Re Nortel Networks Corporation* - endorsement released July 23, 2009 on this point.

16 Finally, counsel to SERP Group placed emphasis on the fact that the amount required to satisfy the obligations to SERP Group is not significant. While this submission may be attractive on the surface, to give effect to this argument would violate a fundamental tenet of insolvency law, namely, that all unsecured creditors receive equal treatment. In my view, there is no basis to prefer the SERP Group or, indeed, any retired executive who is entitled to SERP payments in priority to other unsecured creditors.

17 Counsel to SERP Group also relied upon *Doman Industries Ltd., Re*, 2004 BCSC 733 (B.C. S.C.) for the proposition that, the fact that a company can reduce its costs if it can terminate contracts, is not sufficient for a CCAA court to authorize the termination of the contract. In *Doman*, *supra*, the point at issue concerned licences under the *Forest Act* which created the concept of replaceable contracts. Doman held certain licences. As noted by Tysoe J. (as he then was), at paragraph 7, a replaceable contract is a form of evergreen contract which contains statutorily mandated provisions, the most important of which is that the licence holder must offer a new or replacement contract to the contractor upon each expiry of the term of the contract as long as the contractor is not in default under the contract. That is not the situation in this case. The contractual situation in *Doman*, *supra*, is not, in my view, comparable to this case. *Doman*is clearly distinguishable on the facts.

18 For the forgoing reasons, the motion of SERP Group for reinstatement of SERP benefits is dismissed.

Motion dismissed.

TAB 12

2009 CarswellOnt 3583
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2009 CarswellOnt 3583, [2009] O.J. No. 2558, 178 A.C.W.S. (3d) 305, 55 C.B.R. (5th) 68, 75 C.C.P.B. 233

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 (Applicants)

APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Morawetz J.

Heard: April 21, 2009
Judgment: June 18, 2009
Docket: 09-CL-7950

Counsel: Barry Wadsworth for CAW, George Borosh et al
Susan Philpott, Mark Zigler for Nortel Networks Former Employees
Lyndon Barnes, Adam Hirsh for Nortel Networks Board of Directors
Alan Mersky, Mario Forte for Nortel Networks et al
Gavin H. Finlayson for Informal Nortel Noteholders Group
Leanne Williams for Flextronics Inc.
Joseph Pasquariello, Chris Armstrong for Monitor, Ernst & Young Inc.
Janice Payne for Recently Severed Canadian Nortel Employees ("RSCNE")
Gail Misra for CEP Union
J. Davis-Sydor for Brookfield Lepage Johnson Controls Facility Management Services
Henry Juroviesky for Nortel Terminated Canadian Employees Steering Committee
Alex MacFarlane for Official Unsecured Creditors Committee
M. Starnino for Superintendent of Financial Services

Subject: Insolvency; Labour; Public

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Telecommunications company entered protection under Companies' Creditors Arrangement Act — Company ceased making secured payments — Former employees and union brought motion for continued benefits — Motion dismissed — Poor financial performance of company, which was insolvent, was important consideration — Proceedings were at early stage and no classification of creditors had occurred — Company had breached terms of collective agreement with union, and to former employees not covered by agreement — Claims were unsecured — Section 11.3 of Act could not operate to force payment of claim, as underlying services were provided before initial order — Key factor was not payment obligation arose but rather when services performed — Section 11.3 should be construed narrowly.

Labour and employment law --- Labour law — Labour relations boards — Jurisdiction — General principles

Telecommunications company entered protection under Companies' Creditors Arrangement Act — Company ceased making secured payments — Former employees and union brought motion for continued benefits — Motion dismissed — Section 11.3 of Act could not operate to force payment of claim, as underlying services were provided before initial order — Court had jurisdiction to consider matter — Act may deal with matters which otherwise would be considered under labour legislation — No reason to treat claims of employees differently from unsecured creditors — Claims subject to stay.

Table of Authorities

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Bilodeau v. McLean (1924), [1924] 2 W.W.R. 631, 34 Man. R. 239, [1924] 3 D.L.R. 410, 1924 CarswellMan 48 (Man. C.A.) — referred to

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Statutes considered:

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

Generally — referred to

s. 11 — considered

s. 11.3 [en. 1997, c. 12, s. 124] — considered

Employment Standards Act, 2000, S.O. 2000, c. 41

Generally — referred to

s. 5 — considered
Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A
Generally — referred to
Wage Earner Protection Program Act, S.C. 2005, c. 47, s. 1
Generally — referred to
Words and phrases considered:

services

The ordinary meaning of "services" [in the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36] must be considered in the context of the phrase "services,...provided after the order is made". On a plain reading, it contemplates, in my view, some activity on behalf of the service provider which is performed after the date of the Initial Order. The CCAA contemplates that during the reorganization process, pre-filing debts are not paid, absent exceptional circumstances and services provided after the date of the Initial Order will be paid for the purpose of ensuring the continued supply of services.

MOTIONS by union and former employees for order allowing for continuation of benefits from company under protection of *Companies Creditors' Arrangement Act.*

***Morawetz J.*:**

1 The process by which claims of employees, both unionized and non-unionized, have been addressed in restructurings initiated under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") has been the subject of debate for a number of years. There is uncertainty and strong divergent views have been expressed. Notwithstanding that employee claims are ultimately addressed in many CCAA proceedings, there are few reported decisions which address a number of the issues being raised in these two motions. This lack of jurisprudence may reflect that the issues, for the most part, have been resolved through negotiation, as opposed to being determined by the court in the CCAA process - which includes motions for directions, the classification of creditors' claims, the holding and conduct of creditors' meetings and motions to sanction a plan of compromise or arrangement.

2 In this case, both unionized and non-unionized employee groups have brought motions for directions. This endorsement addresses both motions.

Union Motion

3 The first motion is brought by the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW - Canada) and its Locals 27, 1525, 1530, 1535, 1837, 1839, 1905, and/or 1915 (the "Union") and by George Borosh on his own behalf and on behalf of all retirees of the Applicants who were formerly represented by the Union.

4 The Union requests an order directing the Applicants (also referred to as "Nortel") to recommence certain periodic and lump sum payments which the Applicants, or any of them, are obligated to make pursuant to the CAW collective agreement (the "Collective Agreement"). The Union also seeks an order requiring the Applicants to pay to those entitled persons the payments which should have been made to them under the Collective Agreement since January 14, 2009, the date of the CCAA filing and the date of the Initial Order.

5 The Union seeks continued payment of certain of these benefits including:

(a) retirement allowance payments ("RAP");

(b) voluntary retirement options ("VRO"); and

(c) termination and severance payments.

6 The amounts claimed by the Union are contractual entitlements under the Collective Agreement, which the Union submits are payable only after an individual's employment with the Applicants has ceased.

7 There are approximately 101 former Union members with claims to RAP. The current value of these RAP is approximately $2.3 million. There are approximately 180 former unionized retirees who claim similar benefits under other collective agreements.

8 There are approximately 7 persons who may assert claims to VRO as of the date of the Initial Order. These claims amount to approximately $202,000.

9 There are also approximately 600 persons who may claim termination and severance pay amounts. Five of those persons are former union members.

Former Employee Motion

10 The second motion is brought by Mr. Donald Sproule, Mr. David Archibald and Mr. Michael Campbell (collectively, the "Representatives") on behalf of former employees, including pensioners, of the Applicants or any person claiming an interest under or on behalf of such former employees or pensioners and surviving spouses in receipt of a Nortel pension, or group or class of them (collectively, the "Former Employees"). The Representatives seek an order varying the Initial Order by requiring the Applicants to pay termination pay, severance pay, vacation pay and an amount equivalent to the continuation of the benefit plans during the notice period, which are required to be paid to affected Former Employees in accordance with the *Employment Standards Act*, *2000* S.O. 2000 c.41 ("ESA") or any other relevant provincial employment legislation. The Representatives also seek an order varying the Initial Order by requiring the Applicants to recommence certain periodic and lump sum payments and to make payment of all periodic and lump sum payments which should have been paid since the Initial Order, which the Applicants are obligated to pay Former Employees in accordance with the statutory and contractual obligations entered into by Nortel and affected Former Employees, including the Transitional Retirement Allowance ("TRA") and any pension benefit payments Former Employees are entitled to receive in excess of the Nortel Networks Limited Managerial and Non-negotiated Pension Plan (the "Pension Plan"). TRA is similar to RAP, but is for non-unionized retirees. There are approximately 442 individuals who may claim the TRA. The current value of TRA obligations is approximately $18 million.

11 The TRA and the RAP are both unregistered benefits that run concurrently with other pension entitlements and operate as time-limited supplements.

12 In many respects, the motion of the Former Employees is not dissimilar to the CAW motion, such that the motion of the Former Employees can almost be described as a "Me too motion".

Background

13 On January 14, 2009, the Applicants were granted protection under the CCAA, pursuant to the Initial Order.

14 Upon commencement of the CCAA proceedings, the Applicants ceased making payments of amounts that constituted or would constitute unsecured claims against the Applicants. Included were payments for termination and severance, as well as amounts under various retirement and retirement transitioning programs.

15 The Initial Order provides:

> (a) that Nortel is entitled but not required to pay, among other things, outstanding and future wages, salaries, vacation pay, employee benefits and pension plan payments;

(b) that Nortel is entitled to terminate the employment of or lay off any of its employees and deal with the consequences under a future plan of arrangement;

(c) that Nortel is entitled to vacate, abandon or quit the whole but not part of any lease agreement and repudiate agreements relating to leased properties (paragraph 11);

(d) for a stay of proceedings against Nortel;

(e) for a suspension of rights and remedies vis-à-vis Nortel;

(f) that during the stay period no person shall discontinue, repudiate, cease to perform any contract, agreement held by the company (paragraph 16);

(g) that those having agreements with Nortel for the supply of goods and/or services are restrained from, among other things, discontinuing, altering or terminating the supply of such goods or services. The proviso is that the goods or services supplied are to be paid for by Nortel in accordance with the normal payment practices.

Position of Union

16 The position of the CAW is that the Applicants' obligations to make the payments is to the CAW pursuant to the Collective Agreement. The obligation is not to the individual beneficiaries.

17 The Union also submits that the difference between the moving parties is that RAP, VRO and other payments are made pursuant to the Collective Agreement as between the Union and the Applicants and not as an outstanding debt payable to former employees.

18 The Union further submits that the Applicants are obligated to maintain the full measure of compensation under the Collective Agreement in exchange for the provision of services provided by the Union's members subsequent to the issuance of the Initial Order. As such, the failure to abide by the terms of the Collective Agreement, the Union submits, runs directly contrary to Section 11.3 of the CCAA as compensation paid to employees under a collective agreement can reasonably be interpreted as being payment for services within the meaning of this section.

19 Section 11.3 of the CCAA provides:

No order made under section 11 shall have the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit.

20 In order to fit within Section 11.3, services have to be provided after the date of the Initial Order.

21 The Union submits that persons owed severance pay are post-petition trade creditors in a bankruptcy, albeit in relation to specific circumstances. Thus, by analogy, persons owed severance pay are post-petition trade creditors in a CCAA proceeding. The Union relies on *Smoky River Coal Ltd., Re*, 2001 ABCA 209 (Alta. C.A.) to support its proposition.

22 The Union further submits that when interpreting "compensation" for services performed under the Collective Agreement, it must include all of the monetary aspects of the Collective Agreement and not those specifically made to those actively employed on any particular given day.

23 The Union takes the position that Section 11.3 of the CCAA specifically contemplates that a supplier is entitled to payment for post-filing goods and services provided, and would undoubtedly refuse to continue supply in the event of receiving only partial payment. However, the Union contends that it does not have the ability to cease providing services due to the *Labour Relations Act, 1995*, S.O. 1995, c. 1. As such, the only alternative open to the Union is to seek an order to recommence the payments halted by the Initial Order.

24 The Union contends that Section 11.3 of the CCAA precludes the court from authorizing the Applicants to make selective determinations as to which parts of the Collective Agreement it will abide by. By failing to abide by the terms of the Collective Agreement, the Union contends that the Applicants have acted as if the contract has been amended to the extent that it is no longer bound by all of its terms and need merely address any loss through the plan of arrangement.

25 The Union submits that, with the exception of rectification to clarify the intent of the parties, the court has no jurisdiction at common law or in equity to alter the terms of the contract between parties and as the court cannot amend the terms of the Collective Agreement, the employer should not be allowed to act as though it had done so.

26 The Union submits that no other supplier of services would countenance, and the court does not have the jurisdiction to authorize, the recipient party to a contract unilaterally determining which provisions of the agreement it will or will not abide by while the contract is in operation.

27 The Union concludes that the Applicants must pay for the full measure of its bargain with the Union while the Collective Agreement remains in force and the court should direct the recommencement and repayment of those benefits that arise out of the Collective Agreement and which were suspended subsequently to the filing of the CCAA application on January 14, 2009.

Position of the Former Employees

28 Counsel to the Former Employees submits that the court has the discretion pursuant to Section 11 of the CCAA to order Nortel to recommence periodic and lump-sum payments to Former Employees in accordance with Nortel's statutory and contractual obligations. Further, the RAP payments which the Union seeks to enforce are not meaningfully different from those RAP benefits payable to other unionized retirees who belong to other unions nor from the TRA payable to non-unionized former employees. Accordingly, counsel submits that it would be inequitable to restore payments to one group of retirees and not others. Hence, the reference to the "Me too motion".

29 Counsel further submits that all employers and employees are bound by the minimum standards in the ESA and other applicable provincial employment legislation. Section 5 of the ESA expressly states that no employer can contract out or waive an employment standard in the ESA and that any such contracting out or waiver is void.

30 Counsel submits that each province has minimum standards employment legislation and regulations which govern employment relationships at the provincial level and that provincial laws such as the ESA continue to apply during CCAA proceedings.

31 Further, the Supreme Court of Canada has held that provincial laws in federally-regulated bankruptcy and insolvency proceedings continue to apply so long as the doctrine of paramountcy is not triggered: See *Crystalline Investments Ltd. v. Domgroup Ltd.*, [2004] 1 S.C.R. 60 (S.C.C.).

32 In this case, counsel further submits that there is no conflict between the provisions of the ESA and the CCAA and that paramountcy is not triggered and it follows that the ESA and other applicable employment legislation continues to apply during the Applicants' CCAA proceedings. As a result counsel submits that the Applicants are required to make payment to Former Employees for monies owing pursuant to the minimum employment standards as outlined in the ESA and other applicable provincial legislation.

Position of the Applicants

33 Counsel to the Applicants sets out the central purpose of the CCAA as being: "to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business". (*Pacific National Lease Holding Corp., Re*, [1992] B.C.J. No. 3070 (B.C. S.C.), aff'd by (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers])), and that the stay is the primary procedural instrument used to achieve the purpose of the CCAA:

> ...if the attempt at a 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 Section 11 (*Pacific National Lease Holding Corp. (Re)*, *supra*).

34 The Applicants go on to submit that the powers vested in the court under Section 11 to achieve these goals of the CCAA include:

> (a) the ability to stay past debts; and
>
> (b) the ability to require the continuance of present obligations to the debtor.

35 The corresponding protection extended to persons doing business with the debtor is that such persons (including employees) are not required to extend credit to the debtor corporation in the course of the CCAA proceedings. The protection afforded by Section 11.3 extends only to services provided after the Initial Order. Post-filing payments are only made for the purpose of ensuring the continued supply of services and that obligations in connection with past services are stayed. (See *Mirant Canada Energy Marketing Ltd., Re*, [2004] A.J. No. 331 (Alta. Q.B.)).

36 Furthermore, counsel to the Applicants submits that contractual obligations respecting post employment are obligations in respect of past services and are accordingly stayed.

37 Counsel to the Applicants also relies on the following statement from *Mirant*, *supra*, at paragraph 28:

> Thus, for me to find the decision of the Court of Appeal in Smokey River Coal analogous to Schaefer's situation, I would need to find that the obligation to pay severance pay to Schaefer was a clear contractual obligation that was necessary for Schaefer to continue his employment and not an obligation that arose from the cessation or termination of services. In my view, to find it to be the former would be to stretch the meaning of the obligation in the Letter Agreement to pay severance pay. It is an obligation that arises on the termination of services. It does not fall within a commercially reasonable contractual obligation essential for the continued supply of services. Only is his salary which he has been paid falls within that definition.

38 Counsel to the Applicants states that post-employment benefits have been consistently stayed under the CCAA and that post-employment benefits are properly regarded as pre-filing debts, which receive the same treatment as other unsecured creditors. The Applicants rely on *Mine Jeffrey inc., Re*, [2003] Q.J. No. 264 (Que. C.A.) ("*Jeffrey Mine*") for the proposition that "the fact that these benefits are provided for in the collective agreement changes nothing".

39 Counsel to the Applicants submits that the Union seeks an order directing the Applicants to make payment of various post-employment benefits to former Nortel employees and that the Former Employees claim entitlement to similar treatment for all post-employment benefits, under the Collective Agreement or otherwise.

40 The Applicants take the position the Union's continuing collective representation role does not clothe unpaid benefits with any higher status, relying on the following from *Jeffrey Mine* at paras. 57 - 58:

> Within the framework of the restructuring plan, arrangements can be made respecting the amounts owing in this regard.

> The same is true in the case of the loss of certain fringe benefits sustained by persons who have not provided services to the debtor since the initial order. These persons became creditors of the debtor for the monetary value of the benefits lost further to Jeffrey Mines Inc.'s having ceased to pay premiums. The fact that these benefits are provided for in the collective agreements changes nothing.

41 In addition, the Applicants point to the following statement of the Quebec Court of Appeal in *TQS inc., Re*, 2008 QCCA 1429 (Que. C.A.) at paras. 26-27:

> [Unofficial translation] Employees' rights are defined by the collective agreement that governs them and by certain legislative provisions. However, the resulting claims are just as much [at] risk as those of other creditors, in this case suppliers whose livelihood is also threatened by the financial precariousness of their debtor.
>
> The arguments of counsel for the Applicants are based on the erroneous premise that the employees are entitled to a privileged status. That is not what the CCAA provides nor is it what this court decided in *Syndicat national de l'amiante d'Asbestos inc. c. Mine Jeffrey inc.*

42 Collectively, RAP payment and TRA payments entail obligations of over $22 million. Counsel to the Applicants submits that there is no basis in principle to treat them differently. They are all stayed and there is no basis to treat any of these two unsecured obligations differently. The Applicants are attempting to restructure for the final benefit of all stakeholders and counsel submits that its collective resources must be used for such purposes.

Report of the Monitor

43 In its Seventh Report, the Monitor notes that at the time of the Initial Order, the Applicants employed approximately 6,000 employees and had approximately 11,700 retirees or their survivors receiving pension and/or benefits from retirement plans sponsored by the Applicants.

44 The Monitor goes on to report that the Applicants have continued to honour substantially all of the obligations to active employees. The Applicants have continued to make current service and special funding payments to their registered pension plans. All the health and welfare benefits for both active employees and retirees have been continued to be paid since the commencement of the CCAA proceedings.

45 The Monitor further reports that at the filing date, payments to former employees for termination and severance as well as the provisions of the health and dental benefits ceased. In addition, non-registered and unfunded retirement plan payments ceased.

46 More importantly, the Monitor reports that, as noted in previous Monitor's Reports, the Applicants' financial position is under pressure.

Discussion and Analysis

47 The acknowledged purpose of the CCAA is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. (See *Pacific National Lease Holding Corp., Re*, [1992] B.C.J. No. 3070 (B.C. S.C.), aff'd by (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]), at para. 18 citing *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.), at 315). The primary procedural instrument used to achieve that goal is the ability of the court to issue a broad stay of proceedings under Section 11 of the CCAA.

48 The powers vested in the court under Section 11 of the CCAA to achieve these goals include the ability to stay past debts; and the ability to require the continuance of present obligations to the debtor. (*Woodward's Ltd., Re* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.).

49 The Applicants acknowledged that they were insolvent in affidavit material filed on the Initial Hearing. This position was accepted and is referenced in my endorsement of January 14, 2009. The Applicants are in the process of restructuring but no plan of compromise or arrangement has yet to be put forward.

50 The Monitor has reported that the Applicants are under financial pressure. Previous reports filed by the Monitor have provided considerable detail as to how the Applicants carry on operations and have provided specific information as to the interdependent relationship between Nortel entities in Canada, the United States, Europe, the Middle East and Asia.

51 In my view, in considering the impact of these motions, it is both necessary and appropriate to take into account the overall financial position of the Applicants. There are several reasons for doing so:

(a) The Applicants are not in a position to honour their obligations to all creditors.

(b) The Applicants are in default of contractual obligations to a number of creditors, including with respect to significant bond issues. The obligations owed to bondholders are unsecured.

(c) The Applicants are in default of certain obligations under the Collective Agreements.

(d) The Applicants are in default of certain obligations owed to the Former Employees.

52 It is also necessary to take into account that these motions have been brought prior to any determination of any creditor classifications. No claims procedure has been proposed. No meeting of creditors has been called and no plan of arrangement has been presented to the creditors for their consideration.

53 There is no doubt that the views of the Union and the Former Employees differ from that of the Applicants. The Union insists that the Applicants honour the Collective Agreement. The Former Employees want treatment that is consistent with that being provided to the Union. The record also establishes that the financial predicament faced by retirees and Former Employees is, in many cases, serious. The record references examples where individuals are largely dependent upon the employee benefits that, until recently, they were receiving.

54 However, the Applicants contend that since all of the employee obligations are unsecured it is improper to prefer retirees and the Former Employees over the other unsecured creditors of the Applicants and furthermore, the financial pressure facing the Applicants precludes them from paying all of these outstanding obligations.

55 Counsel to the Union contends that the Applicants must pay for the full measure of its bargain with the Union while the Collective Agreement remains in force and further that the court does not have the jurisdiction to authorize a party, in this case the Applicants, to unilaterally determine which provisions of the Collective Agreement they will abide by while the contract is in operation. Counsel further contends that Section 11.3 of the CCAA precludes the court from authorizing the Applicants to make selective determinations as to which parts of the Collective Agreement they will abide by and that by failing to abide by the terms of the Collective Agreement, the Applicants acted as if the Collective Agreement between themselves and the Union has been amended to the extent that the Applicants are no longer bound by all of its terms and need merely address any loss through the plan of arrangement.

56 The Union specifically contends that the court has no jurisdiction to alter the terms of the Collective Agreement.

57 In addressing these points, it is necessary to keep in mind that these CCAA proceedings are at a relatively early stage. It also must be kept in mind that the economic circumstances at Nortel are such that it cannot be considered to be carrying on "business as usual". As a result of the Applicants' insolvency, difficult choices will have to be made. These choices have to be made by all stakeholders.

58 The Applicants have breached the Collective Agreement and, as a consequence, the Union has certain claims.

59 However, the Applicants have also breached contractual agreements they have with Former Employees and other parties. These parties will also have claims as against the Applicants.

60 An overriding consideration is that the employee claims whether put forth by the Union or the Former Employees, are unsecured claims. These claims do not have any statutory priority.

61 In addition, there is nothing on the record which addresses the issue of how the claims of various parties will be treated in any plan of arrangement, nor is there any indication as to how the creditors will be classified. These issues are not before the court at this time.

62 What is before the court is whether the Applicants should be directed to recommence certain periodic and lump sum payments that they are obligated to make under the Collective Agreement as well as similar or equivalent payments to Former Employees.

63 It is necessary to consider the meaning of Section 11.3 and, in particular, whether the Section should be interpreted in the manner suggested by the Union.

64 Counsel to the Union submits that the ordinary meaning of "services" in section 11.3 includes work performed by employees subject to a collective agreement. Further, even if the ordinary meaning is plain, courts must consider the purpose and scheme of the legislation, and relevant legal norms. Counsel submits that the courts must consider the entire context. As a result, when interpreting "compensation" for services performed under a collective agreement, counsel to the Union submits it must include all of the monetary aspects of the agreement and not those made specifically to those actively employed on any particular given day.

65 No cases were cited in support of this interpretation.

66 I am unable to agree with the Union's argument. In my view, section 11.3 is an exception to the general stay provision authorized by section 11 provided for in the Initial Order. As such, it seems to me that section 11.3 should be narrowly construed. (See Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont.: LexisNexis Canada Inc., 2008) at 483-485.) Section 11.3 applies to services provided after the date of the Initial Order. The ordinary meaning of "services" must be considered in the context of the phrase "services,...provided after the order is made". On a plain reading, it contemplates, in my view, some activity on behalf of the service provider which is performed after the date of the Initial Order. The CCAA contemplates that during the reorganization process, pre-filing debts are not paid, absent exceptional circumstances and services provided after the date of the Initial Order will be paid for the purpose of ensuring the continued supply of services.

67 The flaw in the argument of the Union is that it equates the crystallization of a payment obligation under the Collective Agreement to a provision of a service within the meaning of s. 11.3. The triggering of the payment obligation may have arisen after the Initial Order but it does not follow that a service has been provided after the Initial Order. Section 11.3 contemplates, in my view, some current activity by a service provider post-filing that gives rise to a payment obligation post-filing. The distinction being that the claims of the Union for termination and severance pay are based, for the most part, on services that were provided pre-filing. Likewise, obligations for benefits arising from RAP and VRO are again based, for the most part, on services provided pre-filing. The exact time of when the payment obligation crystallized is not, in my view, the determining factor under section 11.3. Rather, the key factor is whether the employee performed services after the date of the Initial Order. If so, he or she is entitled to compensation benefits for such current service.

68 The interpretation urged by counsel to the Union with respect to this section is not warranted. In my view, section 11.3 does not require the Applicants to make payment, at this time, of the outstanding obligations under the Collective Agreement.

69 The Union also raised the issue as to whether the court has the jurisdiction to order a stay of the outstanding obligations under Section 11 of the CCAA.

70 The Union takes the position that, with the exception of rectification to clarify the intent of the parties, the court has no jurisdiction at common law or in equity to alter the terms of a contract between parties. The Union relies on *Bilodeau v. McLean*, [1924] 3 D.L.R. 410 (Man. C.A.); *Dusener v. Myles*, [1963] S.J. No. 31 (Sask. Q.B.); *Hiesinger v. Bonice*, [1984] A.J. No. 281 (Alta. Q.B.); *Werchola v. KC5 Amusement Holdings Ltd.*, 2002 SKQB 339 (Sask. Q.B.) to support its position.

71 The Union extends this argument and submits that as the court cannot amend the terms of a collective agreement, the employer should not be allowed to act as though it had been.

72 As a general rule, counsel to the Union submits, there is in place a comprehensive regime for the regulation of labour relations with specialized labour-relations tribunals having exclusive jurisdiction to deal with legal and factual matters arising under labour legislation and no court should restrain any tribunal from proceeding to deal with such matters.

73 However, as is clear from the context, these cases referenced at [70] are dealing with the ordinary situation in which there is no issue of insolvency. In this case, we are dealing with a group of companies which are insolvent and which have been accorded the protection of the CCAA. In my view, this insolvency context is an important distinguishing factor. The insolvency context requires that the stay provisions provided in the CCAA and the Initial Order must be given meaningful interpretation.

74 There is authority for the proposition that, when exercising their authority under insolvency legislation, the courts may make, at the initial stage of a CCAA proceeding, orders regarding matters, but for the insolvent condition of the employer, would be dealt with pursuant to provincial labour legislation, and in most circumstances, by labour tribunals. In *Pacific National Lease Holding Corp., Re* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]), the issue involved the question whether a CCAA debtor company had to make statutory severance payments as was mandatory under the provincial employment standards legislation. MacFarlane J.A. stated at pp. 271-2:

> It appears to me that an order which treats creditors alike is in accord with the purpose of the CCAA. Without the provisions of that statute the petitioner companies might soon be in bankruptcy, and the priority which the employees now have would be lost. The process provided by the CCAA is an interim one. Generally, it suspends but does not determine the ultimate rights of any creditor. In the end it may result in the rights of employees being protected, but in the meantime it preserves the status quo and protects all creditors while a reorganization is being attempted.
>
> . . . . .
>
> This case is not so much about the rights of employees as creditors, but the right of the court under the CCAA to serve not only the special interests of the directors and officers of the company but the broader constituency referred to in *Chef Ready Foods Ltd.*, *supra*. Such a decision may invariably conflict with provincial legislation, but the broad purpose of the CCAA must be served.

75 The *Jeffrey Mine* decision is also relevant. In my view, the *Jeffrey Mine* case does not appear to support the argument that the Collective Agreement is to be treated as being completely unaffected by CCAA proceedings. It seems to me that it is contemplated that rights under a collective agreement may be suspended during the CCAA proceedings. At paragraphs 60 - 62, the court said under the heading Recapitulation (in translation):

> The collective agreements continue to apply like any contract of successive performance not modified by mutual agreement after the initial order or not disclaimed (assuming that to be possible in the case of collective agreements).

> Neither the monitor nor the court can amend them unilaterally. That said, distinctions need to be made with regard to the prospect of the resulting debts.
>
> Thus, unionized employees kept on or recalled are entitled to be paid immediately by the monitor for any service provided after the date of the order (s. 11.3), in accordance with the terms of the original version of the applicable collective agreement by the union concerned. However, the obligations not honoured by Jeffrey Mine Inc. with regard to services provided prior to the order constitute debts of Jeffrey Mine Inc. for which the monitor cannot be held liable (s. 11.8 CCAA) and which the employees cannot demand to be paid immediately (s. 11.3 CCAA).
>
> Obligations that have not been met with regard to employees who were laid off permanently on October 7, 2002, or with regard to persons who were former employees of Jeffrey Mine Inc. on that date and that stem from the collective agreements or other commitments constitute debts of the debtor to be disposed of in the restructuring plan or, failing that, upon the bankruptcy of Jeffrey Mine Inc.

76 The issue of severance pay benefits was also referenced in *Printwest Communications Ltd. v. Saskatchewan Cooperative Financial Services Ltd.*, 2005 SKQB 331 (Sask. Q.B.) at paras. 11 and 15. The application of the Union was rejected:

> ...The claims for severance pay arise from the collective bargaining agreement. But severance pay does not fall into the category of essential services provided during the organization period in order to enable Printwest to function.
>
> . . . . .
>
> If the Union's request should be accepted, with the result that the claims for severance pay be dealt with outside the plan of compromise - and thereby be paid in full - such a result could not possibly be viewed as fair and reasonable with respect to other unsecured creditors, who will possibly receive only a small fraction of the amounts owing to them for goods and services provided to Printwest in good faith. Thus, the application of the Union in this respect must be rejected.

Disposition

77 At the commencement of an insolvency process, the situation is oftentimes fluid. An insolvent debtor is faced with many uncertainties. The statute is aimed at facilitating a plan of compromise or arrangement. This may require adjustments to the operations in a number of areas, one of which may be a downsizing of operations which may involve a reduction in the workforce. These adjustments may be painful but at the same time may be unavoidable. The alternative could very well be a bankruptcy which would leave former employees, both unionized and non-unionized, in the position of having unsecured claims against a bankrupt debtor. Depending on the status of secured claims, these unsecured claims may, subject to benefits arising from the recently enacted *Wage Earner Protection Program Act*, be worth next to nothing.

78 In the days ahead, the Applicants, former employees, both unionized and non-unionized may very well have arguments to make on issues involving claims processes (including the ability of the Applicants to compromise claims), classification, meeting of creditors and plan sanction. Nothing in this endorsement is intended to restrict the rights of any party to raise these issues.

79 The reorganization process under the CCAA can be both long and painful. Ultimately, however, for a plan to be sanctioned by the court, the application must meet the following three tests:

> (i) there has to be strict compliance with all statutory requirements and adherence to previous orders of the court;
>
> (ii) nothing has been done or purported to be done that is not authorized by the CCAA;
>
> (iii) the plan is fair and reasonable. *Sammi Atlas Inc., Re* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List])

80 At this stage of the Applicants' CCAA process, I see no basis in principle to treat either unionized or non-unionized employees differently than other unsecured creditors of the Applicants. Their claims are all stayed. The Applicants are attempting to restructure for the benefit of all stakeholders and their resources should be used for such a purpose.

81 It follows that the motion of the Union is dismissed.

82 The Applicants also raised the issue that the Union consistently requested the right to bargain on behalf of retirees who were once part of the Union and that the concession had not been granted. Consequently, the retirees' substantive rights are not part of the bargain between the unionized employees and the employer. Counsel to the Applicants submitted that the union may collectively alter the existing rights of any employee but it cannot negatively do so with respect to retirees' rights.

83 The Union countered that the rights gained by a member of the bargaining unit vest upon retirement, despite the fact that a collective agreement expires, and are enforceable through the grievance procedure.

84 Both parties cited *Dayco (Canada) Ltd. v. C.A.W.*, [1993] 2 S.C.R. 230 (S.C.C.) in support of their respective positions.

85 In view of the fact that this motion has been dismissed for other reasons, it is not necessary for me to determine this specific issue arising out of the *Dayco* decision.

86 The motion of the Former Employees was characterized, as noted above, as a "Me too motion". It was based on the premise that, if the Union's motion was successful, it would only be equitable if the Former Employees also received benefits. The Former Employees do not have the benefit of any enhanced argument based on the Collective Agreement. Rather, the argument of the Former Employees is based on the position that the Applicants cannot contract out of the ESA or any other provincial equivalent. In my view, this is not a case of contracting out of the ESA. Rather, it is a case of whether immediate payout resulting from a breach of the ESA is required to be made. In my view, the analysis is not dissimilar from the Collective Agreement scenario. There is an acknowledgment of the applicability of the ESA, but during the stay period, the Former Employees cannot enforce the payment obligation. In the result, it follows that the motion of the Former Employees is also dismissed.

87 However, I am also mindful that the record, as I have previously noted, makes reference to a number of individuals that are severely impacted by the cessation of payments. There are no significant secured creditors of the Applicants, outside of certain charges provided for in the CCAA proceedings, and in view of the Applicants' declared assets, it is reasonable to expect that there will be a meaningful distribution to unsecured creditors, including retirees and Former Employees. The timing of such distribution may be extremely important to a number of retirees and Former Employees who have been severely impacted by the cessation of payments. In my view, it would be both helpful and equitable if a partial distribution could be made to affected employees on a timely basis.

88 In recognition of the circumstances that face certain retirees and Former Employees, the Monitor is directed to review the current financial circumstances of the Applicants and report back as to whether it is feasible to establish a process by which certain creditors, upon demonstrating hardship, could qualify for an unspecified partial distribution in advance of a general distribution to creditors. I would ask that the Monitor consider and report back to this court on this issue within 30 days.

89 This decision may very well have an incidental effect on the Collective Agreement and the provisions of the ESA, but it is one which arises from the stay. It does not, in my view, result from a repudiation of the Collective Agreement or a contracting out of the ESA. The stay which is being recognized is, in my view, necessary in the circumstances. To hold otherwise, would have the effect of frustrating the objectives of the CCAA to the detriment of all stakeholders.

Motions dismissed.

End of Document

TAB 13

2010 ONSC 1708
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2010 CarswellOnt 1754, 2010 ONSC 1708, 192 A.C.W.S. (3d) 368, 63 C.B.R. (5th) 44, 81 C.C.P.B. 56

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 (Applicants)

Morawetz J.

Heard: March 3-5, 2010
Judgment: March 26, 2010
Docket: 09-CL-7950

Counsel: Derrick Tay, Jennifer Stam, Suzanne Wood for Applicants
Lyndon Barnes, Adam Hirsh for Nortel Directors
Benjamin Zarnett, Gale Rubenstein, C. Armstrong, Melaney Wagner for Monitor, Ernst & Young Inc.
Arthur O. Jacques for Nortel Canada Current Employees
Deborah McPhail for Superintendent of Financial Services (non-PBGF)
Mark Zigler, Susan Philpott for Former and Long-Term Disability Employees
Ken Rosenberg, M. Starnino for Superintendent of Financial Services in its capacity as Administrator of the Pension Benefit Guarantee Fund
S. Richard Orzy, Richard B. Swan for Informal Nortel Noteholder Group
Alex MacFarlane, Mark Dunsmuir for Unsecured Creditors' Committee of Nortel Networks Inc.
Leanne Williams for Flextronics Inc.
Barry Wadsworth for CAW-Canada
Pamela Huff for Northern Trust Company, Canada
Joel P. Rochon, Sakie Tambakos for Opposing Former and Long-Term Disability Employees
Robin B. Schwill for Nortel Networks UK Limited (In Administration)
Sorin Gabriel Radulescu for himself
Guy Martin for himself, Marie Josee Perrault
Peter Burns for himself
Stan and Barbara Arnelien for themselves

Subject: Insolvency; Corporate and Commercial; Civil Practice and Procedure

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

N Corp. was insolvent major telecommunications company which continued to provide pension and other benefits to former employees, retired employees (retirees) and employees on long-term disability (LTD employees) on discretionary basis — N Corp. was granted stay of proceedings under Companies' Creditors Arrangement Act (CCCA), but cessation of payments was inevitable — To reduce or eliminate uncertainty, risk of litigation and disruption in transition of benefits and to provide for early payments to terminated employees and maintain quantum and validity of pension and health

and welfare trust (HWT) claims as ordinary, unsecured claims, N Corp. negotiated settlement agreement (SA) with Monitor appointed under CCAA, representatives of former employees, LTD employees and settlement counsel, and union — SA provided, among other things, for funding and payment of pensions and benefits under HWT until specified dates, for ranking of allowable pension claims pari passu with claims of unsecured creditors, and for express exclusion of HWT benefits from preferential or priority claim or trust — SA contained Bankruptcy and Insolvency Act (BIA) clause providing that subsequent amendments to BIA changing current, relative priorities of claims against N Corp. did not preclude party to SA from arguing applicability of amendment to claims ceded in SA — While most parties supported SA, committee of N Corp.'s unsecured creditors (Committee) and informal N Corp. noteholder group (Noteholders) opposed SA on basis of BIA clause — Applicants brought motion for court approval of SA — Motion dismissed — SA was consistent with spirit and purpose of CCAA but could not be approved in current form as BIA clause in SA was not fair and reasonable in circumstances and resulted in agreement that provided neither certainty nor finality of fundamental priority issue — BIA clause created uncertainty and potential for fundamental alteration of SA — Practical effect of BIA clause was that issue was not fully resolved and clause was somewhat inequitable to other unsecured creditors who were entitled to know, with certainty and finality, effect of SA — Comprehensive settlement of claims in magnitude and complexity contemplated by SA should not provide opportunity to re-trade deal after fact — BIA clause failed to recognize interests of other creditors whose claims ranked equally with claims of former employees and LTD employees — Effect of SA was to give former and LTD employees preferred treatment for certain claims, notwithstanding that priority was not provided for in statute and was not recognized in case law.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Creditor approval

N Corp. was insolvent major telecommunications company which continued to provide pension and other benefits to former employees, retired employees (retirees) and employees on long-term disability (LTD employees) on discretionary basis — N Corp. was granted stay of proceedings under Companies' Creditors Arrangement Act (CCCA), but cessation of payments was inevitable — To reduce or eliminate uncertainty, risk of litigation and disruption in transition of benefits and to provide for early payments to terminated employees and maintain quantum and validity of pension and health and welfare trust (HWT) claims as ordinary, unsecured claims, N Corp. negotiated settlement agreement (SA) with Monitor appointed under CCAA, representatives of former employees, LTD employees and settlement counsel, and union — SA provided, among other things, for funding and payment of pensions and benefits under HWT until specified dates, for ranking of allowable pension claims pari passu with claims of unsecured creditors, and for express exclusion of HWT benefits from preferential or priority claim or trust — SA contained Bankruptcy and Insolvency Act (BIA) clause providing that subsequent amendments to BIA changing current, relative priorities of claims against N Corp. did not preclude party to SA from arguing applicability of amendment to claims ceded in SA — While most parties supported SA, committee of N Corp.'s unsecured creditors (Committee) and informal N Corp. noteholder group (Noteholders) opposed SA on basis of BIA clause — Applicants brought motion for court approval of SA — Motion dismissed — SA was consistent with spirit and purpose of CCAA but could not be approved in current form as BIA clause in SA was not fair and reasonable in circumstances and resulted in agreement that provided neither certainty nor finality of fundamental priority issue — BIA clause created uncertainty and potential for fundamental alteration of SA — Practical effect of BIA clause was that issue was not fully resolved and clause was somewhat inequitable to other unsecured creditors who were entitled to know, with certainty and finality, effect of SA — Comprehensive settlement of claims in magnitude and complexity contemplated by SA should not provide opportunity to re-trade deal after fact — BIA clause failed to recognize interests of other creditors whose claims ranked equally with claims of former employees and LTD employees — Effect of SA was to give former and LTD employees preferred treatment for certain claims, notwithstanding that priority was not provided for in statute and was not recognized in case law.

Pensions --- Payment of pension — Bankruptcy or insolvency of employer — Miscellaneous

N Corp. was insolvent major telecommunications company which continued to provide pension and other benefits to former employees, retired employees (retirees) and employees on long-term disability (LTD employees) on discretionary basis — N Corp. was granted stay of proceedings under Companies' Creditors Arrangement Act (CCCA), but cessation of payments was inevitable — To reduce or eliminate uncertainty, risk of litigation and disruption in transition of benefits and to provide for early payments to terminated employees and maintain quantum and validity of pension and health

and welfare trust (HWT) claims as ordinary, unsecured claims, N Corp. negotiated settlement agreement (SA) with Monitor appointed under CCAA, representatives of former employees, LTD employees and settlement counsel, and union — SA provided, among other things, for funding and payment of pensions and benefits under HWT until specified dates, for ranking of allowable pension claims pari passu with claims of unsecured creditors, and for express exclusion of HWT benefits from preferential or priority claim or trust — SA contained Bankruptcy and Insolvency Act (BIA) clause providing that subsequent amendments to BIA changing current, relative priorities of claims against N Corp. did not preclude party to SA from arguing applicability of amendment to claims ceded in SA — While most parties supported SA, committee of N Corp.'s unsecured creditors (Committee) and informal N Corp. noteholder group (Noteholders) opposed SA on basis of BIA clause — Applicants brought motion for court approval of SA — Motion dismissed — SA was consistent with spirit and purpose of CCAA but could not be approved in current form as BIA clause in SA was not fair and reasonable in circumstances and resulted in agreement that provided neither certainty nor finality of fundamental priority issue — BIA clause created uncertainty and potential for fundamental alteration of SA — Practical effect of BIA clause was that issue was not fully resolved and clause was somewhat inequitable to other unsecured creditors who were entitled to know, with certainty and finality, effect of SA — Comprehensive settlement of claims in magnitude and complexity contemplated by SA should not provide opportunity to re-trade deal after fact — BIA clause failed to recognize interests of other creditors whose claims ranked equally with claims of former employees and LTD employees — Effect of SA was to give former and LTD employees preferred treatment for certain claims, notwithstanding that priority was not provided for in statute and was not recognized in case law.

Pensions --- Payment of pension — Disability benefits

N Corp. was insolvent major telecommunications company which continued to provide pension and other benefits to former employees, retired employees (retirees) and employees on long-term disability (LTD employees) on discretionary basis — N Corp. was granted stay of proceedings under Companies' Creditors Arrangement Act (CCCA), but cessation of payments was inevitable — To reduce or eliminate uncertainty, risk of litigation and disruption in transition of benefits and to provide for early payments to terminated employees and maintain quantum and validity of pension and health and welfare trust (HWT) claims as ordinary, unsecured claims, N Corp. negotiated settlement agreement (SA) with Monitor appointed under CCAA, representatives of former employees, LTD employees and settlement counsel, and union — SA provided, among other things, for funding and payment of pensions and benefits under HWT until specified dates, for ranking of allowable pension claims pari passu with claims of unsecured creditors, and for express exclusion of HWT benefits from preferential or priority claim or trust — SA contained Bankruptcy and Insolvency Act (BIA) clause providing that subsequent amendments to BIA changing current, relative priorities of claims against N Corp. did not preclude party to SA from arguing applicability of amendment to claims ceded in SA — While most parties supported SA, committee of N Corp.'s unsecured creditors (Committee) and informal N Corp. noteholder group (Noteholders) opposed SA on basis of BIA clause — Applicants brought motion for court approval of SA — Motion dismissed — SA was consistent with spirit and purpose of CCAA but could not be approved in current form as BIA clause in SA was not fair and reasonable in circumstances and resulted in agreement that provided neither certainty nor finality of fundamental priority issue — BIA clause created uncertainty and potential for fundamental alteration of SA — Practical effect of BIA clause was that issue was not fully resolved and clause was somewhat inequitable to other unsecured creditors who were entitled to know, with certainty and finality, effect of SA — Comprehensive settlement of claims in magnitude and complexity contemplated by SA should not provide opportunity to re-trade deal after fact — BIA clause failed to recognize interests of other creditors whose claims ranked equally with claims of former employees and LTD employees — Effect of SA was to give former and LTD employees preferred treatment for certain claims, notwithstanding that priority was not provided for in statute and was not recognized in case law.

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MOTION by insolvent corporation for court approval of settlement agreement under Companies' Creditors Arrangement Act.

Morawetz J.:

Introduction

1 On January 14, 2009, Nortel Networks Corporation ("NNC"), Nortel Networks Limited "(NNL"), Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation (collectively, the "Applicants") were granted a stay of proceedings pursuant to the *Companies' Creditors Arrangement Act* ("CCAA") and Ernst & Young Inc. was appointed as Monitor.

2 The Applicants have historically operated a number of pension, benefit and other plans (both funded and unfunded) for their employees and pensioners, including:

(i) Pension benefits through two registered pension plans, the Nortel Networks Limited Managerial and Non-Negotiated Pension Plan and the Nortel Networks Negotiated Pension Plan (the "Pension Plans"); and

(ii) Medical, dental, life insurance, long-term disability and survivor income and transition benefits paid, except for survivor termination benefits, through Nortel's Health and Welfare Trust (the "HWT").

3 Since the CCAA filing, the Applicants have continued to provide medical, dental and other benefits, through the HWT, to pensioners and employees on long-term disability ("Former and LTD Employees") and active employees ("HWT Payments") and have continued all current service contributions and special payments to the Pension Plans ("Pension Payments").

4 Pension Payments and HWT Payments made by the Applicants to the Former and LTD Employees while under CCAA protection are largely discretionary. As a result of Nortel's insolvency and the significant reduction in the size of Nortel's operations, the unfortunate reality is that, at some point, cessation of such payments is inevitable. The Applicants have attempted to address this situation by entering into a settlement agreement (the "Settlement Agreement") dated as of February 8, 2010, among the Applicants, the Monitor, the Former Employees' Representatives (on their own behalf and on behalf of the parties they represent), the LTD Representative (on her own behalf and on behalf of the parties she represents), Representative Settlement Counsel and the CAW-Canada (the "Settlement Parties").

5 The Applicants have brought this motion for approval of the Settlement Agreement. From the standpoint of the Applicants, the purpose of the Settlement Agreement is to provide for a smooth transition for the termination of Pension Payments and HWT Payments. The Applicants take the position that the Settlement Agreement represents the best efforts of the Settlement Parties to negotiate an agreement and is consistent with the spirit and purpose of the CCAA.

6 The essential terms of the Settlement Agreement are as follows:

(a) until December 31, 2010, medical, dental and life insurance benefits will be funded on a pay-as-you-go basis to the Former and LTD Employees;

(b) until December 31, 2010, LTD Employees and those entitled to receive survivor income benefits will receive income benefits on a pay-as-you-go basis;

(c) the Applicants will continue to make current service payments and special payments to the Pension Plans in the same manner as they have been doing over the course of the proceedings under the CCAA, through to March 31, 2010, in the aggregate amount of $2,216,254 per month and that thereafter and through to September 30, 2010, the Applicants shall make only current service payments to the Pension Plans, in the aggregate amount of $379,837 per month;

(d) any allowable pension claims, in these or subsequent proceedings, concerning any Nortel Worldwide Entity, including the Applicants, shall rank *pari passu* with ordinary, unsecured creditors of Nortel, and no part of any such HWT claims shall rank as a preferential or priority claim or shall be the subject of a constructive trust or trust of any nature or kind;

(e) proofs of claim asserting priority already filed by any of the Settlement Parties, or the Superintendent on behalf of the Pension Benefits Guarantee Fund are disallowed in regard to the claim for priority;

(f) any allowable HWT claims made in these or subsequent proceedings shall rank *pari passu* with ordinary unsecured creditors of Nortel;

(g) the Settlement Agreement does not extinguish the claims of the Former and LTD Employees;

(h) Nortel and, *inter alia*, its successors, advisors, directors and officers, are released from all future claims regarding Pension Plans and the HWT, provided that nothing in the release shall release a director of the Applicants from any matter referred to in subsection 5.1(2) of the CCAA or with respect to fraud on the part of any Releasee, with respect to that Releasee only;

(i) upon the expiry of all appeals and rights of appeal in respect thereof, Representative Settlement Counsel will withdraw their application for leave to appeal the decision of the Court of Appeal, dated November 26, 2009, to the Supreme Court of Canada on a with prejudice basis; [1]

(j) a CCAA plan of arrangement in the Nortel proceedings will not be proposed or approved if that plan does not treat the Pension and HWT claimants *pari passu* to the other ordinary, unsecured creditors ("Clause H.1"); and

(k) if there is a subsequent amendment to the *Bankruptcy and Insolvency Act* ("BIA") that "changes the current, relative priorities of the claims against Nortel, no party is precluded by this Settlement Agreement from arguing the applicability" of that amendment to the claims ceded in this Agreement ("Clause H.2").

7 The Settlement Agreement does *not* relate to a distribution of the HWT as the Settlement Parties have agreed to work towards developing a Court-approved distribution of the HWT corpus in 2010.

8 The Applicants' motion is supported by the Settlement Parties and by the Board of Directors of Nortel.

9 The Official Committee of Unsecured Creditors of Nortel Networks Inc. ("UCC"), the informal Nortel Noteholder Group (the "Noteholders"), and a group of 37 LTD Employees (the "Opposing LTD Employees") oppose the Settlement Agreement.

10 The UCC and Noteholders oppose the Settlement Agreement, principally as a result of the inclusion of Clause H.2.

11 The Opposing LTD Employees oppose the Settlement Agreement, principally as a result of the inclusion of the third party releases referenced in [6h] above.

The Facts

A. Status of Nortel's Restructuring

12 Although it was originally hoped that the Applicants would be able to restructure their business, in June 2009 the decision was made to change direction and pursue sales of Nortel's various businesses.

13 In response to Nortel's change in strategic direction and the impending sales, Nortel announced on August 14, 2009 a number of organizational updates and changes including the creation of groups to support transitional services and management during the sales process.

14 Since June 2009, Nortel has closed two major sales and announced a third. As a result of those transactions, approximately 13,000 Nortel employees have been or will be transferred to purchaser companies. That includes approximately 3,500 Canadian employees.

15 Due to the ongoing sales of Nortel's business units and the streamlining of Nortel's operations, it is expected that by the close of 2010, the Applicants' workforce will be reduced to only 475 employees. There is a need to wind-down and rationalize benefits and pension processes.

16 Given Nortel's insolvency, the significant reduction in Nortel's operations and the complexity and size of the Pension Plans, both Nortel and the Monitor believe that the continuation and funding of the Pension Plans and continued funding of medical, dental and other benefits is not a viable option.

B. The Settlement Agreement

17 On February 8, 2010 the Applicants announced that a settlement had been reached on issues related to the Pension Plans, and the HWT and certain employment related issues.

18 Recognizing the importance of providing notice to those who will be impacted by the Settlement Agreement, including the Former Employees, the LTD Employees, unionized employees, continuing employees and the provincial pension plan regulators ("Affected Parties"), Nortel brought a motion to this Court seeking the approval of an extensive notice and opposition process.

19 On February 9, 2010, this Court approved the notice program for the announcement and disclosure of the Settlement (the "Notice Order").

20 As more fully described in the Monitor's Thirty-Sixth, Thirty-Ninth and Thirty-Ninth Supplementary Reports, the Settlement Parties have taken a number of steps to notify the Affected Parties about the Settlement.

21 In addition to the Settlement Agreement, the Applicants, the Monitor and the Superintendent, in his capacity as administrator of the Pension Benefits Guarantee Fund, entered into a letter agreement on February 8, 2010, with respect to certain matters pertaining to the Pension Plans (the "Letter Agreement").

22 The Letter Agreement provides that the Superintendent will not oppose an order approving the Settlement Agreement ("Settlement Approval Order"). Additionally, the Monitor and the Applicants will take steps to complete an orderly transfer of the Pension Plans to a new administrator to be appointed by the Superintendent effective October 1, 2010. Finally, the Superintendent will not oppose any employee incentive program that the Monitor deems reasonable and necessary or the creation of a trust with respect to claims or potential claims against persons who accept directorships of a Nortel Worldwide Entity in order to facilitate the restructuring.

Positions of the Parties on the Settlement Agreement

The Applicants

23 The Applicants take the position that the Settlement is fair and reasonable and balances the interests of the parties and other affected constituencies equitably. In this regard, counsel submits that the Settlement:

(a) eliminates uncertainty about the continuation and termination of benefits to pensioners, LTD Employees and survivors, thereby reducing hardship and disruption;

(b) eliminates the risk of costly and protracted litigation regarding Pension Claims and HWT Claims, leading to reduced costs, uncertainty and potential disruption to the development of a Plan;

(c) prevents disruption in the transition of benefits for current employees;

(d) provides early payments to terminated employees in respect of their termination and severance claims where such employees would otherwise have had to wait for the completion of a claims process and distribution out of the estates;

(e) assists with the commitment and retention of remaining employees essential to complete the Applicants' restructuring; and

(f) does not eliminate Pension Claims or HWT Claims against the Applicants, but maintains their quantum and validity as ordinary and unsecured claims.

24 Alternatively, absent the approval of the Settlement Agreement, counsel to the Applicants submits that the Applicants are not required to honour such benefits or make such payments and such benefits could cease immediately. This would cause undue hardship to beneficiaries and increased uncertainty for the Applicants and other stakeholders.

25 The Applicants state that a central objective in the Settlement Agreement is to allow the Former and LTD Employees to transition to other sources of support.

26 In the absence of the approval of the Settlement Agreement or some other agreement, a cessation of benefits will occur on March 31, 2010 which would have an immediate negative impact on Former and LTD Employees. The Applicants submit that extending payments to the end of 2010 is the best available option to allow recipients to order their affairs.

27 Counsel to the Applicants submits that the Settlement Agreement brings Nortel closer to finalizing a plan of arrangement, which is consistent with the sprit and purpose of the CCAA. The Settlement Agreement resolves uncertainties associated with the outstanding Former and LTD Employee claims. The Settlement Agreement balances certainty with clarity, removing litigation risk over priority of claims, which properly balances the interests of the parties, including both creditors and debtors.

28 Regarding the priority of claims going forward, the Applicants submit that because a deemed trust, such as the HWT, is not enforceable in bankruptcy, the Former and LTD Employees are by default *pari passu* with other unsecured creditors.

29 In response to the Noteholders' concern that bankruptcy prior to October 2010 would create pension liabilities on the estate, the Applicants committed that they would not voluntarily enter into bankruptcy proceedings prior to October 2010. Further, counsel to the Applicants submits the court determines whether a bankruptcy order should be made if involuntary proceedings are commenced.

30 Further, counsel to the Applicants submits that the court has the jurisdiction to release third parties under a Settlement Agreement where the releases (1) are connected to a resolution of the debtor's claims, (2) will benefit creditors generally and (3) are not overly broad or offensive to public policy. See *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 92 O.R. (3d) 513 (Ont. C.A.), [*Metcalfe*] at para. 71, leave to appeal refused, (S.C.C.) and *Grace Canada Inc., Re* (Ont. S.C.J. [Commercial List]) [*Grace 2008*] at para. 40.

31 The Applicants submit that a settlement of the type put forward should be approved if it is consistent with the spirit and purpose of the CCAA and is fair and reasonable in all the circumstances. Elements of fairness and reasonableness include balancing the interests of parties, including any objecting creditor or creditors, equitably (although not necessarily equally); and ensuring that the agreement is beneficial to the debtor and its stakeholders generally, as per *Air Canada, Re* (Ont. S.C.J. [Commercial List]) [*Air Canada*]. The Applicants assert that this test is met.

The Monitor

32 The Monitor supports the Settlement Agreement, submitting that it is necessary to allow the Applicants to wind down operations and to develop a plan of arrangement. The Monitor submits that the Settlement Agreement provides certainty, and does so with input from employee stakeholders. These stakeholders are represented by Employee Representatives as mandated by the court and these Employee Representatives were given the authority to approve such settlements on behalf of their constituents.

33 The Monitor submits that Clause H.2 was bargained for, and that the employees did give up rights in order to have that clause in the Settlement Agreement; particularly, it asserts that Clause H.1 is the counterpoint to Clause H.2. In this regard, the Settlement Agreement is fair and reasonable.

34 The Monitor asserts that the court may either (1) approve the Settlement Agreement, (2) not approve the Settlement Agreement, or (3) not approve the Settlement Agreement but provide practical comments on the applicability of Clause H.2.

Former and LTD Employees

35 The Former Employees' Representatives' constituents number an estimated 19,458 people. The LTD Employees number an estimated 350 people between the LTD Employee's Representative and the CAW-Canada, less the 37 people in the Opposing LTD Employee group.

36 Representative Counsel to the Former and LTD Employees acknowledges that Nortel is insolvent, and that much uncertainty and risk comes from insolvency. They urge that the Settlement Agreement be considered within the scope of this reality. The alternative to the Settlement Agreement is costly litigation and significant uncertainty.

37 Representative Counsel submits that the Settlement Agreement is fair and reasonable for all creditors, but especially the represented employees. Counsel notes that employees under Nortel are unique creditors under these proceedings, as they are not sophisticated creditors and their personal welfare depends on receiving distributions from Nortel. The Former and LTD Employees assert that this is the best agreement they could have negotiated.

38 Representative Counsel submits that bargaining away of the right to litigate against directors and officers of the corporation, as well at the trustee of the HWT, are examples of the concessions that have been made. They also point to the giving up of the right to make priority claims upon distribution of Nortel's estate and the HWT, although the claim itself is not extinguished. In exchange, the Former and LTD Employees will receive guaranteed coverage until the end of 2010. The Former and LTD Employees submit that having money in hand today is better than uncertainty going forward, and that, on balance, this Settlement Agreement is fair and reasonable.

39 In response to allegations that third party releases unacceptably compromise employees' rights, Representative Counsel accepts that this was a concession, but submits that it was satisfactory because the claims given up are risky, costly and very uncertain. The releases do not go beyond s. 5.1(2) of the CCAA, which disallows releases relating to misrepresentations and wrongful or oppressive conduct by directors. Releases as to deemed trust claims are also very uncertain and were acceptably given up in exchange for other considerations.

40 The Former and LTD Employees submit that the inclusion of Clause H.2 was essential to their approval of the Settlement Agreement. They characterize Clause H.2 as a no prejudice clause to protect the employees by not releasing any future potential benefit. Removing Clause H.2 from the Settlement Agreement would be not the approval of an agreement, but rather the creation of an entirely new Settlement Agreement. Counsel submits that without Clause H.2, the Former and LTD Employees would not be signatories.

CAW

41 The CAW supports the Settlement Agreement. It characterizes the agreement as Nortel's recognition that it has a moral and legal obligation to its employees, whose rights are limited by the laws in this country. The Settlement Agreement temporarily alleviates the stress and uncertainty its constituents feel over the winding up of their benefits and is satisfied with this result.

42 The CAW notes that some members feel they were not properly apprised of the facts, but all available information has been disclosed, and the concessions made by the employee groups were not made lightly.

Board of Directors

43 The Board of Directors of Nortel supports the Settlement Agreement on the basis that it is a practical resolution with compromises on both sides.

Opposing LTD Employees

44 Mr. Rochon appeared as counsel for the Opposing LTD Employees, notwithstanding that these individuals did not opt out of having Representative Counsel or were represented by the CAW. The submissions of the Opposing LTD

Employees were compelling and the court extends it appreciation to Mr. Rochon and his team in co-ordinating the representatives of this group.

45 The Opposing LTD Employees put forward the position that the cessation of their benefits will lead to extreme hardship. Counsel submits that the Settlement Agreement conflicts with the spirit and purpose of the CCAA because the LTD Employees are giving up legal rights in relation to a $100 million shortfall of benefits. They urge the court to consider the unique circumstances of the LTD Employees as they are the people hardest hit by the cessation of benefits.

46 The Opposing LTD Employees assert that the HWT is a true trust, and submit that breaches of that trust create liabilities and that the claim should not be released. Specifically, they point to a $37 million shortfall in the HWT that they should be able to pursue.

47 Regarding the third party releases, the Opposing LTD Employees assert that Nortel is attempting to avoid the distraction of third party litigation, rather than look out for the best interests of the Former and LTD Employees. The Opposing LTD Employees urge the court not to release the only individuals the Former and LTD Employees can hold accountable for any breaches of trust. Counsel submits that Nortel has a common law duty to fund the HWT, which the Former and LTD Employees should be allowed to pursue.

48 Counsel asserts that allowing these releases (a) is not necessary and essential to the restructuring of the debtor, (b) does not relate to the insolvency process, (c) is not required for the success of the Settlement Agreement, (d) does not meet the requirement that each party contribute to the plan in a material way and (e) is overly broad and therefore not fair and reasonable.

49 Finally, the Opposing LTD Employees oppose the *pari passu* treatment they will be subjected to under the Settlement Agreement, as they have a true trust which should grant them priority in the distribution process. Counsel was not able to provide legal authority for such a submission.

50 A number of Opposing LTD Employees made in person submissions. They do not share the view that Nortel will act in their best interests, nor do they feel that the Employee Representatives or Representative Counsel have acted in their best interests. They shared feelings of uncertainty, helplessness and despair. There is affidavit evidence that certain individuals will be unable to support themselves once their benefits run out, and they will not have time to order their affairs. They expressed frustration and disappointment in the CCAA process.

UCC

51 The UCC was appointed as the representative for creditors in the U.S. Chapter 11 proceedings. It represents creditors who have significant claims against the Applicants. The UCC opposes the motion, based on the inclusion of Clause H.2, but otherwise the UCC supports the Settlement Agreement.

52 Clause H.2, the UCC submits, removes the essential element of finality that a settlement agreement is supposed to include. The UCC characterizes Clause H.2 as a take back provision; if activated, the Former and LTD Employees have compromised nothing, to the detriment of other unsecured creditors. A reservation of rights removes the finality of the Settlement Agreement.

53 The UCC claims it, not Nortel, bears the risk of Clause H.2. As the largest unsecured creditor, counsel submits that a future change to the BIA could subsume the UCC's claim to the Former and LTD Employees and the UCC could end up with nothing at all, depending on Nortel's asset sales.

Noteholders

54 The Noteholders are significant creditors of the Applicants. The Noteholders oppose the settlement because of Clause H.2, for substantially the same reasons as the UCC.

55 Counsel to the Noteholders submits that the inclusion of H.2 is prejudicial to the non-employee unsecured creditors, including the Noteholders. Counsel submits that the effect of the Settlement Agreement is to elevate the Former and LTD Employees, providing them a payout of $57 million over nine months while everyone else continues to wait, and preserves their rights in the event the laws are amended in future. Counsel to the Noteholders submits that the Noteholders forego millions of dollars while remaining exposed to future claims.

56 The Noteholders assert that a proper settlement agreement must have two elements: a real compromise, and resolution of the matters in contention. In this case, counsel submits that there is no resolution because there is no finality in that Clause H.2 creates ambiguity about the future. The very object of a Settlement Agreement, assert the Noteholders, is to avoid litigation by withdrawing claims, which this agreement does not do.

Superintendent

57 The Superintendent does not oppose the relief sought, but this position is based on the form of the Settlement Agreement that is before the Court.

Northern Trust

58 Northern Trust, the trustee of the pension plans and HWT, takes no position on the Settlement Agreement as it takes instructions from Nortel. Northern Trust indicates that an oversight left its name off the third party release and asks for an amendment to include it as a party released by the Settlement Agreement.

Law and Analysis

A. Representation and Notice Were Proper

59 It is well settled that the Former Employees' Representatives and the LTD Representative (collectively, the "Settlement Employee Representatives") and Representative Counsel have the authority to represent the Former Employees and the LTD Beneficiaries for purposes of entering into the Settlement Agreement on their behalf: *see Grace 2008*, *supra* at para 32.

60 The court appointed the Settlement Employee Representatives and the Representative Settlement Counsel. These appointment orders have not been varied or appealed. Unionized employees continue to be represented by the CAW. The Orders appointing the Settlement Employee Representatives expressly gave them authority to represent their constituencies "for the purpose of settling or compromising claims" in these Proceedings. Former Employees and LTD Employees were given the right to opt out of their representation by Representative Settlement Counsel. After provision of notice, only one former employee and one active employee exercised the opt-out right.

B. Effect of the Settlement Approval Order

61 In addition to the binding effect of the Settlement Agreement, many additional parties will be bound and affected by the Settlement Approval Order. Counsel to the Applicants submits that the binding nature of the Settlement Approval Order on all affected parties is a crucial element to the Settlement itself. In order to ensure all Affected Parties had notice, the Applicants obtained court approval of their proposed notice program.

62 Even absent such extensive noticing, virtually all employees of the Applicants are represented in these proceedings. In addition to the representative authority of the Settlement Employee Representatives and Representative Counsel as noted above, Orders were made authorizing a Nortel Canada Continuing Employees' Representative and Nortel Canada Continuing Employees' Representative Counsel to represent the interests of continuing employees on this motion.

63 I previously indicated that "the overriding objective of appointing representative counsel for employees is to ensure that the employees have representation in the CCAA process": *Nortel Networks Corp., Re* (Ont. S.C.J. [Commercial List]) at para 16. I am satisfied that this objective has been achieved.

64 The Record establishes that the Monitor has undertaken a comprehensive notice process which has included such notice to not only the Former Employees, the LTD Employees, the unionized employees and the continuing employees but also the provincial pension regulators and has given the opportunity for any affected person to file Notices of Appearance and appear before this court on this motion.

65 I am satisfied that the notice process was properly implemented by the Monitor.

66 I am satisfied that Representative Counsel has represented their constituents' interests in accordance with their mandate, specifically, in connection with the negotiation of the Settlement Agreement and the draft Settlement Approval Order and appearance on this Motion. There have been intense discussions, correspondence and negotiations among Representative Counsel, the Monitor, the Applicants, the Superintendent, counsel to the Board of the Applicants, the Noteholder Group and the Committee with a view to developing a comprehensive settlement. NCCE's Representative Counsel have been apprised of the settlement discussions and served with notice of this Motion. Representatives have held Webinar sessions and published press releases to inform their constituents about the Settlement Agreement and this Motion.

C. Jurisdiction to Approve the Settlement Agreement

67 The CCAA is a flexible statute that is skeletal in nature. It has been described as a "sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest". *Nortel Networks Corp., Re* (Ont. S.C.J. [Commercial List]) at paras. 28-29, citing *Metcalfe*, *supra*, at paras. 44 and 61.

68 Three sources for the court's authority to approve pre-plan agreements have been recognized:

(a) the power of the court to impose terms and conditions on the granting of a stay under s. 11(4) of the CCAA;

(b) the power of the court to make an order "on such terms as it may impose" pursuant to s. 11(4) of the CCAA; and

(c) the inherent jurisdiction of the court to "fill in the gaps" of the CCAA in order to give effect to its objects: see *Nortel Networks Corp., Re* (Ont. S.C.J. [Commercial List]) at para. 30, citing *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (Ont. Gen. Div. [Commercial List]) [*Canadian Red Cross*] at para. 43; *Metcalfe*, *supra* at para. 44.

69 In *Stelco Inc., Re* (2005), 78 O.R. (3d) 254 (Ont. C.A.), the Ontario Court of Appeal considered the court's jurisdiction under the CCAA to approve agreements, determining at para. 14 that it is not limited to preserving the *status quo*. Further, agreements made prior to the finalization of a plan or compromise are valid orders for the court to approve: *Grace 2008*, *supra* at para. 34.

70 In these proceedings, this court has confirmed its jurisdiction to approve major transactions, including settlement agreements, during the stay period defined in the Initial Order and prior to the proposal of any plan of compromise or arrangement: see, for example, *Nortel Networks Corp., Re* (Ont. S.C.J. [Commercial List]); *Nortel Networks Corp., Re* (Ont. S.C.J. [Commercial List]) and *Nortel Networks Corp., Re*, 2010 ONSC 1096 (Ont. S.C.J. [Commercial List]).

71 I am satisfied that this court has jurisdiction to approve transactions, including settlements, in the course of overseeing proceedings during a CCAA stay period and prior to any plan of arrangement being proposed to creditors: see *Calpine Canada Energy Ltd., Re* (Alta. C.A. [In Chambers]) [*Calpine*] at para. 23, affirming (Alta. Q.B.); *Canadian Red Cross*, *supra*; *Air Canada*, *supra*; *Grace 2008*, *supra*, and *Grace Canada Inc., Re* (Ont. S.C.J. [Commercial List])

[*Grace 2010*], leave to appeal to the C.A. refused February 19, 2010; *Nortel Networks Corp., Re*, 2010 ONSC 1096 (Ont. S.C.J. [Commercial List]).

D. Should the Settlement Agreement Be Approved?

72 Having been satisfied that this court has the jurisdiction to approve the Settlement Agreement, I must consider whether the Settlement Agreement *should* be approved.

73 A Settlement Agreement can be approved if it is consistent with the spirit and purpose of the CCAA and is fair and reasonable in all circumstances. What makes a settlement agreement fair and reasonable is its balancing of the interests of all parties; its equitable treatment of the parries, including creditors who are not signatories to a settlement agreement; and its benefit to the Applicant and its stakeholders generally.

i) Sprit and Purpose

74 The CCAA is a flexible instrument; part of its purpose is to allow debtors to balance the conflicting interests of stakeholders. The Former and LTD Employees are significant creditors and have a unique interest in the settlement of their claims. This Settlement Agreement brings these creditors closer to ultimate settlement while accommodating their special circumstances. It is consistent with the spirit and purpose of the CCAA.

ii) Balancing of Parties' Interests

75 There is no doubt that the Settlement Agreement is comprehensive and that it has support from a number of constituents when considered in its totality.

76 There is, however, opposition from certain constituents on two aspects of the proposed Settlement Agreement: (1) the Opposing LTD Employees take exception to the inclusion of the third party releases; (2) the UCC and Noteholder Groups take exception to the inclusion of Clause H.2.

Third Party Releases

77 Representative Counsel, after examining documentation pertaining to the Pension Plans and HWT, advised the Former Employees' Representatives and Disabled Employees' Representative that claims against directors of Nortel for failing to properly fund the Pension Plans were unlikely to succeed. Further, Representative Counsel advised that claims against directors or others named in the Third Party Releases to fund the Pension Plans were risky and could take years to resolve, perhaps unsuccessfully. This assisted the Former Employees' Representatives and the Disabled Employees' Representative in agreeing to the Third Party Releases.

78 The conclusions reached and the recommendations made by both the Monitor and Representative Counsel are consistent. They have been arrived at after considerable study of the issues and, in my view, it is appropriate to give significant weight to their positions.

79 In *Grace 2008*, *supra*, and *Grace 2010*, *supra*, I indicated that a Settlement Agreement entered into with Representative Counsel that contains third party releases is fair and reasonable where the releases are necessary and connected to a resolution of claims against the debtor, will benefit creditors generally and are not overly broad or offensive to public policy.

80 In this particular case, I am satisfied that the releases are necessary and connected to a resolution of claims against the Applicants.

81 The releases benefit creditors generally as they reduces the risk of litigation against the Applicants and their directors, protect the Applicants against potential contribution claims and indemnity claims by certain parties, including directors,

officers and the HWT Trustee; and reduce the risk of delay caused by potentially complex litigation and associated depletion of assets to fund potentially significant litigation costs.

82 Further, in my view, the releases are not overly broad or offensive to public policy. The claims being released specifically relate to the subject matter of the Settlement Agreement. The parties granting the release receive consideration in the form of both immediate compensation and the maintenance of their rights in respect to the distribution of claims.

Clause H.2

83 The second aspect of the Settlement Agreement that is opposed is the provision known as Clause H.2. Clause H.2 provides that, in the event of a bankruptcy of the Applicants, and notwithstanding any provision of the Settlement Agreement, if there are any amendments to the BIA that change the current, relative priorities of the claims against the Applicants, no party is precluded from arguing the applicability or non-applicability of any such amendment in relation to any such claim.

84 The Noteholders and UCC assert that Clause H.2 causes the Settlement Agreement to not be a "settlement" in the true and proper sense of that term due to a lack of certainty and finality. They emphasize that Clause H.2 has the effect of undercutting the essential compromises of the Settlement Agreement in imposing an unfair risk on the non-employee creditors of NNL, including NNI, after substantial consideration has been paid to the employees.

85 This position is, in my view, well founded. The inclusion of the Clause H.2 creates, rather than eliminates, uncertainty. It creates the potential for a fundamental alteration of the Settlement Agreement.

86 The effect of the Settlement Agreement is to give the Former and LTD Employees preferred treatment for certain claims, notwithstanding that priority is not provided for in the statute nor has it been recognized in case law. In exchange for this enhanced treatment, the Former Employees and LTD Beneficiaries have made certain concessions.

87 The Former and LTD Employees recognize that substantially all of these concessions could be clawed back through Clause H.2. Specifically, they acknowledge that future Pension and HWT Claims will rank *pari passu* with the claims of other ordinary unsecured creditors, but then go on to say that should the BIA be amended, they may assert once again a priority claim.

88 Clause H.2 results in an agreement that does not provide certainty and does not provide finality of a fundamental priority issue.

89 The Settlement Parties, as well as the Noteholders and the UCC, recognize that there are benefits associated with resolving a number of employee-related issues, but the practical effect of Clause H.2 is that the issue is not fully resolved. In my view, Clause H.2 is somewhat inequitable from the standpoint of the other unsecured creditors of the Applicants. If the creditors are to be bound by the Settlement Agreement, they are entitled to know, with certainty and finality, the effect of the Settlement Agreement.

90 It is not, in my view, reasonable to require creditors to, in effect, make concessions in favour of the Former and LTD Employees today, and be subject to the uncertainty of unknown legislation in the future.

91 One of the fundamental purposes of the CCAA is to facilitate a process for a compromise of debt. A compromise needs certainty and finality. Clause H.2 does not accomplish this objective. The inclusion of Clause H.2 does not recognize that at some point settlement negotiations cease and parties bound by the settlement have to accept the outcome. A comprehensive settlement of claims in the magnitude and complexity contemplated by the Settlement Agreement should not provide an opportunity to re-trade the deal after the fact.

92 The Settlement Agreement should be fair and reasonable in all the circumstances. It should balance the interests of the Settlement Parties and other affected constituencies equitably and should be beneficial to the Applicants and their stakeholders generally.

93 It seems to me that Clause H.2 fails to recognize the interests of the other creditors of the Applicants. These creditors have claims that rank equally with the claims of the Former Employees and LTD Employees. Each have unsecured claims against the Applicants. The Settlement Agreement provides for a transfer of funds to the benefit of the Former Employees and LTD Employees at the expense of the remaining creditors. The establishment of the Payments Charge crystallized this agreed upon preference, but Clause H.2 has the effect of not providing any certainty of outcome to the remaining creditors.

94 I do not consider Clause H.2 to be fair and reasonable in the circumstances.

95 In light of this conclusion, the Settlement Agreement cannot be approved in its current form.

96 Counsel to the Noteholder Group also made submissions that three other provisions of the Settlement Agreement were unreasonable and unfair, namely:

(i) ongoing exposure to potential liability for pension claims if a bankruptcy order is made before October 1, 2010;

(ii) provisions allowing payments made to employees to be credited against employees' claims made, rather than from future distributions or not to be credited at all; and

(iii) lack of clarity as to whether the proposed order is binding on the Superintendent in all of his capacities under the *Pension Benefits Act* and other applicable law, and not merely in his capacity as Administrator on behalf of the Pension Benefits Guarantee Fund.

97 The third concern was resolved at the hearing with the acknowledgement by counsel to the Superintendent that the proposed order would be binding on the Superintendent in all of his capacities.

98 With respect to the concern regarding the potential liability for pension claims if a bankruptcy order is made prior to October 1, 2010, counsel for the Applicants undertook that the Applicants would not take any steps to file a voluntary assignment into bankruptcy prior to October 1, 2010. Although such acknowledgment does not bind creditors from commencing involuntary bankruptcy proceedings during this time period, the granting of any bankruptcy order is preceded by a court hearing. The Noteholders would be in a position to make submissions on this point, if so advised. This concern of the Noteholders is not one that would cause me to conclude that the Settlement Agreement was unreasonable and unfair.

99 Finally, the Noteholder Group raised concerns with respect to the provision which would allow payments made to employees to be credited against employees' claims made, rather than from future distributions, or not to be credited at all. I do not view this provision as being unreasonable and unfair. Rather, it is a term of the Settlement Agreement that has been negotiated by the Settlement Parties. I do note that the proposed treatment with respect to any payments does provide certainty and finality and, in my view, represents a reasonable compromise in the circumstances.

Disposition

100 I recognize that the proposed Settlement Agreement was arrived at after hard-fought and lengthy negotiations. There are many positive aspects of the Settlement Agreement. I have no doubt that the parties to the Settlement Agreement consider that it represents the best agreement achievable under the circumstances. However, it is my conclusion that the inclusion of Clause H.2 results in a flawed agreement that cannot be approved.

101 I am mindful of the submission of counsel to the Former and LTD Employees that if the Settlement Agreement were approved, with Clause H.2 excluded, this would substantively alter the Settlement Agreement and would, in effect, be a creation of a settlement and not the approval of one.

102 In addition, counsel to the Superintendent indicated that the approval of the Superintendent was limited to the proposed Settlement Agreement and would not constitute approval of any altered agreement.

103 In *Grace 2008*, *supra*, I commented that a line-by-line analysis was inappropriate and that approval of a settlement agreement was to be undertaken in its entirety or not at all, at para. 74. A similar position was taken by the New Brunswick Court of Queen's Bench in *Wandlyn Inns Limited (Re)* (1992), 15 C.B.R. (3d) 316 (N.B. Q.B.). I see no reason or basis to deviate from this position.

104 Accordingly, the motion is dismissed.

105 In view of the timing of the timing of the release of this decision and the functional funding deadline of March 31, 2010, the court will make every effort to accommodate the parties if further directions are required.

106 Finally, I would like to express my appreciation to all counsel and in person parties for the quality of written and oral submissions.

Motion dismissed.

Footnotes

1 On March 25, 2010, the Supreme Court of Canada released the following: *Donald Sproule et al. v. Nortel Networks Corporation et al.* (Ont.) (Civil) (By Leave) (33491) (The motions for directions and to expedite the application for leave to appeal are dismissed. The application for leave to appeal is dismissed with no order as to costs./La requête en vue d'obtenir des directives et la requête visant à accélérer la procédure de demande d'autorisation d'appel sont rejetées. La demande d'autorisation d'appel est rejetée; aucune ordonnance n'est rendue concernant les dépens.): <http://scc.lexum.umontreal.ca/en/news_release/2010/10-03-25.3a/10-03-25.3a.html>

TAB 14

2010 ONSC 1977
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re [Employee Settlement Approval Motion #2

2010 CarswellOnt 2077, 2010 ONSC 1977, 187 A.C.W.S. (3d) 396, 66 C.B.R. (5th) 77

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 (Applicants)

Morawetz J.

Heard: March 31, 2010
Judgment: March 31, 2010
Written reasons: April 8, 2010
Docket: 09-CL-7950

Counsel: Derrick Tay, Jennifer Stam for Applicants
J.A. Carfagnini, G. Rubenstein, M. Wagner, C. Armstrong for Monitor, Ernst & Young Inc.
Susan Philpott for Former Employees and Disabled Employees
Kevin Zych for Informal Nortel Noteholder Group
Arthur Jacques for Nortel Canada Current Employees
Deborah McPhail for Superintendent of Financial Services (non-PBGF)
Alex MacFarlane for Official Unsecured Creditors' Committee of Nortel Networks Inc.
Ken Rosenberg, Lily Harmer for Superintendent of Financial Services of the Pension Benefit Guarantee Fund (PBGF)
Rupert Chartrand, Adam Hirsh for Nortel Board of Directors
Robin Schwill for Nortel Networks UK Limited (In Administration)
Pamela Huff for Northern Trust Company, Canada
Barry Wadsworth for CAW-Canada
Joel P. Rochon, Sakie Tambakos for Opposing Long-Term Disability Employees
Guy Martin for Marie Josee Perrault

Subject: Insolvency; Corporate and Commercial; Civil Practice and Procedure

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous

Sufficiency of notice of motion.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

N Corp. was granted stay of proceedings under Companies' Creditors' Arrangements Act and monitor was appointed — N Corp. continued to pay pensions and benefits to former employees and long-term disability (LTD) employees (benefits at issue) — N Corp. engaged in negotiations with monitor, former and LTD employees, and labour union regarding benefits at issue — Negotiations resulted in settlement agreement (SA), which provided for funding and payment of benefits at issue until specified dates and for ranking of allowable pension claims with those of unsecured creditors — SA also contained "no preclusion clause" — N Corp.'s motion for court approval of SA was dismissed — N Corp. negotiated

amended and restated settlement agreement (ARSA) — ARSA was identical to SA except that preclusion clause was deleted — ARSA was opposed by approximately 10 percent of LTD employees (opposing LTD employees) — N Corp. brought motion to approve ARSA — Motion granted — ARSA balanced competing interests of all stakeholders and represented fair and reasonable compromise — ARSA was product of "best efforts" negotiations — Absent approval of ARSA, benefits at issue could cease as of date of hearing — It was not appropriate for objections of opposing LTD employees to override views of 90 percent majority — Proposal by opposing LTD employees to extend benefits at issue for 60 days while court-ordered negotiations transpired was not acceptable — Ordering payments out of health and welfare trust would deplete corpus of trust — Payment of benefits at issue outside of ARSA would be preferential and there was no statutory priority for former and LTD employees.

Table of Authorities

Cases considered by *Morawetz J.*:

Nortel Networks Corp., Re (2010), 2010 CarswellOnt 1754, 2010 ONSC 1708 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

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

Generally — referred to

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

Generally — referred to

MOTION by insolvent corporation under *Companies' Creditors Arrangement Act* for approval of settlement agreement regarding pension and benefit payments.

***Morawetz J.*:**

1 At the conclusion of argument, the record was endorsed:

> Motion granted. Settlement Agreement approved. Reasons will follow. Order to go in the form presented, as amended.

2 These are those reasons.

3 The motion was brought by the Applicants to approve the Amended and Restated Settlement Agreement, dated as of March 30, 2010 (the "Amended and Restated Settlement Agreement"), entered into by the Settlement Parties.

4 The Amended and Restated Settlement Agreement was entered into following the release of my decision on March 26, 2010, in which I did not approve the original Settlement Agreement, which included the "No Preclusion Clause" found in Clause H.2.

5 The Amended and Restated Settlement Agreement is identical to the Settlement Agreement, except that Clause H.2 has been deleted and the schedules to the Settlement Agreement have been updated to account for the deletion of Clause H.2.

6 The court was advised that in connection with the Amended and Restated Settlement Agreement, the Applicants and the Superintendent, in his capacity as Administrator of the PBGF, also entered into a letter agreement with respect to certain matters pertaining to the Pension Plans.

7 In view of obvious overlap between the Settlement Agreement and the Amended and Restated Settlement Agreement, it is appropriate to incorporate, by reference, the March 26, 2010 reasons (the "March 26 Reasons") into this endorsement. The March 26 Reasons are reported at *Nortel Networks Corp., Re*, 2010 ONSC 1708 (Ont. S.C.J. [Commercial List]).

8 The defined terms in this endorsement have the same meaning as set out in the March 26 Reasons.

9 In addition to the motion to approve the Amended and Restated Settlement Agreement, ancillary issues were raised, including issues of sufficiency of notice, an adjournment request and certain alternatives to the Amended and Restated Settlement Agreement.

Sufficiency of Notice

10 Concerns have been raised with respect to the short service of this motion. Counsel to the Monitor supports the expedited approval of the Amended and Restated Settlement Agreement and urges that the abridged notice be approved for two reasons. First, the pending cessation of benefits on March 31, 2010, in the absence of approval of the Amended and Restated Settlement Agreement, necessitated a hearing on an urgent basis, and second, the March 26 Reasons found that the Monitor (i) undertook a comprehensive notice process, (ii) gave the opportunity for any affected person to file a notice of appearance and appear before the court and, (iii) properly implemented the notice process.

11 In my view, this motion did not raise any new issues in respect of Clause H.2. Arguments with respect to Clause H.2 were detailed at the hearings from March 3 - 5, 2010 and were referenced in the March 26 Reasons commencing at [83]. Furthermore, all parties were represented in court and counsel were in a position to argue the matter on March 31, 2010. I accept that there was a degree of urgency to hear the motion.

12 In addition, there was a comprehensive notice process for the March 3, 2010 settlement approval motion properly implemented by the Monitor. Given that the only change from the Settlement Agreement, that was the subject of the March 3, 2010 settlement approval motion, and the Amended and Restated Settlement Agreement, is the removal of Clause H.2, notice and service with respect to the March 3, 2010 settlement approval motion is, in my view, sufficient for all purposes including, validating service of this motion.

13 In my view, it was both necessary and appropriate to hear the motion on short notice. Short service is validated.

Motion to Adjourn

14 Counsel for the Opposing LTD Employees requested an adjournment of this motion. The adjournment request was denied, with reasons to follow. The reasons for the denial are the same reasons which I rely upon to approve short service: urgency, full representation of employees in court and counsel were in a position to argue the motion on the merits.

Alternative Relief

15 Counsel for the Opposing LTD Employees also requested that the benefits in place at the time of the hearing be continued for another 60 days while the parties, including representatives from the Opposing LTD Employees, participate in court-ordered negotiations with Campbell J. This alternative requested relief is addressed in these reasons.

The Amended and Restated Settlement Agreement

16 Counsel to the Applicants makes four points:

> 1. Unless the Amended and Restated Settlement Agreement was approved, the Applicants had no authority to continue making preferred payments to the employees.
>
> 2. Without the settlement, the Applicants would wind up or terminate the Pension Plan and medical, dental and other benefits in the near future.
>
> 3. The approval of the Amended and Restated Settlement Agreement provides clarity and certainty to the parties who depend on receiving benefits on a daily basis.
>
> 4. The Amended and Restated Settlement Agreement is not only the best deal available, it is the only deal.

17 Counsel to the Applicants also submits that the concerns expressed by the court in the March 26 Reasons have been addressed in the Amended and Restated Settlement Agreement, and that this motion does not provide for an opportunity to re-argue the settlement approval motion heard on March 3, 4, and 5, 2010. Effectively, counsel submits that there is nothing new to consider in this motion.

18 The Applicants' position is supported by the Former and LTD Employees, the CAW, the Superintendent, in all capacities, the Nortel Canada Continuing Employees, the Nortel Board of Directors, the Noteholders, the Unsecured Creditors' Committee, and the Monitor.

19 The record in support of the motion includes the affidavit of Ms. Elena King, the Forty-Second Report of the Monitor, affidavits from Mr. Donald Sproule and Mr. Michael Campbell, two of the three court-appointed Former Employees' Representatives who were appointed on behalf of all Former Employees, including pensioners of Nortel, and the affidavit of Ms. Susan Kennedy, the court-appointed LTD Representative.

20 The affidavits stressed the importance of the continuation of the members' medical benefits and pension plans for a further period of time, as well as the anxiety of employees concerned with the imminent cessation or reduction in payments. The affidavits establish that the certainty associated with the preservation and continuation of benefits negotiated in the Settlement Agreement outweigh the limited concession associated with the deletion of Clause H.2.

21 In its recommendation in support of the requested relief, the Monitor states that it believes the Amended and Restated Settlement Agreement and the Settlement Approval Order take into account the March 26 Reasons, and represents a fair balancing of the interests of the Applicants' stakeholders. The Monitor is of the view that the Amended and Restated Settlement Agreement represents an important step in the implementation of the Applicants' restructuring, which was arrived at after extensive negotiations.

22 The Opposing LTD Employees request the continuation of benefits for another 60 days, and court-ordered mediation with Campbell J., or alternatively that the Amended and Restated Settlement Agreement not be approved. The motion record of the Opposing LTD Employees consists of the affidavit of Ms. Urquhart and various exhibits. Ms. Urquhart also swore an affidavit March 1, 2010 in support of the Opposing LTD Employees in respect of the hearing for the approval of the Settlement Agreement.

23 Counsel to the Opposing LTD Employees submits that the stated urgency of the March 31, 2010 "cutting off" of benefits was exaggerated and that the reality is that, while the income replacement benefits for the disabled may cease to be funded from Nortel's operations, the HWT remains in place as a source of funding for income replacement benefits for the LTD Employees.

24 Counsel also submits that, in terms of extending the payment of benefits from Nortel's operations, the evidence demonstrates that there are sufficient assets to do this. No specifics were provided in support of this statement.

25 Further, counsel submitted that there are additional facts to justify rejection of the deal and he summarizes from Ms. Urquhart's affidavit that there are legislative initiatives regarding the status of LTD Employee creditor claims that may be addressed by way of amendments to both the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*.

26 Mr. Rochon also stated that the Opposing LTD Employees rely upon and incorporate by reference the submissions made in their factum submitted in opposition to the Settlement Agreement. These submissions primarily relate to the issue of Third Party Releases.

27 Submissions were also made in person by Mr. Guy Martin on behalf of Ms. Marie Josee Perrault. Mr. Martin also made submissions on the settlement approval motion. He remains passionate in his opposition to the Amended and Restated Settlement Agreement, for similar reasons to those expressed on the earlier settlement approval motion.

28 I cannot accept the Opposing LTD Employees' proposal to extend benefits for 60 days while court-ordered negotiations transpire as being an acceptable outcome. There is no evidence to suggest the March 31, 2010 deadline is not genuine. Further, ordering payments out of the HWT corpus will deplete the corpus of the trust, to the potential detriment of the LTD Employees. In addition, the payment by the Applicants of any benefits to the LTD Employees outside of the Amended and Restated Settlement Agreement would be preferential in nature and ignores the fact that there is no statutory priority for the Former and LTD Employees.

29 Circumstances require that the position of the Former and LTD Employees be considered in light of the current reality. The current reality is that Nortel is insolvent and the benefits and payments promised by Nortel cannot continue indefinitely. Absent approval of the Amended and Restated Settlement Agreement, benefits can cease as at March 31, 2010.

30 There is uncertainty as to what would occur if the Amended and Restated Settlement Agreement was not approved.

31 Counsel to the Opposing LTD Employees was specifically asked whether he had any assurances that the Amended and Restated Settlement Agreement, supported by a $57 million charge, would be on the table at the end of a 60-day extension period. Counsel could provide no such assurances.

32 In contrast, counsel to the Noteholders was emphatic in stating that either the Amended and Restated Settlement Agreement be approved or benefits should cease. This position was supported by counsel to the Unsecured Creditors' Committee. These two groups are significant creditors of the Applicants.

33 The reality is that, absent approval of the Amended and Restated Settlement Agreement, the Former and LTD Employees face cessation of benefits, or at best, uncertainty, a position that was consistently stated by Representative Counsel to be unacceptable.

34 It seems to me that the Former Employees' Representatives and the LTD Representative fully considered the impact of the March 26 Reasons and, after consultations with Representative Counsel and communications with a significant number of Former and LTD Employees, came to the conclusion that the Amended and Restated Settlement Agreement represented an acceptable compromise. The Amended and Restated Settlement Agreement does provide the Former and LTD Employees with preferential treatment, at the expense of the remaining unsecured creditors of the Applicants, in exchange for certain concessions.

35 The Opposing LTD Employees constitute between 37 and 39 people, all of whom, with one or two possible exceptions, are represented by Representative Counsel or the CAW, the latter of who particularly asserts exclusive representation rights for its members. The total number of former employees is approximately 20,000 and the total number of LTD Employees is about 350. The Opposing LTD Employees consist of approximately 10% of all LTD Employees. I have not been persuaded by the arguments of counsel to the Opposing LTD Employees that the matters in issue be deferred or that approval of the Amended and Restated Settlement Agreement be denied. In my view, it is not appropriate for the objections of a 10% minority override the views of 90% of the LTD Employees, who support the settlement through their court-appointed representative.

36 The Settlement Agreement and the Amended and Restated Settlement Agreement are products of extensive negotiations between the parties. The Settlement Parties participated in "best efforts" negotiations that resulted in these agreements. In my view, the very existence of the Amended and Restated Settlement Agreement indicates that effective mediation has occurred.

37 In the March 26 Reasons, I recognized that the Settlement Agreement was arrived at after hard-fought and lengthy negotiations and that the parties to the Settlement Agreement considered it to be the best agreement achievable under the circumstances. In my view, the same can be said with respect to the Amended and Restated Settlement Agreement.

38 In particular, I note that Representative Counsel consulted with the representatives immediately after the March 26 Reasons were released and there was significant communication with a number of the members of the group. There is strong evidence of support from the employees to the Amended and Restated Settlement Agreement. On the other hand, there are approximately 37 to 39 employees opposing court approval.

39 Finally, I note that this endorsement does not directly address the third party releases in the Amended and Restated Settlement Agreement, which the Opposing LTD Employees referenced in their submissions. The issue of third party releases was fully argued in the earlier motion and the March 26 Reasons reflect my findings. Nothing in the Amended and Restated Settlement Agreement alters these findings or conclusions.

Disposition

40 The Amended and Restated Settlement Agreement is not perfect but, in my view, under the circumstances, it balances competing interests of all stakeholders and represents a fair and reasonable compromise, and accordingly, it is appropriate to approve same.

41 A formal order giving effect to the foregoing was prepared by counsel to the Applicants. Nothing in the order granted, including in particular paragraphs 5 and 11, is intended to prevent the Northern Trust Company, Canada, from claiming and recovering its fees and expenses from the trust funds, as it may be entitled pursuant to law and the trust agreements. All rights of the Northern Trust Company, Canada to recover its fees and expenses and any right of indemnification from the HWT and Pension Plan trust assets that it may have under the terms of the HWT trust or the Pension Plan trusts or under applicable law are not affected or prejudiced by the order.

42 I would again like to express my appreciation to all counsel for the quality of their written and oral submissions. The efforts of the Former Employees' Representatives, the LTD Representative and Representative Counsel are specifically recognized for the dignified manner in which they have discharged their responsibilities.

Motion granted.

TAB 15

Court File No. 09-CL-7950

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	WEDNESDAY, THE 31ST DAY
	)	
JUSTICE MORAWETZ	)	OF MARCH, 2010

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

SETTLEMENT APPROVAL ORDER

THIS MOTION, made by the Applicants (collectively, "Nortel") for an order approving the amended and restated settlement agreement made as of the 30th day of March, 2010, attached as Schedule "A" to this Order (the "Amended and Restated Settlement Agreement") and for the other relief set out in the Notice of Motion dated March 30, 2010 was heard this day at 393 University Avenue, Toronto, Ontario.

ON READING the affidavit of Elena King sworn March 30, 2010 and the Forty-Second Report of Ernst & Young Inc. dated March 30, 2010 (the "Forty-Second Report") in its capacity as monitor (the "Monitor"), and on hearing submissions of counsel for the Applicants, the Monitor, The Northern Trust Company, Canada, in its capacity as trustee of the HWT and it is capacity as trustee and custodian for the trust funds maintained in respect of the Pension Plans and the master trust for the Pension Plans, the Northern Telecom Limited Pension Trust Fund, the Opposing LTD Employees and the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited and on the consent of CAW, the Former

Employees Representatives, the LTD Representative and Representative Counsel (as those terms are defined in the Amended and Restated Settlement Agreement); the UCC, the Bondholder Committee (as those terms are defined in the Amended and Restated Settlement Agreement) and the Superintendent of Financial Services of Ontario (the "Superintendent") as the administrator of and on behalf of the Pension Benefits Guarantee Fund (the "PBGF") not opposing, no one else appearing although duly served as appears from the affidavit of service of Katie Legree dated March 30, 2010, filed.

1. **THIS COURT ORDERS** that service of the Notice of Motion, the Forty-Second Report and the Motion Record is hereby validated so that this Motion is properly returnable today and further service thereof is hereby dispensed with.

2. **THIS COURT ORDERS** that capitalized terms used herein and not otherwise defined shall have the meaning given to them in the Affidavit of Elena King dated February 18, 2010 or the Amended and Restated Settlement Agreement.

Amended and Restated Settlement Agreement

3. **THIS COURT ORDERS** that the Amended and Restated Settlement Agreement is hereby approved in its entirety, including all schedules attached thereto, and that the Parties thereto (including by representation) are hereby bound by this Order and the Amended and Restated Settlement Agreement and authorized and directed to comply with their obligations thereunder, including, without limitation, to make the payments provided for therein. The Amended and Restated Settlement Agreement supersedes all prior arrangements and understandings among the Parties thereto (including by representation) with respect to such subject matter, including, without limitation, the Settlement Agreement made as of the 8th day of February, 2010.

Pension Plans

4. **THIS COURT ORDERS AND DECLARES** that any Pension Claims made in these proceedings or in any subsequent receivership or bankruptcy proceedings or in any other proceedings or in any other forum whatsoever concerning Nortel, any Nortel Worldwide Entity or the Pension Plans shall, to the extent they are allowed pursuant to any claims

adjudication procedure established in such proceedings, rank as ordinary unsecured claims on a *pari passu* basis with the claims of ordinary unsecured creditors of Nortel, such that no part of any Pension Claims shall be entitled to any preferential treatment or enjoy any priority in any manner over the claims of ordinary unsecured creditors made against Nortel, or rank as a priority claim, as a trust (whether deemed or otherwise) or a lien or charge.

5. **THIS COURT ORDERS AND DECLARES** that no person or entity, including without limitation, (i) the Representatives, (ii) the Superintendent, as administrator of and on behalf of the PBGF, (iii) NNL, as the administrator of the Pension Plans, (iv) all successor administrators of the Pension Plans (whether appointed by the Superintendent or otherwise), and (v) the Pension HWT Claimants, all future members and beneficiaries of the Pension Plans, the trustee and custodian of the Pension Plans, the employees and former employees of Nortel and others who may have or make claims against Nortel or any Nortel Worldwide Entity with respect to employment or post employment or post retirement benefits (collectively, with the Pension HWT Claimants, the "Employee Claimants"), shall directly or indirectly assert, advance, re-assert or re-file any claim or initiate any legal proceedings or actions of any nature or kind in these proceedings or in any subsequent receivership or bankruptcy proceedings, or in any other proceedings, or in any other forum whatsoever concerning Nortel, any Nortel Worldwide Entity (to the extent such claims are provable) or the Pension Plans except as an ordinary unsecured claim ranking on a *pari passu* basis with the claims of ordinary unsecured creditors of Nortel, and shall not assert or advance any claim, directly or indirectly, that the Pension Claims, or any part thereof, ranks as a priority or preferential claim over the claims of ordinary unsecured creditors or Nortel, including, without limitation, that it is the subject of a trust (whether deemed or otherwise) or a lien or charge, or under other legal or equitable theory, and all such priority, trust, lien or charge claims are hereby forever barred, enjoined, released and extinguished as against Nortel, any Nortel Worldwide Entity, the Pension Plans, the trustee and custodian of the Pension Plans, and their respective officers, directors, employees, agents, members, legal counsel, financial advisors and each of the heirs, executors, administrators, legal representatives, successors and assigns of each of the foregoing.

6. **THIS COURT ORDERS** that the portion of proofs of claim already or hereafter filed by the Superintendent as the administrator of and on behalf of the PBGF, by Nortel, by any Employee Claimants or by any other person or entity claiming, asserting or advancing priority or preferential treatment of any kind, including, without limitation, trusts (whether deemed or otherwise) liens or charges in respect of any Pension Claims or payments by the PBGF with respect to the Pension Plans be and they hereby are disallowed, but only to the extent that they claim such priority or preferential treatment, without prejudice to the ordinary unsecured claims included in such proofs of claim. For greater certainty, such disallowance shall not otherwise affect the quantum or validity of such claims, which shall rank as ordinary unsecured creditors on a *pari passu* basis with the claims of the ordinary unsecured creditors of Nortel, in each case, to the extent allowed against Nortel pursuant to any claims adjudication procedure established in these proceedings.

7. THIS COURT ORDERS that with respect to claims by the Superintendent on behalf of the PBGF, and any administrator appointed by the Superintendent, paragraphs 4, 5 and 6 shall only apply if: (i) the Pension Payments are made in accordance with the Amended and Restated Settlement Agreement; and (ii) no bankruptcy order is made with respect to Nortel on or before September 30, 2010.

8. **THIS COURT ORDERS** that as long as NNL continues to administer the Pension Plans, there shall be no change whatsoever to the plan terms of the Pension Plans without the approval of the Court, and no change to the current asset mix or investment policies with respect to the Pension Plans other than at the request, and with the consent, of the Representative Counsel and the approval of the Court.

9. **THIS COURT ORDERS** that Nortel shall make all current service payments and special payments to the Pension Plans in respect of defined benefit entitlements thereunder in the same manner as it has been doing over the course of the proceedings under the CCAA, through to March 31, 2010 in accordance with the last actuarial valuation for the Pension Plans filed with the Financial Services Commission of Ontario ("FSCO") in the aggregate amount of $2,216,254.00 per month. Thereafter and through to September 30, 2010, Nortel shall make only current service payments to the Pension Plans (in accordance with the last

actuarial valuation for the Pension Plans filed with FSCO) in the aggregate amount of $379,837.00 per month. For greater certainty, Nortel shall not be required to make any special payment contributions to the Pension Plans after March 31, 2010. Nortel shall also make current service contributions in respect of defined contribution entitlements under the Nortel Networks Limited Managerial and Non-Negotiated Pension Plan (Registration No. 0342048) in accordance with the terms thereof, through to September 30, 2010 and shall not be precluded from doing so by the terms of the Amended and Restated Settlement Agreement. Nortel shall not be required to make any payments to the Pension Plans after September 30, 2010, except in respect of any claims in respect of the Pension Plans allowed against Nortel (which claims shall rank on a *pari passu* basis with the unsecured claims of the ordinary unsecured creditors of Nortel) pursuant to any claims adjudication procedure established in these proceedings. Neither Nortel, nor any Nortel Worldwide Entity shall have any liability regarding any contributions, fees, indemnities, charges or costs of any kind in respect of the administration of the Pension Plans that occurs after September 30, 2010. For greater certainty, nothing in this paragraph affects any obligation or liability of Nortel regarding any contributions, fees, indemnities, charges or costs of any kind in respect of the administration of the Pension Plans that occurs before 11:59 p.m. on September 30, 2010.

Health and Welfare Trust

10. **THIS COURT ORDERS AND DECLARES** that any HWT Claims made in these proceedings or in any subsequent receivership or bankruptcy proceedings, or in any other proceedings, or in any other forum whatsoever concerning Nortel, any Nortel Worldwide Entity or the HWT shall, to the extent they are allowed against Nortel pursuant to any claims adjudication procedure established in such proceedings, rank as ordinary unsecured claims on a *pari passu* basis with the claims of ordinary unsecured creditors of Nortel, and no part of any such HWT Claims shall rank as a preferential or priority claim or shall be the subject of a constructive trust or trust of any nature or kind.

11. **THIS COURT ORDERS AND DECLARES** that no person or entity, including without limitation, the trustee of the HWT, the Employee Claimants and the Representatives, shall, directly or indirectly (i) advance, assert, re-assert, re-file or make any HWT Claim in

these proceedings or in any subsequent receivership or bankruptcy proceedings, or in any other proceedings, or in any other forum whatsoever concerning Nortel, any Nortel Worldwide Entity (to the extent that such claims are provable) or the HWT except as an ordinary unsecured claim ranking on a *pari passu* basis with the claims of ordinary unsecured creditors of Nortel, or (ii) advance, assert, re-assert, re-file or make any claim that any HWT Claims are entitled to any priority or preferential treatment over ordinary unsecured claims, including without limitation that they rank as preferential or priority claims against Nortel or any Nortel Worldwide Entity, or are the subject of a constructive trust or trust of any nature or kind, and all such claims are hereby forever barred, enjoined, released and extinguished as against Nortel, any Nortel Worldwide Entity, the HWT and the trustee of the HWT, and their respective officers, directors, employees, agents, members, legal counsel, financial advisors and each of the heirs, executors, administrators, legal representatives, successors and assigns of each of the foregoing.

12. **THIS COURT ORDERS AND DECLARES THAT** nothing in this Order, including, without limiting the generality of the foregoing, the provisions of paragraphs 10 and 11, affects the determination on any basis whatsoever of the entitlement of any beneficiary to a distribution from the corpus of the HWT.

Release and Charge

13. **THIS COURT ORDERS** that the M&D Beneficiaries and former employees entitled to payment from the Termination Fund shall be entitled to the benefit of a charge on Nortel's Property (as defined in the Initial Order) to secure payment of the Medical and Dental Payments, Income Payments, Termination Payments and Pension Payments (the "Payments Charge"), which Payments Charge shall: (i) not exceed an aggregate amount of FIFTY-SEVEN MILLION DOLLARS ($57,000,000.00); (ii) rank subordinate in priority to the Inter-company Charge and the Shortfall Charge (as both terms are defined in the Initial Order); (iii) apply in these proceedings and in any subsequent bankruptcy or receivership; (iv) be reduced in amount as the Medical and Dental Payments, Income Payments, Termination Payments and Pension Payments are paid by an amount equal to each such payment made; and (v) automatically terminate and be extinguished on the filing with this Honourable Court

by the Monitor of a certificate certifying that the terms of the Amended and Restated Settlement Agreement have been complied with by Nortel.

14. **THIS COURT ORDERS** that the Payments Charge shall constitute a "Charge" pursuant to the Initial Order, and shall be subject to the provisions relating to Charges including, without limitation, paragraphs 42 through 47 thereof and that the creation of the Payments Charge shall not preclude this Court from creating additional charges under the Initial Order that rank in priority to or *pari passu* with the Payments Charge.

15. **THIS COURT ORDERS AND DECLARES** that the Releasees, the trustee and custodian of the Pension Plans, the CAW, the Representatives, and if and only if paragraphs 4, 5 and 6 apply as provided in paragraph 7, the Superintendent in his capacity as administrator of and on behalf of the PBGF, and their respective officers, directors, employees, agents, members, legal counsel and financial advisors and each of the heirs, executors, administrators, legal representatives, successors and assigns of each of the foregoing, be and they are hereby released, discharged and remised from any and all direct and indirect claims (contingent, liquidated or unliquidated, proven or unproven, known or unknown, in the nature of damages or otherwise, whether or not asserted and whether arising by contract, agreement (whether written or oral), under statute, civil law, common law, or in equity, or otherwise in any jurisdiction) related to (i) the Pension Plans, including without limitation, the administration of the Pension Plans, any obligation to assert or advance in these proceedings, or in any subsequent receivership or bankruptcy proceedings or in any other proceedings or in any other forum whatsoever concerning Nortel, any Nortel Worldwide Entity or the Pension Plans, any claim ranking in preference or priority to claims of unsecured creditors, as a trust (whether deemed or otherwise) or a lien or charge, the funding of the Pension Plans (including any obligation to contribute to the Pension Plans, except as required by paragraph 9 of this Order) and the investment of the Pension Plan assets, and (ii) the HWT, including without limitation, the administration of the HWT, the funding of the HWT, any obligation to contribute to the HWT and the investment of the HWT assets, provided that nothing herein shall release a director of Nortel from any matter referred to in subsection 5.1(2) of the CCAA or with respect to fraud on the part of any Releasee, with respect to that Releasee only.

16. **THIS COURT ORDERS AND DECLARES** that the Nortel Releasees be and they are hereby released, discharged and remised from any and all direct and indirect claims (contingent, liquidated or unliquidated, proven or unproven, known or unknown, in the nature of damages or otherwise, whether or not asserted and whether arising by contract, agreement (whether written or oral), under statute, civil law, common law, or in equity, or otherwise in any jurisdiction) that the Pension Claims and the HWT Claims, or any part thereof, rank as a preferential or priority claim over the claims of ordinary unsecured creditors of Nortel, as a trust (whether deemed or otherwise) or a lien or charge, or under any other legal or equitable theory. For greater certainty, notwithstanding the foregoing, nothing in this Order shall release or discharge the Nortel Releasees from any Pension Claims and HWT Claims to the extent such claims are allowed as ordinary unsecured claims (which claims shall rank as on a *pari passu* basis with the unsecured claims of the ordinary unsecured creditors of Nortel) against the Nortel Releasees pursuant to any claims adjudication procedure established in these proceedings.

17. **THIS COURT ORDERS** that the Employee Claimants shall not assert, advance or make any claims of any nature whatsoever against any person or entity whatsoever that could reasonably be expected to result in a claim over (including, without limitation, a claim for contribution or indemnity) being made against any of the Releasees or Nortel Releasees with respect to the subject matter of the release provisions hereof.

CCAA Plan or Subsequent Bankruptcy

18. **THIS COURT ORDERS AND DECLARES** that under no circumstances shall any CCAA Plan of Arrangement in the Nortel proceedings (the "Plan") be proposed or approved by the Court if: (i) the Plan provides for separate classification of any Employee Claimants from ordinary unsecured creditors of Nortel, including, without limitation, bondholders and Nortel Networks Inc.; or (ii) the Employee Claimants and the other ordinary unsecured

creditors do not receive the same *pari passu* treatment of their allowed claims against Nortel pursuant to the Plan.

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ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

APR 0 1 2010

PER / PAR:

SCHEDULE "A"

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AMENDED AND RESTATED SETTLEMENT AGREEMENT

THIS AGREEMENT made as of the 30th day of March, 2010

AMONG :

NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS TECHNOLOGY CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION, NORTEL NETWORKS GLOBAL CORPORATION

(collectively, "**Nortel**" and individually a **"Nortel Entity"**)

- and –

ERNST & YOUNG INC., solely in its capacity as monitor in the CCAA proceedings of Nortel and not in its personal capacity

(the **"Monitor"**)

- and -

DONALD SPROULE, DAVID ARCHIBALD and MICHAEL CAMPBELL, court appointed representatives of the Nortel Former Employees (as hereinafter defined)

(the **"Former Employees Representatives"**)

- and -

SUE KENNEDY, court appointed representative of the Represented LTD Beneficiaries (as hereinafter defined)

(the **"LTD Representative"**)

- and -

KOSKIE MINSKY LLP, court appointed counsel to the Former Employees of Nortel and the Represented LTD Beneficiaries

("Representative Counsel")

- and -

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-Canada) and its Locals 27, 1525, 1530, 1837, 1839, 1905 and/or 1915 and George Borosh et al.

("CAW")

A. RECITALS

WHEREAS Nortel filed for and obtained protection under the *Companies' Creditors Arrangement Act* (**"CCAA"**) by order of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") dated January 14, 2009, as amended and restated (the "**Initial Order**");

AND WHEREAS by Order of the Court dated May 27, 2009, the Former Employees Representatives were appointed representatives of all former employees, including pensioners, of Nortel or any person claiming an interest under or on behalf of such former employees or pensioners and surviving spouses in receipt of a Nortel pension, or group or class of them, other than (a) those represented by counsel to the CAW, and (b) those who elected pursuant to the requirements of such Order not to be bound by such Order (the individuals in respect of whom the Former Employees Representatives were appointed pursuant to such Order, are referred to herein as the "**Nortel Former Employees**");

AND WHEREAS certain employees and former employees of Nortel are represented by counsel to the CAW;

AND WHEREAS by Order of the Court dated July 30, 2009, the LTD Representative was appointed representative of those employees of Nortel who are currently not working due to an injury, illness or medical condition in respect of which they are receiving or entitled to receive disability income benefits by or through Nortel, and who may assert an existing or future claim for payment, reimbursement or coverage arising in connection with their employment with Nortel or termination thereof, a pension or benefit plan sponsored by Nortel, including in relation to medical, dental, long-term or short-term disability benefits, life insurance or any other benefit, obligation or payment to which such person (or others who may be entitled to claim under or through such person) may be entitled from or through Nortel , other than (a) those individuals who are currently employed and whose benefit or other payments, as described above, arise directly or inferentially out of a collective agreement between any Nortel Entity and the CAW, and (b) those individuals who elected pursuant to the requirements of such Order not to be bound by such Order (the individuals in respect of whom the LTD Representative was appointed pursuant to such Order are referred to herein as the **"Represented LTD Beneficiaries"**);

AND WHEREAS Representative Counsel was appointed as counsel to the Nortel Former Employees and the Represented LTD Beneficiaries by Court orders dated May 27, 2009 and dated July 30, 2009, respectively, for the purpose of, among other things, settling or compromising the claims of the individuals they represent;

AND WHEREAS the parties to this Settlement Agreement (the **"Parties"**) have reached an agreement for the benefit of Nortel and all of its stakeholders, as well as the Official Committee of Unsecured Creditors of Nortel Networks Inc. and certain of its affiliates in the chapter 11 proceedings before the U.S. Bankruptcy Court for the District of Delaware (the **"UCC"**) and the Informal Nortel Noteholder Group (the **"Bondholder Committee"**) regarding certain issues related to, among other things, Nortel's Pension Plans, HWT (both as defined below) and certain employment related issues (collectively, the **"Settlement"**); and

NOW THEREFORE for value received (the receipt and sufficiency of which are hereby acknowledged), the Parties agree as follows:

B. BENEFITS AND EMPLOYEES

1. For the remainder of 2010, Nortel shall continue in accordance with current practice to pay medical and dental benefits and life insurance benefits to Nortel pensioners and their beneficiaries and survivors, whether or not represented by Representative Counsel, and for greater certainty, including without limitation all of the individuals referenced in paragraphs (a) and (b) of the second recital above (collectively, the "**Pensioners**") and the Nortel employees receiving or who become entitled during 2010 to receive long term disability benefits, whether or not represented by Representative Counsel, and for greater certainty, including without limitation all of the individuals referenced in paragraphs (a) and (b) of the fourth recital above (collectively, the **"LTD Beneficiaries"**) in accordance with the current benefit plan terms and conditions. The Pensioners and the LTD Beneficiaries shall be referred to collectively as the **"M&D Beneficiaries"**. Medical and dental benefits to be paid to the M&D Beneficiaries shall be funded solely from Nortel's funds on a "pay as you go basis" in respect of benefits for the coverage period ending December 31, 2010 (the "**Medical and Dental Payments**"), provided that no Medical and Dental Payments claims submitted after February 28, 2011 shall be accepted, honoured or paid. Life insurance benefits to the M&D Beneficiaries shall continue unchanged until December 31, 2010 and shall be funded in the same manner as for 2009 (the **"Life Insurance Benefits"**). For greater certainty, no Medical and Dental Payments or Life Insurance Benefits shall be paid by Nortel for any benefit coverage period following December 31, 2010.

2. Nortel shall pay income benefits to the LTD Beneficiaries and to those people receiving or who become entitled during 2010 to receive survivor income benefits and survivor transition benefits under Nortel benefit plans (as such plans exist at the date of this Settlement Agreement) solely from Nortel funds on a "pay as you

go basis" for benefits in respect of the coverage period from January 1, 2010 to December 31, 2010 (the "**Income Payments**"). For greater certainty, no Income Payments shall be paid by Nortel for the benefit coverage period following December 31, 2010.

3. Upon the satisfaction of all of the conditions in paragraph I.1 of this Settlement Agreement, Nortel shall create a pool of $4.3 million (inclusive of Representative Counsel's costs in respect of the motion for leave to appeal referred to in paragraph B.4 below to a maximum of $100,000.00, based on documented and reasonable fees and disbursements) (the "**Termination Fund**") to be set aside for employees and former employees of Nortel whose employment has been terminated or is terminated prior to or on June 30, 2010 to whom amounts are or may become owing for termination or severance payments, who have not been offered employment with a purchaser of Nortel's assets and who have not received or are not entitled to receive (i) gross cumulative Annual Incentive Plan payments from and after October 1, 2009 of $3,000.00 or more; or (ii) a Key Employee Incentive Plan or Key Employee Retention Plan payment in 2009; or (iii) payment from any Court approved equivalent 2010 plan. Each such individual shall be paid a maximum of $3,000.00 (subject to applicable withholding taxes) from the Termination Fund (the "**Termination Payments**"). Any Termination Payments paid to such individuals shall be credited against allowed claims of such individuals and such claims shall be correspondingly reduced. To the extent that funds are unused in respect of terminations prior to or on June 30, 2010, or payment of Representative Counsel's costs referred to above, the Termination Fund may be used to make payments on account of terminations after June 30, 2010. If such unused funds are to be used for another purpose, such purpose shall be approved by the Court, on such basis as is agreed to between Representative Counsel and the Monitor.

4. Upon the issuance of an order by the Court approving this Settlement Agreement in its entirety, including all schedules thereto, and upon the expiry of all appeals and rights of appeal in respect thereof (the "**Final Approval Order**"), Representative Counsel shall promptly withdraw their application for leave to appeal the decision of the Court of Appeal, dated November 26, 2009, to the Supreme Court of Canada (the **"Leave Application"**) on a with prejudice basis. No claim for costs in respect of the Leave Application shall be made by or against Nortel, or any creditor participants (including the UCC and the Bondholder Committee).

5. The employment of the LTD Beneficiaries shall terminate on December 31, 2010. However, such termination shall not affect in any manner any rights the LTD Beneficiaries or anyone claiming through them may have, either under a collective agreement, at common law or pursuant to any statute in relation to ordinary unsecured claims against Nortel arising out of their employment or termination thereof, including but not limited to claims for future lost long term

disability or income continuation benefits, pension benefits or pension benefit accruals, and medical, dental and life insurance benefits, nor should affect in any manner their ability to participate in any program of benefits for which they are eligible that is established as a successor to the plans in which they currently participate. For greater certainty, such claims, to the extent they are allowed as claims against Nortel pursuant to any claims adjudication procedure established in these proceedings, shall rank as ordinary unsecured claims on a *pari passu* basis with the claims of the ordinary unsecured creditors of Nortel. Nothing in this paragraph will affect the rights of the LTD Beneficiaries to make claims in respect of the HWT (as defined below).

C. *HEALTH AND WELFARE TRUST*

1. Resolution: The Parties will work towards a Court approved distribution of the Health and Welfare Trust ("**HWT**") corpus in 2010 to its beneficiaries entitled thereto and the resolution of any issues necessarily incident thereto. For greater certainty, nothing in this Settlement Agreement affects the determination on any basis whatsoever of the entitlement of any beneficiary to a distribution from the corpus of the HWT. Any fees or expenses incurred in connection with any dispute or litigation among the beneficiaries of the HWT concerning entitlement (including without limitation all legal, actuarial and other fees and expenses of the trustee of the HWT and other service providers of the HWT) shall not be paid by Nortel, but shall be paid by the HWT corpus. For greater certainty, such fees or expenses shall not include those of the Monitor and incurred by Nortel in connection with any motion for termination of the HWT or for directions with respect to the HWT, which shall be paid by Nortel.

2. Ranking: The CAW, Representative Counsel, the LTD Representative and the Former Employee Representatives (the "**Representatives**") agree, on behalf of those they represent and on their own behalf, that in respect of any funding deficit in the HWT or any HWT related claims (the "**HWT Claims**"), in these proceedings or in any subsequent receivership or bankruptcy proceedings, or in any other proceedings, or in any other forum whatsoever concerning Nortel, any of the entities listed in Schedule "A" (collectively the "**Nortel Worldwide Entities**" and individually, a "**Nortel Worldwide Entity**") or the HWT, they shall not advance, assert or make any claim that any HWT Claims are entitled to any priority or preferential treatment over ordinary unsecured claims, including without limitation that they rank as priority claims against Nortel or any Nortel Worldwide Entity, or are the subject of a constructive trust or trust of any nature or kind in respect of the property and assets of Nortel or any Nortel Worldwide Entity, nor shall they take any action or support any party, person or entity, directly or indirectly, who advances, asserts or makes such claims, and such claims, to the extent allowed against Nortel pursuant to any claims adjudication procedure established in these proceedings, shall rank as ordinary unsecured

claims on a *pari passu* basis with the claims of the ordinary unsecured creditors of Nortel.

D. REGISTERED PENSION PLANS

1. Administration: Nortel shall continue to administer the Nortel Networks Negotiated Pension Plan (Registration No. 08587766) and the Nortel Networks Limited Managerial and Non-Negotiated Pension Plan (Registration No. 0342048) (collectively, the "**Pension Plans**") until 11:59 p.m. on September 30, 2010. For greater certainty, Nortel Networks Limited shall remain the administrator (as defined in the *Pension Benefits Act*) of the Pension Plans until 11:59 p.m. on September 30, 2010. Neither Nortel nor the Monitor will take any steps to initiate a wind up, in whole or in part, of the Pension Plans with an effective date prior to September 30, 2010 at 11:59 p.m. Nortel shall cease to administer the Pension Plans on September 30, 2010 at 11:59 p.m. and thereafter shall have no further responsibility or liability for administration thereof (including any windup). So long as Nortel continues to administer the Pension Plans, there shall be no change whatsoever to the plan terms of the Pension Plans without the approval of the Court, and no change to the current asset mix or investment policies with respect to the Pension Plans other than at the request, and with the consent, of the Representative Counsel and the approval of the Court.

2. Payments: Nortel shall continue to make contributions to the Pension Plans in the same manner as it has been doing over the course of the proceedings, under the CCAA, through to March 31, 2010, and for greater certainty, shall continue to make all current service payments and special payments related to the Pension Plans through that date in accordance with the last actuarial valuation for the Pension Plans filed with the Financial Services Commission of Ontario in the aggregate amount of $2,216,254.00 per month (the "**March Pension Payments**"). Thereafter and through to September 30, 2010, Nortel shall make only current service payments to the Pension Plans in the aggregate amount of $379,837.00 per month (the "**September Pension Payments**"). For greater certainty, Nortel shall not make any special payment contributions to the Pension Plans after March 31, 2010. The March Pension Payments and the September Pension Payments shall be referred to collectively as the "**Pension Payments**". Nortel shall not make any payments or contributions whatsoever to the Pension Plans after September 30, 2010, except in respect of any claims in respect of the Pension Plans allowed against Nortel (which claims shall rank on a *pari passu* basis with the claims of the ordinary unsecured creditors of Nortel) pursuant to any claims adjudication procedure established in these proceedings. Neither Nortel, nor any Nortel Worldwide Entity shall have any obligation or liability regarding any contributions, fees, indemnities, charges or costs of any kind in respect of the administration of the Pension Plans after September 30, 2010. For greater certainty, nothing in this paragraph affects any obligation or liability of Nortel regarding any contributions, fees, indemnities, charges or costs of any kind in

respect of the administration of the Pension Plans before 11:59 p.m. on September 30, 2010.

3. Transition: With the assistance of the Monitor, Nortel shall use reasonable efforts to cause all books, records, data and other information relating to the Pension Plans or beneficial to the administration or winding-up of the Pension Plans in the possession or control of Nortel to be consolidated in Toronto, Ontario, Canada by no later than March 31, 2010. The Monitor and Nortel shall take all reasonable steps, at the sole cost and expense of Nortel, to complete the orderly transfer of the records of administration of the Pension Plans to a new administrator appointed by the Superintendent of Financial Services (the "**Superintendent**'), on September 30, 2010 (the "**New Administrator**"). Any non-compliance or allegation of non-compliance by Nortel or the Monitor under this paragraph D.3 shall have no effect on the enforceability or effectiveness of any other provision of this Agreement.

E. RANKING OF PENSION CLAIMS

1. The Representatives agree on behalf of the members of the Pension Plans their and beneficiaries and surviving spouses who are entitled to benefits from the Pension Plans and whom they represent and on their own behalf (collectively, the "**Pension Claimants**") that in respect of any claim for payment of or damages related to any solvency or wind up deficiencies, unfunded liabilities, or unpaid or accrued contributions (including, for greater certainty, any special payments whatsoever), any liability regarding the Pension Benefits Guarantee Fund (the "**PBGF**") or any obligation of or claim arising against any person with respect to the Pension Plans or the administration thereof (the "**Pension Claims**"): (a) no Pension Claims shall enjoy any priority in any manner over the claims of ordinary unsecured creditors made against Nortel; (b) the Pension Claimants hereby waive, and shall not directly or indirectly assert, advance, re-assert or re-file any claims or initiate any legal proceedings or actions of any nature or kind in these proceedings or in any subsequent receivership or bankruptcy proceedings, or in any other proceedings, or in any other forum whatsoever concerning Nortel or any Nortel Worldwide Entity or the Pension Plans, that the Pension Claims or any part thereof rank as a priority claim over the claims of ordinary unsecured creditors, as a trust (whether deemed or otherwise) or a lien or charge (hereinafter referred to as a "**lien**"), or under any other legal or equitable theory; and (c) the Pension Claimants shall not support, directly or indirectly, any application, claim or action by Nortel, in its capacity as administrator of the Pension Plans, the New Administrator, any successor administrator howsoever appointed, the Superintendent, as the administrator of and on behalf of the PBGF, or any other person or entity, to directly or indirectly assert, advance, re-assert or re-file any claims or initiate any legal proceedings or actions of any nature or kind in these proceedings or in any subsequent receivership or bankruptcy proceedings, or in any other proceedings, or in any other forum whatsoever concerning Nortel or any

Nortel Worldwide Entity or the Pension Plans, that the Pension Claims or any part thereof rank as a priority claim over the claims of ordinary unsecured creditors, as a trust (whether deemed or otherwise) or a lien, or under any other legal or equitable theory, and such claims shall be treated as ordinary unsecured claims, and for greater certainty, any such claims, to the extent allowed against Nortel pursuant to any claims adjudication procedure established in these proceedings, shall rank on a *pari passu* basis with the claims of the ordinary unsecured creditors of Nortel.

2. That portion of any proofs of claim already or hereafter filed by the Superintendent as the administrator of and on behalf of the PBGF, by Nortel or by any person claiming that any payments by the PBGF or that the Pension Claims or any part thereof rank as a priority or preferential claim over the claims of ordinary unsecured creditors of Nortel, as a trust (whether deemed or otherwise) or a lien, or under any other legal or equitable theory shall be disallowed, but only to the extent that they claim such priority or preference, and such disallowance shall not be opposed or appealed, directly or indirectly, by such claimants. For greater certainty, such disallowance shall not otherwise affect the quantum or validity of such claims, which shall rank as ordinary unsecured creditors on a *pari passu* basis with the claims of the ordinary unsecured creditors of Nortel, in each case, to the extent allowed against Nortel pursuant to any claims adjudication procedure established in these proceedings.

F. NON-OPPOSITION

1. The Representatives agree, on their own behalf and on behalf of those they represent, that they shall not oppose, directly or indirectly, any employee incentive program, including any charge therefor, that is determined by the Monitor to be reasonable and necessary for the continued operation of Nortel. They further agree that they shall not oppose, directly or indirectly, the creation of a trust with respect to claims or potential claims against persons who accept directorships of a Nortel Worldwide Entity in order to facilitate the restructuring, provided that: (i) such trust is approved and recommended by the Monitor; (ii) no part of the corpus of the trust may be used to pay bonuses or any other compensation to the directors; and (iii) any corpus of the trust remaining on the termination of the trust reverts to Nortel.

G. RELEASE AND CHARGE

1. The CAW, the LTD Representative and the Former Employees Representatives agree on their own behalf and on behalf of the Pension Claimants and the beneficiaries of the HWT who they represent (collectively, the "**Pension HWT Claimants**") that each of the trustee of the HWT, the Monitor, and all members of Pension Plans' committees, (in their personal capacity), and their respective officers, directors, employees, agents, members, legal counsel, financial advisors,

against any person or entity whatsoever that could reasonably be expected to result in a claim over (including, without limitation, a claim for contribution or indemnity) being made against any of the Releasees or the Nortel Releasees with respect to the subject matter of the release provisions of this Settlement Agreement.

4. The M&D Beneficiaries and former employees entitled to payment from the Termination Fund shall be entitled to the benefit of a charge on Nortel's Property (as defined in the Initial Order) to secure payment of the Medical and Dental Payments, Income Payments, Termination Payments and Pension Payments (the "**Payments Charge**"), which Payments Charge shall not exceed an aggregate amount of FIFTY-SEVEN MILLION DOLLARS ($57,000,000.00) and which Payments Charge shall rank subordinate in priority to the Inter-company Charge (as defined in the Initial Order). The Payments Charge shall apply in these proceedings and in any subsequent bankruptcy or receivership. The maximum amount secured by the Payments Charge shall be reduced as the Medical and Dental Payments, Income Payments, Termination Payments and Pension Payments are paid by an amount equal to each such payment made. Once the last payment is made, the Monitor shall file a certificate (the **"Monitor's Certificate"**) with the Court certifying that the terms of the Settlement have been complied with by Nortel, and the Payments Charge shall automatically terminate and be extinguished by the filing of the Monitor's Certificate.

H. CCAA PLAN OR SUBSEQUENT BANKRUPTCY

1. The Representatives agree on their own behalf and on behalf of the Pension HWT Claimants that under no circumstances shall any CCAA Plan of Arrangement in the Nortel proceedings (the "**Plan**") be proposed or approved if: (i) the Plan provides for separate classification of any Pension HWT Claimants from ordinary unsecured creditors of Nortel, including, without limitation, bondholders and Nortel Networks Inc.; or (ii) the Pension HWT Claimants and the other ordinary unsecured creditors of Nortel do not receive the same *pari passu* treatment of their allowed ordinary unsecured claims against Nortel pursuant to the Plan.

I. CONDITIONS

1. This Settlement Agreement is conditional upon (i) Nortel obtaining the Final Approval Order substantially in the form attached as Schedule "B" with such changes as the parties may agree to, acting reasonably; (ii) the Superintendent in his capacity as administrator of the PBGF, Nortel and the Monitor executing the letter attached as Schedule "C"; and (iii) the Leave Application having been withdrawn on a with prejudice basis.

2. It is the intention of the Parties that these terms be binding upon, and enure to the benefit of the Pension HWT Claimants, the Releasees and the Nortel Releasees, and that: (i) as beneficiaries hereof, the Relcasees and the Nortel Releasees shall

be entitled to rely upon and to seek the enforcement of these terms, which cannot be varied without further order of the Court on full and proper notice to them; and (ii) the ordinary unsecured creditors of Nortel shall be entitled to rely upon and benefit from the provisions and agreements herein and to seek their enforcement, which provisions and agreements cannot be varied without further order of the Court on full and proper notice to them.

J. GENERAL

1. The Monitor shall post the motion record for approval of the Settlement, including the Settlement Agreement and the proposed Final Approval Order on the Monitor's website at www.ey.com/ca/Nortel and on the website of Representative Counsel at www.kmlaw.ca.

2. The Representatives, the Representative Counsel and the CAW shall co-operate with Nortel and the Monitor on all communications related to this settlement, as required.

3. This Settlement Agreement will be governed by and interpreted and enforced in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable therein. The Parties hereby irrevocably consent and submit to the non-exclusive jurisdiction of the Ontario Superior Court of Justice and waive any objection based on venue or forum non conveniens with respect to any action commenced in connection with this Settlement Agreement.

4. This Settlement Agreement may be executed in any number of counterparts (including by way of facsimile and PDF) and all of such counterparts taken together will be deemed to constitute one and the same instrument.

[Signature pages to follow]

IN WITNESS WHEREOF the Parties have duly executed this Agreement as of the date first written above:

NORTEL NETWORKS CORPORATION

Per: _____
Name: John Doolittle
Title: Senior Vice-President, Corporate Services and Chief Financial Officer

Per: _____
Name: Clarke Glaspell
Title: Controller

NORTEL NETWORKS LIMITED

Per: _____
Name: John Doolittle
Title: Senior Vice-President, Corporate Services and Chief Financial Officer

Per: _____
Name: Clarke Glaspell
Title: Controller

NORTEL NETWORKS TECHNOLOGY CORPORATION

Per: _____
Name: Clarke Glaspell
Title: President and Controller

NORTEL NETWORKS INTERNATIONAL CORPORATION

Per: _____
Name: John Doolittle
Title: President

Per: _____
Name: Clarke Glaspell
Title: Treasurer

NORTEL NETWORKS GLOBAL CORPORATION

Per: _____
Name: John Doolittle
Title: President

Per: _____
Name: Clarke Glaspell
Title: Controller

ERNST & YOUNG INC., solely in its capacity as monitor in the CCAA proceedings of Nortel and not in its personal capacity

Per: _____
Name:
Title:

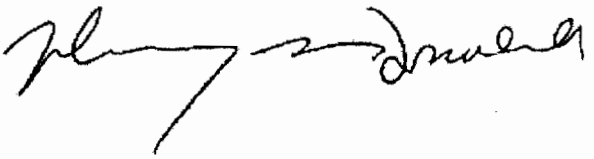
DONALD SPROULE, court appointed representative of the Nortel Former Employees

Per: _____
Name:
Title:

NORTEL NETWORKS GLOBAL CORPORATION

Per: _____
Name:
Title:

ERNST & YOUNG INC., solely in its capacity as monitor in the CCAA proceedings of Nortel and not in its personal capacity



Per: _____
Name: Murray A. McDonald
Title: President

DONALD SPROULE, court appointed representative of the Nortel Former Employees

Per: _____
Name:
Title:

DAVID ARCHIBALD, court appointed representative of the Nortel Former Employees

Per: _____
Name:
Title:

NORTEL NETWORKS GLOBAL CORPORATION

Per: _____
Name:
Title:

ERNST & YOUNG INC., solely in its capacity as monitor in the CCAA proceedings of Nortel and not in its personal capacity

Per: _____
Name:
Title:

DONALD SPROULE, court appointed representative of the Nortel Former Employees

Per: D E K Sproule
Name:
Title: NRPC National Chair

DAVID ARCHIBALD, court appointed representative of the Nortel Former Employees

Per: _____
Name:
Title:

MICHAEL CAMPBELL, court appointed representative of the Nortel Former Employees

Per: _____
Name:
Title:

NORTEL NETWORKS GLOBAL CORPORATION

Per: _____
Name:
Title:

ERNST & YOUNG INC., solely in its capacity as monitor in the CCAA proceedings of Nortel and not in its personal capacity

Per: _____
Name:
Title:

DONALD SPROULE, court appointed representative of the Nortel Former Employees

Per: _____
Name:
Title:

DAVID ARCHIBALD, court appointed representative of the Nortel Former Employees

Per: _____
Name: DAVID D. ARCHIBALD
Title: RETIREE

MICHAEL CAMPBELL, court appointed representative of the Nortel Former Employees

Per: _____
Name:
Title:

NORTEL NETWORKS GLOBAL CORPORATION

Per: _____
Name:
Title:

ERNST & YOUNG INC., solely in its capacity as monitor in the CCAA proceedings of Nortel and not in its personal capacity

Per: _____
Name:
Title:

DONALD SPROULE, court appointed representative of the Nortel Former Employees

Per: _____
Name:
Title:

DAVID ARCHIBALD, court appointed representative of the Nortel Former Employees

Per: _____
Name:
Title:

MICHAEL CAMPBELL, court appointed representative of the Nortel Former Employees

Per: Michael Campbell I.auth.
Name: MICHAEL CAMPBELL.
Title: C.A.R.

SUE KENNEDY, court appointed representative of the Represented LTD Beneficiaries

Per: Sue Kennedy
Name:
Title:

KOSKIE MINSKY LLP, court appointed counsel to the Former Employees of Nortel and the Represented LTD Beneficiaries

Per: _____
Name:
Title:

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-Canada) and its Locals 27, 1525, 1530, 1837, 1839, 1905 and/or 1915 and George Borosh et al.

Per: _____
Name:
Title:

SUE KENNEDY, court appointed representative of the Represented LTD Beneficiaries

Per: _____
Name:
Title:

KOSKIE MINSKY LLP, court appointed counsel to the Former Employees of Nortel and the Represented LTD Beneficiaries

Per: _____
Name: Susan Philpott
Title: Representative Counsel

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-Canada) and its Locals 27, 1525, 1530, 1837, 1839, 1905 and/or 1915 and George Borosh et al.

Per: _____
Name:
Title:

SUE KENNEDY, court appointed representative of the Represented LTD Beneficiaries

Per: _____
Name:
Title:

KOSKIE MINSKY LLP, court appointed counsel to the Former Employees of Nortel and the Represented LTD Beneficiaries

Per: _____
Name:
Title:

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-Canada) and its Locals 27, 1525, 1530, 1837, 1839, 1905 and/or 1915 and George Borosh et al.

Per: _____
Name:
Title:

SCHEDULE "A"

NORTEL NETWORKS CORPORATION

Direct and Indirect Subsidiaries

Sonoma Systems
Sonoma Limited
Sonoma Systems Europe Limited
Nortel Networks Optical Components (Switzerland) GmbH
Xros, Inc.
Architel Systems Corporation
Architel Systems (U.S.) Corporation
Architel Systems (UK) Limited
NN Applications Management Solutions Inc.
CoreTek, Inc.
Alteon WebSystems Inc.
Alteon WebSystems International Inc.
Alteon WebSystems AB
Alteon WebSystems International Limited
Nortel Networks Limited
Capital Telecommunications Funding Corporation
PT Nortel Networks Indonesia
Nortel Networks Peru S.A.C.
Nortel Networks (Thailand) Ltd.
Nortel Networks Telecommunicacoes do Brazil Ltda.
Nortel Networks Malaysia Sdn Bhd.
Nortel Networks New Zealand Limited
Nortel Networks Global Corporation
Nortel Networks de Colombia S.A.
Nortel Networks Chile S.A.
Nortel Networks de Argentina S.A.
Nortel Networks del Paraguay S.A.
Nortel Networks de Venezuela C.A.

Nortel Networks del Ecuador S.A.
Nortel Networks de Mexico S.A. de C.V.
Nortel de Mexico, S. De R.L. de C.V.
Nortel Networks del Uruguay S.A.
Nortel Networks Technology Corporation
Nortel Vietnam Limited
Nortel Networks Korea Limited
Nortel Networks Singapore Pte Ltd
Nortel Networks Telecommunications Equipment (Shanghai) Co., Ltd.
Nortel Networks International Corporation
Shenyang Nortel Telecommunications Company Limited
Nortel Networks (Ireland) Limited
Northern Telecom Maroc SA
Nortel Networks Electronics Corporation
Regional Telecommunications Funding Corporation
Nortel Networks de Bolivia S.A.
1328556 Ontario Inc.
CTFC Canada Inc.
Northern Telecom Canada Limited
Nortel Networks de Panama S.A.
TSFC Canada Inc.
Nortel Networks Mauritius Ltd.
Nortel Networks (India) Private Limited
Nortel Networks S.A.
Northern Telecom France SA
Nortel Networks France SAS
Matra Communications Business Systeme GmbH
Nortel Networks (China) Limited
Nortel Networks Communications Engineering Ltd.
Nortel Networks (Asia) Limited
Guangdong – Nortel Telecommunications Equipment Co. Ltd.
LG-Nortel Co. Ltd.

6141-Sub Novera Optics Korea Inc.
Novera Optics Inc.
LN Srithai Comm Co Ltd
Nortel Communications Inc.
Nortel Networks Financial Services Limited Liability Co.
Nortel Networks Inc.
Bay Networks do Brasil Ltda.
Bay Networks Fedes de Dados para Sistemas Informaticos, da.
Clarify Limited
Clarify K.K.
Nortel Networks Cable Solutions Inc.
Nortel Networks Capital Corporation
Nortel Networks Technology K.K.
Nortel Networks Eastern Mediterranean Ltd.
Nortel Networks International Inc.
Nortel Ventures LLC
Nortel Networks Japan
Penril Datacomm Limited
Nortel Networks Southeast Asia Pte Ltd.
Nortel Networks Technology (Thailand) Ltd.
Nortel Technology Excellence Centre Private Limited
Diamondware, Ltd.
Northern Telecom International Inc.
Nortel Networks Optical Components Inc.
The Nortel Foundation
Nortel Networks India International Inc.
Nortel Networks (CALA) Inc.
Nortel Networks de Guatemala, Ltda.
Nortel Trinidad and Tobago Limited
Qtera Corporation
Nortel Networks Technology Ltd.
Nortel Networks (Shannon) Limited

Nortel Networks Europe Sales Limited
Nortel Government Solutions Incorporated
AC Technologies, Inc.
Integrated Information Technology Corporation
Nortel Networks UK Limited
Northern Telecom International Limited
Nor. Web DLP Limited
Nortel Limited
Nortel Networks (Northern Ireland) Limited
Networks Employee Benefit Trustee Company Limited
Nortel-SE d.o.o. Beograd
Nortel Networks Properties Limited
Promatory Communications Limited
X-CEL Communications Limited
Nortel Networks Optical Components Limited
Nortel Networks (Photonics) Pty. Ltd.
Northern Telecom PCN Limited
Telephone Switching International Limited
Frisken Investments Pty. Ltd.
Betts Investments Pty. Ltd.
Periphonics Limited
Nortel Networks Australia Pty Limited
Nortel Australia Communication Systems Pty. Limited
Star 21 Networks GmbH
Star 21 Networks (Schweiz) AG
Star 21 Networks Deutschland GmbH
Star 21 Facility Management Verwaltung GmbH
Star 21 Operations GmbH
Star 21 Facility Management GmbH & Co. KG
Nortel Networks International Finance & Holding BV
Uni-Nortel Communication Technologies (Hellas), S.A.
Nortel Networks (Austria) GmbH

Nortel Networks AG
Nortel Networks AS
Nortel Networks S.R.O.
Nortel Networks S.p.A.
Nortel Networks S.A.
Nortel Networks South Africa (Proprietary) Limited
Nortel Networks NV
Matra Communication Cellular Terminals GmbH
Nortel Networks Engineering Service Kft.
Nortel Networks (Bulgaria) EOOD
Nortel Networks Slovensko, s.r.o.
Nortel Networks Romania Srl
Nortel Networks O.O.O
Nortel Networks Portugal, S.A.
Nortel Communications Holdings (1997) Limited
Nortel Networks Israel (Sales and Marketing) Limited
Nortel Networks Communications (Israel) Limited
Nortel Networks Polska Sp. z.o.o.
Nortel GmbH
Nortel Networks BV
Nortel Networks Malta Limited
Nortel Ukraine Ltd.
Nortel Networks AB
Nortel Networks OY
Nortel Networks, Hispania S.A.
Nortel Networks Netas Telekomunikasyon A.S.

SCHEDULE "B" TO AMENDED AND RESTATED SETTLEMENT AGREEMENT

[ATTACHED]

Court File No. 09-CL-7950

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	WEDNESDAY, THE 31ST DAY
	)	
JUSTICE MORAWETZ	)	OF MARCH, 2010

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

SETTLEMENT APPROVAL ORDER

THIS MOTION, made by the Applicants (collectively, "Nortel") for an order approving the amended and restated settlement agreement made as of the 30th day of March, 2010, attached as Schedule "A" to this Order (the "Amended and Restated Settlement Agreement") and for the other relief set out in the Notice of Motion dated March 30, 2010 was heard this day at 393 University Avenue, Toronto, Ontario.

ON READING the affidavit of Elena King sworn March 30, 2010 and the Forty-Second Report of Ernst & Young Inc. dated March 30, 2010 (the "Forty-Second Report") in its capacity as monitor (the "Monitor"), and on hearing submissions of counsel for the Applicants, the Monitor, The Northern Trust Company, Canada, in its capacity as trustee of the HWT and it is capacity as trustee and custodian for the trust funds maintained in respect of the Pension Plans and the master trust for the Pension Plans, the Northern Telecom Limited Pension Trust Fund, the Opposing LTD Employees and the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited and on the consent of CAW, the Former

Employees Representatives, the LTD Representative and Representative Counsel (as those terms are defined in the Amended and Restated Settlement Agreement); the UCC, the Bondholder Committee (as those terms are defined in the Amended and Restated Settlement Agreement) and the Superintendent of Financial Services of Ontario (the "Superintendent") as the administrator of and on behalf of the Pension Benefits Guarantee Fund (the "PBGF") not opposing, no one else appearing although duly served as appears from the affidavit of service of Katie Legree dated March 30, 2010, filed.

1. **THIS COURT ORDERS** that service of the Notice of Motion, the Forty-Second Report and the Motion Record is hereby validated so that this Motion is properly returnable today and further service thereof is hereby dispensed with.

2. **THIS COURT ORDERS** that capitalized terms used herein and not otherwise defined shall have the meaning given to them in the Affidavit of Elena King dated February 18, 2010 or the Amended and Restated Settlement Agreement.

Amended and Restated Settlement Agreement

3. **THIS COURT ORDERS** that the Amended and Restated Settlement Agreement is hereby approved in its entirety, including all schedules attached thereto, and that the Parties thereto (including by representation) are hereby bound by this Order and the Amended and Restated Settlement Agreement and authorized and directed to comply with their obligations thereunder, including, without limitation, to make the payments provided for therein. The Amended and Restated Settlement Agreement supersedes all prior arrangements and understandings among the Parties thereto (including by representation) with respect to such subject matter, including, without limitation, the Settlement Agreement made as of the 8th day of February, 2010.

Pension Plans

4. **THIS COURT ORDERS AND DECLARES** that any Pension Claims made in these proceedings or in any subsequent receivership or bankruptcy proceedings or in any other proceedings or in any other forum whatsoever concerning Nortel, any Nortel Worldwide Entity or the Pension Plans shall, to the extent they are allowed pursuant to any claims

adjudication procedure established in such proceedings, rank as ordinary unsecured claims on a *pari passu* basis with the claims of ordinary unsecured creditors of Nortel, such that no part of any Pension Claims shall be entitled to any preferential treatment or enjoy any priority in any manner over the claims of ordinary unsecured creditors made against Nortel, or rank as a priority claim, as a trust (whether deemed or otherwise) or a lien or charge.

5. **THIS COURT ORDERS AND DECLARES** that no person or entity, including without limitation, (i) the Representatives, (ii) the Superintendent, as administrator of and on behalf of the PBGF, (iii) NNL, as the administrator of the Pension Plans, (iv) all successor administrators of the Pension Plans (whether appointed by the Superintendent or otherwise), and (v) the Pension HWT Claimants, all future members and beneficiaries of the Pension Plans, the trustee of the Pension Plans, the employees and former employees of Nortel and others who may have or make claims against Nortel or any Nortel Worldwide Entity with respect to employment or post employment or post retirement benefits (collectively, with the Pension HWT Claimants, the "Employee Claimants"), shall directly or indirectly assert, advance, re-assert or re-file any claim or initiate any legal proceedings or actions of any nature or kind in these proceedings or in any subsequent receivership or bankruptcy proceedings, or in any other proceedings, or in any other forum whatsoever concerning Nortel, any Nortel Worldwide Entity (to the extent such claims are provable) or the Pension Plans except as an ordinary unsecured claim ranking on a *pari passu* basis with the claims of ordinary unsecured creditors of Nortel, and shall not assert or advance any claim, directly or indirectly, that the Pension Claims, or any part thereof, ranks as a priority or preferential claim over the claims of ordinary unsecured creditors or Nortel, including, without limitation, that it is the subject of a trust (whether deemed or otherwise) or a lien or charge, or under other legal or equitable theory, and all such priority, trust, lien or charge claims are hereby forever barred, enjoined, released and extinguished as against Nortel, any Nortel Worldwide Entity, the Pension Plans, the trustee of the Pension Plans, and their respective officers, directors, employees, agents, members, legal counsel, financial advisors and each of the heirs, executors, administrators, legal representatives, successors and assigns of each of the foregoing.

6. **THIS COURT ORDERS** that the portion of proofs of claim already or hereafter filed by the Superintendent as the administrator of and on behalf of the PBGF, by Nortel, by any

Employee Claimants or by any other person or entity claiming, asserting or advancing priority or preferential treatment of any kind, including, without limitation, trusts (whether deemed or otherwise) liens or charges in respect of any Pension Claims or payments by the PBGF with respect to the Pension Plans be and they hereby are disallowed, but only to the extent that they claim such priority or preferential treatment, without prejudice to the ordinary unsecured claims included in such proofs of claim. For greater certainty, such disallowance shall not otherwise affect the quantum or validity of such claims, which shall rank as ordinary unsecured creditors on a *pari passu* basis with the claims of the ordinary unsecured creditors of Nortel, in each case, to the extent allowed against Nortel pursuant to any claims adjudication procedure established in these proceedings.

7. THIS COURT ORDERS that with respect to claims by the Superintendent on behalf of the PBGF, and any administrator appointed by the Superintendent, paragraphs 4, 5 and 6 shall only apply if: (i) the Pension Payments are made in accordance with the Amended and Restated Settlement Agreement; and (ii) no bankruptcy order is made with respect to Nortel on or before September 30, 2010.

8. **THIS COURT ORDERS** that as long as NNL continues to administer the Pension Plans, there shall be no change whatsoever to the plan terms of the Pension Plans without the approval of the Court, and no change to the current asset mix or investment policies with respect to the Pension Plans other than at the request, and with the consent, of the Representative Counsel and the approval of the Court.

9. **THIS COURT ORDERS** that Nortel shall make all current service payments and special payments to the Pension Plans in respect of defined benefit entitlements thereunder in the same manner as it has been doing over the course of the proceedings under the CCAA, through to March 31, 2010 in accordance with the last actuarial valuation for the Pension Plans filed with the Financial Services Commission of Ontario ("FSCO") in the aggregate amount of $2,216,254.00 per month. Thereafter and through to September 30, 2010, Nortel shall make only current service payments to the Pension Plans (in accordance with the last actuarial valuation for the Pension Plans filed with FSCO) in the aggregate amount of $379,837.00 per month. For greater certainty, Nortel shall not be required to make any

special payment contributions to the Pension Plans after March 31, 2010. Nortel shall also make current service contributions in respect of defined contribution entitlements under the Nortel Networks Limited Managerial and Non-Negotiated Pension Plan (Registration No. 0342048) in accordance with the terms thereof, through to September 30, 2010 and shall not be precluded from doing so by the terms of the Amended and Restated Settlement Agreement. Nortel shall not be required to make any payments to the Pension Plans after September 30, 2010, except in respect of any claims in respect of the Pension Plans allowed against Nortel (which claims shall rank on a *pari passu* basis with the unsecured claims of the ordinary unsecured creditors of Nortel) pursuant to any claims adjudication procedure established in these proceedings. Neither Nortel, nor any Nortel Worldwide Entity shall have any liability regarding any contributions, fees, indemnities, charges or costs of any kind in respect of the administration of the Pension Plans that occurs after September 30, 2010. For greater certainty, nothing in this paragraph affects any obligation or liability of Nortel regarding any contributions, fees, indemnities, charges or costs of any kind in respect of the administration of the Pension Plans that occurs before 11:59 p.m. on September 30, 2010.

Health and Welfare Trust

10. **THIS COURT ORDERS AND DECLARES** that any HWT Claims made in these proceedings or in any subsequent receivership or bankruptcy proceedings, or in any other proceedings, or in any other forum whatsoever concerning Nortel, any Nortel Worldwide Entity or the HWT shall, to the extent they are allowed against Nortel pursuant to any claims adjudication procedure established in such proceedings, rank as ordinary unsecured claims on a *pari passu* basis with the claims of ordinary unsecured creditors of Nortel, and no part of any such HWT Claims shall rank as a preferential or priority claim or shall be the subject of a constructive trust or trust of any nature or kind.

11. **THIS COURT ORDERS AND DECLARES** that no person or entity, including without limitation, the Employee Claimants and the Representatives, shall, directly or indirectly (i) advance, assert, re-assert, re-file or make any HWT Claim in these proceedings or in any subsequent receivership or bankruptcy proceedings, or in any other proceedings, or in any other forum whatsoever concerning Nortel, any Nortel Worldwide Entity (to the extent

that such claims are provable) or the HWT except as an ordinary unsecured claim ranking on a *pari passu* basis with the claims of ordinary unsecured creditors of Nortel, or (ii) advance, assert, re-assert, re-file or make any claim that any HWT Claims are entitled to any priority or preferential treatment over ordinary unsecured claims, including without limitation that they rank as preferential or priority claims against Nortel or any Nortel Worldwide Entity, or are the subject of a constructive trust or trust of any nature or kind, and all such claims are hereby forever barred, enjoined, released and extinguished as against Nortel, any Nortel Worldwide Entity, the HWT and the trustee of the HWT, and their respective officers, directors, employees, agents, members, legal counsel, financial advisors and each of the heirs, executors, administrators, legal representatives, successors and assigns of each of the foregoing.

12. **THIS COURT ORDERS AND DECLARES THAT** nothing in this Order, including, without limiting the generality of the foregoing, the provisions of paragraphs 10 and 11, affects the determination on any basis whatsoever of the entitlement of any beneficiary to a distribution from the corpus of the HWT.

Release and Charge

13. **THIS COURT ORDERS** that the M&D Beneficiaries and former employees entitled to payment from the Termination Fund shall be entitled to the benefit of a charge on Nortel's Property (as defined in the Initial Order) to secure payment of the Medical and Dental Payments, Income Payments, Termination Payments and Pension Payments (the "Payments Charge"), which Payments Charge shall: (i) not exceed an aggregate amount of FIFTY-SEVEN MILLION DOLLARS ($57,000,000.00); (ii) rank subordinate in priority to the Inter-company Charge and the Shortfall Charge (as both terms are defined in the Initial Order); (iii) apply in these proceedings and in any subsequent bankruptcy or receivership; (iv) be reduced in amount as the Medical and Dental Payments, Income Payments, Termination Payments and Pension Payments are paid by an amount equal to each such payment made; and (v) automatically terminate and be extinguished on the filing with this Honourable Court by the Monitor of a certificate certifying that the terms of the Amended and Restated Settlement Agreement have been complied with by Nortel.

14. **THIS COURT ORDERS** that the Payments Charge shall constitute a "Charge" pursuant to the Initial Order, and shall be subject to the provisions relating to Charges including, without limitation, paragraphs 42 through 47 thereof and that the creation of the Payments Charge shall not preclude this Court from creating additional charges under the Initial Order that rank in priority to or *pari passu* with the Payments Charge.

15. **THIS COURT ORDERS AND DECLARES** that the Releasees, the CAW, the Representatives, and if and only if paragraphs 4, 5 and 6 apply as provided in paragraph 7, the Superintendent in his capacity as administrator of and on behalf of the PBGF, and their legal counsel and financial advisors and each of the heirs, executors, administrators, legal representatives, successors and assigns of each of the foregoing, be and they are hereby released, discharged and remised from any and all direct and indirect claims (contingent, liquidated or unliquidated, proven or unproven, known or unknown, in the nature of damages or otherwise, whether or not asserted and whether arising by contract, agreement (whether written or oral), under statute, civil law, common law, or in equity, or otherwise in any jurisdiction) related to (i) the Pension Plans, including without limitation, the administration of the Pension Plans, any obligation to assert or advance in these proceedings, or in any subsequent receivership or bankruptcy proceedings or in any other proceedings or in any other forum whatsoever concerning Nortel, any Nortel Worldwide Entity or the Pension Plans, any priority claim, as a trust (whether deemed or otherwise) or a lien or charge, the funding of the Pension Plans (including any obligation to contribute to the Pension Plans, except as required by paragraph 9 of this Order) and the investment of the Pension Plan assets, and (ii) the HWT, including without limitation, the administration of the HWT, the funding of the HWT, any obligation to contribute to the HWT and the investment of the HWT assets, provided that nothing herein shall release a director of Nortel from any matter referred to in subsection 5.1(2) of the CCAA or with respect to fraud on the part of any Releasee, with respect to that Releasee only.

16. **THIS COURT ORDERS AND DECLARES** that the Nortel Releasees be and they are hereby released, discharged and remised from any and all direct and indirect claims (contingent, liquidated or unliquidated, proven or unproven, known or unknown, in the nature of damages or otherwise, whether or not asserted and whether arising by contract, agreement

(whether written or oral), under statute, civil law, common law, or in equity, or otherwise in any jurisdiction) that the Pension Claims and the HWT Claims, or any part thereof, rank as a preferential or priority claim over the claims of ordinary unsecured creditors of Nortel, as a trust (whether deemed or otherwise) or a lien or charge, or under any other legal or equitable theory. For greater certainty, notwithstanding the foregoing, nothing in this Order shall release or discharge the Nortel Releasees from any Pension Claims and HWT Claims to the extent such claims are allowed as ordinary unsecured claims (which claims shall rank as on a *pari passu* basis with the unsecured claims of the ordinary unsecured creditors of Nortel) against the Nortel Releasees pursuant to any claims adjudication procedure established in these proceedings.

17. **THIS COURT ORDERS** that the Employee Claimants shall not assert, advance or make any claims of any nature whatsoever against any person or entity whatsoever that could reasonably be expected to result in a claim over (including, without limitation, a claim for contribution or indemnity) being made against any of the Releasees or Nortel Releasees with respect to the subject matter of the release provisions hereof.

CCAA Plan or Subsequent Bankruptcy

18. **THIS COURT ORDERS AND DECLARES** that under no circumstances shall any CCAA Plan of Arrangement in the Nortel proceedings (the "Plan") be proposed or approved by the Court if: (i) the Plan provides for separate classification of any Employee Claimants from ordinary unsecured creditors of Nortel, including, without limitation, bondholders and Nortel Networks Inc.; or (ii) the Employee Claimants and the other ordinary unsecured creditors do not receive the same *pari passu* treatment of their allowed claims against Nortel pursuant to the Plan.

SCHEDULE "A"

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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 *et al.*

Court File No: 09-CL-7950

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

SETTLEMENT APPROVAL ORDER

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CANADA

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Lawyers for the Applicants

SCHEDULE "C" TO AMENDED AND RESTATED SETTLEMENT AGREEMENT

[ATTACHED]

NORTEL

March 30, 2010

Pension Benefits Guarantee Fund (Ontario)
c/o Financial Services Commission of Ontario
4th Floor
5160 Yonge Street
Toronto, ON
M2N 6L9

Attention: K. David Gordon, Deputy Superintendent, Pensions

Dear Sirs:

Re: Court File No. 09-CL-7950
In the Matter of the Companies' Creditors Arrangement Act and Nortel Networks Corporation et al (Nortel")

This letter sets out, among other things, the understanding among Nortel, the Monitor and the Superintendent of Financial Services in his capacity as Administrator of the Pension Benefits Guarantee Fund concerning the administration of Nortel's registered pension plans (the "Pension Plans") and the transition of the Pension Plans to a new administrator, in order to provide for an orderly, cost effective transition that will be in the best interests of the members of the Pension Plans.

Defined terms used herein shall have the meaning given to them in the agreement made as of the 30th day of March, 2010 a copy of which is attached hereto as Schedule "A" (the "Amended and Restated Settlement Agreement"):

1. Conditional Understanding: It is acknowledged that the terms of this letter are conditional on (a) the Amended and Restated Settlement Agreement having been fully executed and delivered, and (b) the order of the Court approving the Amended and Restated Settlement Agreement having been issued and entered substantially in the form of the Order attached as Schedule "B".

2. Pension Plan Administration: Nortel will continue to administer the Pension Plans until September 30, 2010 at 11:59 p.m. Neither Nortel nor the Monitor will take any steps to initiate a wind up, in whole or in part, of the Pension Plans with an effective date prior to October 1, 2010. So long as Nortel is the administrator of the Pension Plans, there will be no change to the current asset mix, investment policies or the plan terms with respect to the Pension Plans without the consent of the Representative Counsel and the approval of the Court.

3. Pension Plan Transition: (a) Nortel will ensure that all books, records, data and other information relating to the Pension Plans or beneficial to the administration or winding-up of the Pension Plans are consolidated in Toronto, Ontario, Canada by no later than March 31, 2010; and (b) the Monitor and Nortel will take all reasonable steps, at the sole cost and expense of Nortel, to complete the orderly transfer of the administration of the Pension Plans to a new administrator appointed by the Superintendent effective October 1, 2010 (the "New Administrator").

4. Amended and Restated Settlement Agreement and Settlement Appoval Order: The Superintendent will not oppose the granting of an Order substantially in the form attached hereto as Schedule "B".

5. Employee Incentive and Director Charge Order: The Superintendent will not oppose the granting of a court order approving (a) any employee incentive program, including any charge therefor, that is determined by the Monitor to be reasonable and necessary for the continued operation of Nortel, or (b) the creation of a trust for persons who accept the directorship of Nortel worldwide subsidiaries in order to facilitate the restructuring, provided that: (i) such trust is approved and recommended by the Monitor; (ii) no part of the corpus of the trust may be used to pay bonuses or any other compensation to the directors; and (iii) any corpus of the trust remaining on the termination of the trust reverts to Nortel.

6. Directors: The Superintendent confirms that as of January 15, 2010, he is not aware of any claims against directors, officers or the Monitor, other than such claims as may arise as a result of the transfer of pension information and other records outside of Canada.

Please sign and return the copy of this letter attached.

Yours very truly,

attachments

\5812988

NORTEL NETWORKS CORPORATION

Per: _____
Name: John Doolittle
Title: Senior Vice-President, Corporate Services and Chief Financial Officer

Per: _____
Name: Clarke Glaspell
Title: Controller

NORTEL NETWORKS LIMITED

Per: _____
Name: John Doolittle
Title: Senior Vice-President, Corporate Services and Chief Financial Officer

Per: _____
Name: Clarke Glaspell
Title: Controller

NORTEL NETWORKS GLOBAL CORPORATION

Per: _____
Name: John Doolittle
Title: President

Per: _____
Name: Clarke Glaspell
Title: Controller

NORTEL NETWORKS INTERNATIONAL CORPORATION

Per: _____

Name: John Doolittle
Title: President

Per: _____

Name: Clarke Glaspell
Treasurer

NORTEL NETWORKS TECHNOLOGY CORPORATION

Per: _____

Name: Clarke Glaspell
Title: President and Controller

ERNST & YOUNG INC., solely in its capacity as monitor in the CCAA proceedings of Nortel and not in its personal capacity

Per: _____

Name:
Title:

SUPERINTENDENT OF FINANCIAL SERVICES OF ONTARIO as administrator of the Pension Benefits Guarantee Fund, without personal liability

Per: _____

Name:
Title:

NORTEL NETWORKS INTERNATIONAL CORPORATION

Per: _____
Name:
Title:

Per: _____
Name:
Title:

NORTEL NETWORKS TECHNOLOGY CORPORATION

Per: _____
Name:
Title:

ERNST & YOUNG INC., solely in its capacity as monitor in the CCAA proceedings of Nortel and not in its personal capacity

Per: _____
Name: Murray A. McDonald
Title: President

SUPERINTENDENT OF FINANCIAL SERVICES OF ONTARIO as administrator of the Pension Benefits Guarantee Fund. without personal liability

Per: _____
Name:
Title:

NORTEL NETWORKS INTERNATIONAL CORPORATION

Per: _____
Name:
Title:

Per: _____
Name:
Title:

NORTEL NETWORKS TECHNOLOGY CORPORATION

Per: _____
Name:
Title:

ERNST & YOUNG INC., solely in its capacity as monitor in the CCAA proceedings of Nortel and not in its personal capacity

Per: _____
Name: Murray A. McDonald
Title: President

SUPERINTENDENT OF FINANCIAL SERVICES OF ONTARIO as administrator of the Pension Benefits Guarantee Fund, without personal liability

Per: _____
Name: K David Gordon
Title: Deputy Superintendent, Pensions

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 *et al.*

Court File No: 09-CL-7950

ONTARIO
SUPERIOR COURT OF JUSTICE (COMMERCIAL LIST)

Proceeding commenced at Toronto

SETTLEMENT APPROVAL ORDER

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Fax: (416) 216-3930

Lawyers for the Applicants

TAB 16

2017 ONSC 700
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2017 CarswellOnt 1120, 2017 ONSC 700, 275 A.C.W.S. (3d) 692, 31 C.C.P.B. (2nd) 1, 44 C.B.R. (6th) 265

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, NOR TEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION and NORTEL NETWORKS TECHNOLOGY CORPORATION

Newbould J.

Heard: January 24, 2017
Judgment: January 30, 2017 *
Docket: 09-CL-7950

Counsel: Benjamin Zarnett, Jay A. Carfagnini, Joseph Pasquariello, Christopher G. Armstrong, for Monitor
Jennifer Starn, for Canadian Debtors
R. Paul Steep, for Morneau Sheppell and Canadian Creditors Committee
Mark Ziegler, Barbara Walancik, for Canadian former employees and LTD beneficiaries
Barry E. Wadsworth, for active, retired and disabled employees represented by Unifor
Max Starnino, for Pension Benefit Guarantee Fund
Matthew Urback, for Canadian continuing employees
Scott Bomhof, Adam Slavens, for U.S. Debtors
R. Shayne Kukulowicz, M. Wunder, for U.S. Unsecured Creditors' Committee
Michael E. Barrack, D.J Miller, for UKPC
Gavin H. Finlayson, for Ad Hoc Bondholders Group
John Salmas, for Wilmington Trust, National Association, Trustee
Joseph Greg McAvoy, for himself
Jennifer Holley, for herself

Subject: Constitutional; Insolvency; Human Rights

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous

Global telecommunications company with corporate entities in many jurisdictions (debtors) became insolvent — Canadian debtors were granted Companies' Creditors Arrangement Act protection — Dispute arose regarding $7.3 billion held in escrow after sale of debtors' assets, which involved protracted litigation in Canada and U.S. with various parties from multiple jurisdictions — Parties executed settlement and support agreement — Monitor brought motion to sanction Canadian debtors' plan of compromise and arrangement and to release escrowed sale proceeds in accordance with agreement — Motion granted — Plan sanctioned — Release of sale proceeds authorized in manner set out in agreement — Plan was fair and reasonable — Plan received approval from 99.7 percent of creditors and called for payment to creditors on pari passu basis, which was bedrock of Canadian insolvency law — Objections to approval of plan by long-term disability (LTD) beneficiaries were dismissed — LTD claimants were bound to prior agreement that their claims were to rank as unsecured claims that shared pari passu with other unsecured claims against Canadian

debtors and that any claim for priority treatment had been released — Plan was not contrary to ss. 7 and 15 of Charter of Rights and Freedoms with respect to LTD claimants.

Table of Authorities

Cases considered by *Newbould J.*:

B.C.G.E.U., Re (1988), [1988] 6 W.W.R. 577, 30 C.P.C. (2d) 221, [1988] 2 S.C.R. 214, 220 A.P.R. 93, 53 D.L.R. (4th) 1, 87 N.R. 241, 31 B.C.L.R. (2d) 273, 71 Nfld. & P.E.I.R. 93, 44 C.C.C. (3d) 289, 88 C.L.L.C. 14,047, 1988 CarswellBC 762, 1988 CarswellBC 363, 50 C.R.R. 397, 50 C.R.R. 397 (note) (S.C.C.) — considered

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

Canadian Airlines Corp., Re (2000), 2000 ABCA 238, 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, 266 A.R. 131, 228 W.A.C. 131 (Alta. C.A. [In Chambers]) — referred to

Canadian Airlines Corp., Re (2001), 2001 CarswellAlta 888, 2001 CarswellAlta 889, 275 N.R. 386 (note), 293 A.R. 351 (note), 257 W.A.C. 351 (note) (S.C.C.) — referred to

Cline Mining Corp., Re (2015), 2015 ONSC 622, 2015 CarswellOnt 3285, 23 C.B.R. (6th) 194 (Ont. S.C.J.) — referred to

Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580 (1986), 38 C.C.L.T. 184, 71 N.R. 83, *(*sub nom. *R.W.D.S.U. v. Dolphin Delivery Ltd.)* [1986] 2 S.C.R. 573, *(*sub nom. *R.W.D.S.U. v. Dolphin Delivery Ltd.)* 9 B.C.L.R. (2d) 273, *(*sub nom. *R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd.)* 87 C.L.L.C. 14,002, *(*sub nom. *R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd.)* [1987] 1 W.W.R. 577, *(*sub nom. *R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd.)* 33 D.L.R. (4th) 174, *(*sub nom. *R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd.)* 25 C.R.R. 321, [1987] D.L.Q. 69 (note), 1986 CarswellBC 411, 1986 CarswellBC 764 (S.C.C.) — distinguished

Nortel Networks Corp., Re (2010), 2010 ONSC 1977, 2010 CarswellOnt 2077, 66 C.B.R. (5th) 77 (Ont. S.C.J. [Commercial List]) — considered

Nortel Networks Corp., Re (2010), 2010 ONSC 5584, 2010 CarswellOnt 8462, 85 C.C.P.B. 161 (Ont. S.C.J. [Commercial List]) — considered

Nortel Networks Corp., Re (2015), 2015 ONSC 4170, 2015 CarswellOnt 10304, 27 C.B.R. (6th) 51 (Ont. S.C.J. [Commercial List]) — referred to

Nortel Networks Corp., Re (2011), 2011 ONCA 10, 2011 CarswellOnt 11, 86 C.C.P.B. 178 (Ont. C.A. [In Chambers]) — referred to

Nortel Networks Corp., Re (2011), 2011 CarswellOnt 4527, 2011 CarswellOnt 4528, 425 N.R. 390 (note) (S.C.C.) — 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, 1993 CarswellOnt 182 (Ont. Gen. Div.) — referred to

R. v. Rahey (1987), 75 N.R. 81, [1987] 1 S.C.R. 588, 39 D.L.R. (4th) 481, 78 N.S.R. (2d) 183, 33 C.C.C. (3d) 289, 57 C.R. (3d) 289, 33 C.R.R. 275, 193 A.P.R. 183, 1987 CarswellNS 340, 1987 CarswellNS 38 (S.C.C.) — considered

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Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 1 — considered

s. 2(b) — considered

s. 7 — referred to

s. 15 — referred to

s. 15(1) — considered
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 6 — considered

s. 6(a) — considered
Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44
s. 32 — considered

MOTION by Monitor to sanction Canadian debtors' plan of compromise and arrangement and to release escrowed sale proceeds in accordance with settlement and support agreement.

***Newbould J.*:**

1 On January 24, 2017, a joint hearing of this Court and the U.S. Bankruptcy Court for the District of Delaware was held to deal with motions for the sanctioning of plans of arrangement effecting a settlement by all major parties of the allocation dispute regarding the $7.3 billion held in escrow since the sale of the Nortel assets. At the conclusion of the hearing, I granted the motion of the Monitor to sanction the Canadian Debtors' Plan of Compromise and Arrangement (the "Plan") and to release the escrowed sale proceeds in accordance with the settlement, for reasons to follow [1] . These are my reasons.

Background

2 The Canadian Nortel Debtors, along with the U.S. Nortel Debtors, EMEA Nortel Debtors, and certain of their respective key stakeholder groups were party to protracted litigation in the Canada and U.S. regarding the allocation of the $7.3 billion in sale proceeds (the "Sale Proceeds"). Following a 21-day cross-border trial, this Court and the U.S. Bankruptcy Court issued decisions with respect to the allocation of the sale proceeds in May 2015. The decision of this Court later became final when the Ontario Court of Appeal refused leave to appeal. The decision of Judge Gross in the U.S. Bankruptcy Court was appealed by the U.S. interests to the 3rd Circuit District Court. Mediation was directed by that Court.

3 Following extensive negotiations, on October 12, 2016, the Canadian Debtors, Monitor, U.S. Debtors, EMEA Debtors, EMEA Non-filed Entities, Joint Administrators, NNSA Conflicts Administrator, French Liquidator, Bondholder Group, the members of the CCC, the UCC, the U.K. Pension Trustee, the PPF, the Joint Liquidators and the NNCC Bondholder Signatories executed the Settlement and Support Agreement. The Settlement and Support Agreement, among other things:

(a) contains the terms of settlement of the allocation dispute, including the payment of 57.1065% of the Sale Proceeds to the Canadian Debtors (being in excess of $4.1 billion), plus an additional amount of $35 million on account of the M&A Cost Reimbursement;

(b) resolves a number of significant claims against the Canadian Debtors, including the claims of the Crossover Bondholders, the UKPI and the Canadian Pension Claims;

(c) contemplates the substantive consolidation of the Canadian Debtors into the Canadian Estate;

(d) provides that the Canadian Estate will retain the value of its remaining assets, which means, among other things, the release to the Canadian Estate of approximately $237 million from the Canada Only Sales and additional amounts held on account of IP address sales;

(e) provides for the exchange of comprehensive releases among the Estates and the other parties to the Settlement and Support Agreement; and

(f) contains the framework for the development and implementation of coordinated plans of arrangement in Canada and the U.S., and a timeline for the approval and implementation thereof.

4 The Plan provides for a comprehensive resolution of these CCAA Proceedings and implementation of the Settlement and Support Agreement and paves the way for distributions to creditors in a timely manner. The Plan provides for, among other things, the following:

(a) substantive consolidation of the Canadian Debtors into the Canadian Estate;

(b) the payment in full of certain Proven Priority Claims and other payments contemplated by the Plan;

(c) a compromise of all Affected Unsecured Claims in exchange for a *pro rata* distribution of the cash assets of the Canadian Estate available for distribution to Affected Unsecured Creditors, and the full and final release and discharge of all Affected Claims;

(d) the subordination of Equity Claims such that Equity Claimants and holders of Equity Interests will not receive a distribution or other recovery under the Plan;

(e) authorization for the Canadian Debtors and Monitor to direct the Escrow Agents to effect the allocation and distribution of the Sale Proceeds contemplated by the Settlement and Support Agreement and to otherwise implement the Settlement and Support Agreement, including the giving and receiving of the Settlement and Support Agreement Releases;

(f) release of all amounts held by NNL pursuant to the Canadian Only Sale Proceeds Orders or held as Unavailable Cash to the Canadian Estate;

(g) the establishment of certain reserves for the ongoing administration of the Canadian Estate and in respect of Unresolved Claims; and

(h) the release and discharge of all Affected Claims and Released Claims as against, among others, the Canadian Debtors, the Directors and Officers and the Monitor.

5 On December 1, 2016, a meeting order was made which authorized the Monitor to call and hold a meeting of Affected Unsecured Creditors to consider and vote on the Plan. The Creditors' Meeting was held on January 17, 2017. The Plan was approved by an overwhelming majority of Affected Unsecured Creditors voting at the meeting in person or by proxy, with 99.97% in number and 99.24% in value voting to approve the Plan.

Analysis

6 Section 6 of the CCAA provides for a plan to be sanctioned by a court if approved by a vote of creditor as required by that section. It provides, in part:

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 or 5, or either of those sections, agree to any compromise or arrangement either as proposed or 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; ...

7 The general requirements for Court approval of a CCAA plan are well established:

a. there must be strict compliance with all statutory requirements;

b. all material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and

c. the plan must be fair and reasonable.

See *Canadian Airlines Corp., Re*, 2000 ABQB 442 (Alta. Q.B.) at para. 60, leave to appeal refused 2000 ABCA 238 (Alta. C.A. [In Chambers]), leave to appeal refused [2001] S.C.C.A. No. 60 (S.C.C.); *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.); *Cline Mining Corp., Re*, 2015 ONSC 622 (Ont. S.C.J.) at para. 19.

8 It is clear that there has been compliance with all statutory requirements and that nothing has been done or purported to be done which is not authorized by the CCAA. The meeting of creditors was properly called and held, a sufficient vote of creditors as required by section 6 of the CCAA was obtained and equity interests do not receive any payment under the Plan.

9 Whether a plan is fair and reasonable is necessarily shaped by the unique circumstances of each case within the context of the CCAA. See *Canadian Airlines* at para. 94. I am satisfied that the Plan in this case is fair and reasonable for the following reasons:

(i) The Plan was a compromise reached among all of the parties after extensive negotiations led by a very experienced mediator.

(ii) The Plan received approval from 99.7% of the creditors. This overwhelming number of creditors cannot be ignored as they are the only persons affected by the Plan. There is no equity participation as there is no equity in Nortel. I agree with what Blair. J. (as he then was) said in *Olympia & York Developments Ltd. v. Royal Trust Co.*;

> 36 One important measure of whether a plan is fair and reasonable is the parties' approval of the Plan, and the degree to which approval has been given.
>
> 37 As other courts have done, I observe that it is not my function to second guess the business people with respect to the "business" aspects of the Plan, descending into the negotiating arena and substituting my own view of what is a fair and reasonable compromise or arrangement for that of the business judgment of the participants. The parties themselves know best what is in their interests in those areas.

(iii) If the Plan is not sanctioned, the likely result will be further delays from litigation in the U.S. on the appeals from the allocation decision. Delays in payments to persons, whom Mr. Wadsworth aptly described as desperately needing the payments, would be very unfair.

(iv) Further litigation would add to the costs of the Nortel insolvency, costs which are already enormous, and take away amounts to be paid to the creditors, all of whom have approved the Plan.

(v) The Plan calls for payment to creditors on a *pari passu* basis, which is the bedrock of Canadian insolvency law.

(vi) The Plan calls for the substantive consolidation of the Canadian Debtors into a single estate. In this case, the consolidation is fair and reasonable. The Canadian Debtors were highly integrated and intertwined. Many obligations of a Canadian Debtor, including nearly $4 billion of bond debt, are guaranteed by another Canadian Debtor and the vast majority of claims filed against the Canadian Debtors by quantum have been asserted against

two or more of the Canadian Debtors. Substantive consolidation eliminates the possibility of any further litigation regarding the specific dollar amount that could be allocated to each Canadian Debtor.

(vii) The releases in the Plan in favour of each of the Canadian Debtors, the directors and officers, the Monitor and the Monitor's legal counsel, each of whom have been integrally involved in the CCAA Proceedings, are fair and reasonable, are directly connected to the objectives of the Plan, and assist in bringing finality to these long running proceedings. These releases have been approved by the relevant parties.

Objecting long term disability claimants

10 There are two LTD objectors being Mr. Greg McAvoy and Ms. Jennifer Holley. They are self-represented persons in this proceeding. They filed thoughtful submissions and made thoughtful oral presentations. They state that the Plan is unfair and unreasonable for the LTD Beneficiaries and have requested that $44 million be set aside and paid to the LTD Beneficiaries in full satisfaction of amounts owing to them. They raise *Charter* issues.

11 While I have every sympathy for these objectors, as do all of the parties who appeared and spoke at the hearing, I am afraid that they have no basis to make the request that they are making.

12 On July 30, 2009 a representation order ("LTD Rep Order") for disabled employees was made. Pursuant to the order an LTD representative, Ms. Susan Kennedy, was appointed as Representative of the LTD Beneficiaries in the CCAA proceedings, including, without limitation, for the purpose of settling or compromising claims by the LTD Beneficiaries in the CCAA proceedings. Pursuant to the LTD Rep Order, LTD Beneficiaries had the option to opt-out of representation by the LTD Rep within 30 days of mailing of notice of the LTD Rep Order to them in mid-2009. Neither of the LTD Objectors (or any other LTD Beneficiary) elected to opt out of representation by the LTD Rep pursuant to the terms of the LTD Rep Order and thus are bound by it and the actions of the LTD Rep.

13 In 2010, certain of the Canadian Debtors, the Monitor, the Representatives (including the LTD Rep) and Representative Counsel entered into an Amended and Restated Settlement Agreement dated March 30, 2010 (the "Employee Settlement Agreement") which was approved by this Court in its Settlement Approval Order dated March 31, 2010.

14 Pursuant to the Employee Settlement Agreement and the Settlement Approval Order:

(i) the Canadian Debtors agreed to continue paying LTD benefits to LTD Beneficiaries for the remainder of 2010;

(ii) the Canadian Debtors agreed to establish a CA$4.3 million fund pursuant to which CA$3,000 termination payments were made to former employees, including the LTD Objectors;

(iii) claims of LTD Beneficiaries were agreed to rank as ordinary unsecured claims on a *pari passu* basis with the claims of the ordinary unsecured creditors of the Canadian Debtors;

(iv) the Representatives (including the LTD Rep) agreed, on behalf of those they represent and on their own behalf, that in respect of any funding deficit in the HWT or any HWT related claims in these CCAA proceedings they would not advance, assert or make any claim that any HWT claims are entitled to any priority or preferential treatment over ordinary unsecured claims and that to the extent allowed against the Canadian Debtors, such HWT claims would rank as ordinary unsecured claims on a *pari passu* basis with the claims of the ordinary unsecured creditors of the Canadian Debtors;

(v) the Representatives (including the LTD Rep) agreed on their own behalf and on behalf of the Pension HWT Claimants (as defined in the Employee Settlement Agreement) that under no circumstances shall any CCAA plan be proposed or approved if, among other things, the Pension HWT Claimants and the other ordinary unsecured creditors of the Canadian Debtors do not receive the same *pari passu* treatment of their allowed ordinary unsecured claims against the Canadian Debtors pursuant to the Plan.

15 Certain LTD Beneficiaries, including the individual LTD Objectors, unsuccessfully sought leave to appeal the Settlement Approval Order to the Ontario Court of Appeal. The Settlement Approval Order is no longer capable of appeal. Accordingly, the LTD Objectors are bound to the provision that their claims are to rank as unsecured claims that share *pari passu* with other unsecured claims against the Canadian Debtors, that any claim for priority treatment has been released, and that no plan could be proposed or approved if the LTD Beneficiaries and other unsecured creditors did not receive the same *pari passu* treatment of their allowed claims pursuant to such plan.

16 The LTD Objectors in their brief stated that they exercise their option to opt out of the LTD Rep Order. Unfortunately, they have no right to do so at this late stage.

17 In making the Settlement Approval Order, Morawetz J. (as he then was) came to the conclusion that the settlement was fair and reasonable. He stated in *Nortel Networks Corp., Re* (2010), 66 C.B.R. (5th) 77 (Ont. S.C.J. [Commercial List]):

> 40 The Amended and Restated Settlement Agreement is not perfect but, in my view, under the circumstances, it balances competing interests of all stakeholders and represents a fair and reasonable compromise, and accordingly, it is appropriate to approve same.

18 That finding is binding of the LTD Objectors. However, they say that the adjustment that they request in order to make changes to the Plan requires a reconsideration of the Employee Settlement Agreement and the Settlement Approval Order. There is simply no legal basis seven years later to reconsider the matter. The grounds for reconsideration of a decision are narrow even when no order has been signed and taken out. See *Nortel Networks Corp., Re*, 2015 ONSC 4170 (Ont. S.C.J. [Commercial List]) at paras. 3-6.

19 In any event, I agree with the finding of Morawetz J. that the settlement was reasonable. The LTD Beneficiaries will receive the same *pari passu* treatment under the Plan as all other creditors. They are all treated equally, with each receiving exactly the same proportion of their entitlements. In insolvency, equal treatment premised on underlying legal entitlements is not unfair or unreasonable. To the contrary, it is a fundamental tenet of insolvency law.

20 The LTD Objectors say that the Plan as it pertains to them is contrary to sections 7 and 15 of the *Charter*.

21 It is argued by the LTD Rep that the *Charter* does not apply to the courts, reliance being placed on *Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580*, [1986] 2 S.C.R. 573 (S.C.C.) at paras. 34 and 36. In that case, the SCC declined to set aside an injunction on the basis that a court order does not constitute governmental action for the purposes of the *Charter* and stated that the judicial branch is not an element of governmental action for the purposes of the *Charter*. It said that the word "government" in section 32 of the *Charter* referred to the legislative, executive, and administrative branches of government.

22 However, there are other cases in the SCC that say otherwise. In *R. v. Rahey*, [1987] 1 S.C.R. 588 (S.C.C.), the SCC held that an unreasonable delay by the trial judge in deciding on an application for a directed verdict by the accused at the close of the Crown's case had denied to the accused the section 11(b) right to be tried within a reasonable time, and stayed the proceedings. In *Rahey*, of the four judges who wrote opinions, only La Forest J. averted to the point of the *Charter* applying to a court. He stated:

> 95 ...it seems obvious to me that the courts, as custodians of the principles enshrined in the *Charter*, must themselves be subject to *Charter* scrutiny in the administration of their duties. In my view, the fact that the delay in this case was caused by the judge himself makes it all the more unacceptable both to the accused and to society in general.

23 In *B.C.G.E.U., Re*, [1988] 2 S.C.R. 214 (S.C.C.), the SCC refused to set aside an injunction ordered by the Chief Justice of British Columbia against picketing outside the court that had been made without notice to the union because

although the injunction contravened the section 2(b) right to freedom of expression, it was justified by section 1. Chief Justice Dickson distinguished *Dolphin* as follows:

> 56 As a preliminary matter, one must consider whether the order issued by McEachern CJ.S.C. is, or is not, subject to *Charter* scrutiny. *RWDSU v. Dolphin Delivery*, [1986] 2 S.C.R. 573, holds that the *Charter* does apply to the common law, although not where the common law is invoked with reference to a purely private dispute. At issue here is the validity of a common law breach of criminal law and ultimately the authority of the court to punish for breaches of that law. The court is acting on its own motion and not at the instance of any private party. The motivation for the court's action is entirely "public" in nature, rather than "private". The criminal law is being applied to vindicate the rule of law and the fundamental freedoms protected by the *Charter*. At the same time, however, this branch of the criminal law, like any other, must comply with the fundamental standards established by the *Charter*.

24 In dealing with these three decisions, Professor Hogg has stated that while it is impossible to reconcile the definition of "government" in *Dolphin* with the decisions in *Rahey* and *B.C.G.E.U.*, the cases can be accommodated. See Hogg, Peter W. *Constitutional Law of Canada*, 5th ed. supplemented Thomson: Carswell, 2007 at § 37-22. He states:

> The *ratio decidendi* of Dolphin Delivery must be that a court order, when issued as a resolution of a dispute between private parties, and when based on the common law, is not governmental action to which the *Charter* applies. And the reason for the decision is that a contrary decision would have the effect of applying the *Charter* to the relationships of private parties that s. 32 intends to exclude from *Charter* coverage. Where, however a court order is issued on the court's own motion for a public purpose (as in *BCGEU*), or in a proceeding to which government is a party (as in any criminal case, such as *Rahey*), or in a purely private proceeding that is governed by statute law, then the *Charter* will apply to the court order.

25 In this case, the proceedings are being taken under the CCAA and the discretionary power of a court to sanction a plan is contained in section 6 of that statute. While it is not strictly necessary for me to decide whether the *Charter* applies to such an order in light of the view that I take of the section 7 and 15 rights asserted by the LTD Objectors, I accept that any order I make to sanction the Plan may be subject to the *Charter*.

26 There is another issue, however, regarding the right of the LTD Objectors to raise a *Charter* challenge. They were represented by competent counsel in 2010 on the motion to approve the Employee Settlement Agreement. They did not raise any *Charter* challenge to that agreement before Morawetz J. or in the Court of Appeal on their application to appeal from the Settlement Approval Order made by Morawetz J. So far as the LTD benefits are concerned, the Plan merely contains the provisions for them in the Employee Settlement Agreement. Issue estoppel prevents the LTD Objectors from now raising a *Charter* challenge to those provisions.

27 Section 7 of the *Charter* provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

28 What the LTD Objectors seek is to have the allocation proceeds re-allocated by providing that 100% of the claims of the LTD Beneficiaries will be paid from the Sale Proceeds at the expense of all other claimants. This involves their economic interests which are not protected by section 7 of the *Charter*. In *Siemens v. Manitoba (Attorney General)* (2002), [2003] 1 S.C.R. 6 (S.C.C.) Justice Major for the Court stated:

> 45 The appellants also submitted that s. 16 of the VLT Act violates their right under s. 7 of the Charter to pursue a lawful occupation. Additionally, they submitted that it restricts their freedom of movement by preventing them from pursuing their chosen profession in a certain location, namely, the Town of Winkler. However, as a brief review of this Court's Charter jurisprudence makes clear, the rights asserted by the appellants do not fall within the meaning of s. 7. The right to life, liberty and security of the person encompasses fundamental life choices, not pure economic interests. As La Forest J. explained in *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, at para. 66:

> ... the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence.

More recently, *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, concluded that the stigma suffered by Mr. Blencoe while awaiting trial of a human rights complaint against him, which hindered him from pursuing his chosen profession as a politician, did not implicate the rights under s. 7. See Bastarache J., at para. 86:

> The prejudice to the respondent in this case ... is essentially confined to his personal hardship. He is not "employable" as a politician, he and his family have moved residences twice, his financial resources are depleted, and he has suffered physically and psychologically. However, the state has not interfered with the respondent and his family's ability to make essential life choices. To accept that the prejudice suffered by the respondent in this case amounts to state interference with his security of the person would be to stretch the meaning of this right.

29 Professor Hogg in *Constitutional Law of Canada* at §47.9 makes clear that purely economic interests are not protected by section 7. He states:

> Section 7 protects "life, liberty and security of the person". The omission of property from s. 7 was a striking and deliberate departure from the constitutional texts that provided the models for s. 7. ...
>
> The omission of property rights from s. 7 greatly reduces its scope. It means that s. 7 affords no guarantee of compensation or even of a fair procedure for the taking of property by government. It means that s. 7 affords no guarantee of fair treatment by courts, tribunals or officials with no power over the purely economic interests of individuals or corporations. It also requires, as have noticed in the earlier discussion of "liberty" and "security of the person", that those terms be interpreted as excluding economic liberty and economic security; otherwise property, having been shut out of the front door, would enter by the back.

30 What is in play in this case are pure economic rights among the creditors of Nortel and the request of the LTD Objectors to be compensated by the other Nortel creditors. There is authority that a plan of compromise or arrangement is simply a contract between the debtor and its creditors. See *Olympia & York Developments Ltd. v. Royal Trust Co.* at para. 74.

31 Section 7 does not assist the LTD Objectors in their request for unequal treatment for unequal treatment.

32 Section 15 of the *Charter* provides:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

33 In this case, it cannot be said that the LTD Objectors are being deprived of these section 15 rights because of discrimination based on physical disability. They are being treated like all creditors of Nortel. All unsecured creditors, be they bondholders, trade creditors, pensioners or LTD Beneficiaries, will receive the same *pari passu* treatment under the Plan. They are treated equally, with each receiving exactly the same proportion of their entitlements. In insolvency, equal treatment premised on underlying legal entitlements is not unfair or unreasonable. To the contrary, it is the fundamental tenet of insolvency law. Except for the two LTD Objectors, all other LTD Beneficiaries, in excess of 300 in number, accept this equal treatment.

34 LTD Beneficiaries have been treated in the same manner as all similarly situated creditors, without discrimination. Pensioners, their beneficiaries, surviving spouses of deceased employees, Former Employees and LTD Beneficiaries are

all unsecured creditors who are experiencing hardship due to lost income and benefits in the Nortel insolvency. All are disadvantaged to varying degrees, depending on personal circumstances and there is no basis for preferring one group above others. All have suffered losses in the Nortel insolvency. This was recognized by Justice Morawetz in 2010 when the Monitor applied for an order for distribution of the assets of the HWT (from which benefits were paid to beneficiaries, including the LTD Beneficiaries), on a *pari passu* basis. That was opposed by the LTD Objectors. In his decision of November 9, 2010 accepting the position of the Monitor at *Nortel Networks Corp., Re*, 2010 ONSC 5584 (Ont. S.C.J. [Commercial List]), Justice Morawetz said:

> 110 As I have indicated above, there is no question that the impact of the shortfall in the HWT is significant. This was made clear in the written Record, as well as in the statements made by certain Dissenting LTD Beneficiaries at the hearing. However, the effects of the shortfall are not limited to the Dissenting LTD Beneficiaries and affect all LTD Beneficiaries and Pensioner Life claimants. The relative hardship for each claimant may differ, but, in my view, the allocation of the HWT corpus has to be based on entitlement and not on relative need. [2]

35 In the circumstances, I cannot find any breach of section 15 of the *Charter*.

Conclusion

36 For the foregoing reasons, I have sanctioned the Plan and made an order authorizing and directing the release of the Sale Proceeds from the Escrow Accounts in the manner contemplated by the Settlement and Support Agreement.

Motion granted.

Footnotes

* A corrigendum issued by the court on March 1, 2017 has been incorporated herein.

1 Judge Gross also sanctioned the U.S. plan of arrangement and signed at the hearing the necessary orders to effect the plan.

2 Leave to appeal to the C of A denied 2011 ONCA 10 (Ont. C.A. [In Chambers]); leave to appeal to the SCC [2011] S.C.C.A. No. 124 (S.C.C.).

TAB 17

2018 ONSC 6257
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corporation (Re)

2018 CarswellOnt 18952, 2018 ONSC 6257, 298 A.C.W.S. (3d) 238, 64 C.B.R. (6th) 278

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, NORTEL COMMUNICATIONS INC., ARCHITEL SYSTEMS CORPORATION AND NORTHERN TELECOM CANADA LIMITED (Applicants)

G.B. Morawetz R.S.J.

Heard: October 17, 2018
Judgment: October 23, 2018
Docket: CV-09-7950-00CL

Counsel: Christopher Armstrong, for Monitor, Ernst & Young Inc.
Scott Bomhof, for US Debtors, Nortel Networks Inc. et al.
Jeffrey Spiegelman, for Apex Logistics
Paul McCullough, for Ministry of the Environment, Conservation and Parks

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

Monitor of Canadian debtors brought motion for order approving two property settlement agreements in relation to proceedings under Companies' Creditors Arrangement Act — Motion granted — Releases contemplated by proposed orders were fair and reasonable and satisfied guidelines set by court — Releases were necessary and connected to resolution of claims against Canadian debtors and once implemented, represented final resolution of all issues pertaining to both properties — Settlements followed on years of negotiations among relevant parties — As proceedings had been ongoing for nearly one decade, potential claimants had been given every opportunity to assert claims against Canadian debtors and their former directors and officers — Requested third party relief was inextricably linked to resolution of environmental claims against Canadian Estates and would ensure closure in respect of both properties — Closure would allow monitor to reduce significant administrative and unsecured claims and reserves that were established in respect of Canadian debtors' potential environmental liabilities which would facilitate further distribution to creditors — Proposed releases were neither over broad nor offensive to public policy.

Table of Authorities

Cases considered by *G.B. Morawetz R.S.J.*:

Grace Canada Inc., Re (2008), 2008 CarswellOnt 6284, 50 C.B.R. (5th) 25 (Ont. S.C.J. [Commercial List]) — followed

Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp. (2013), 2013 ONSC 1078, 2013 CarswellOnt 3361, 100 C.B.R. (5th) 30, 37 C.P.C. (7th) 135 (Ont. S.C.J. [Commercial List]) — followed

Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp. (2013), 2013 CarswellOnt 15064 (S.C.C.) — referred to

Nortel Networks Corp., Re (2010), 2010 ONSC 1708, 2010 CarswellOnt 1754, 81 C.C.P.B. 56, 63 C.B.R. (5th) 44 (Ont. S.C.J. [Commercial List]) — followed

Sino-Forest Corp., Re (2013), 2013 ONCA 456, 2013 CarswellOnt 8896 (Ont. C.A.) — referred to

Statutes considered:

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

Generally — referred to

s. 5.1(2) [en. 1997, c. 12, s. 122] — referred to

MOTION by Monitor of Canadian debtors or order approving two property settlements in relation to proceedings under *Companies' Creditors Arrangement Act*.

***G.B. Morawetz R.S.J.*:**

1 At the conclusion of the hearing on October 17, 2018, I granted the motion with reasons to follow. These are the reasons.

2 Ernst & Young Inc., in its capacity as monitor (the "Monitor") of the Canadian Debtors brought a motion for:

a. an order (the "MECP Belleville Settlement Order") approving the Belleville Property Settlement Agreement (MECP) dated October 10, 2018 among Her Majesty the Queen in Right of Ontario as Represented by the Minister of the Environment, Conservation and Parks ("MECP"), Nortel Networks Limited ("NNL") and the Monitor (the "MECP Belleville Settlement"); and

b. an order (the "Brockville Settlement Order") approving the Brockville Property Settlement Agreement dated April 2, 2018, among SCI Brockville Corporation ("SCI"), Sanmina Corporation, NNL and the Monitor, as amended by the Amendment to Brockville Property Settlement Agreement dated October 11, 2018 (the "Brockville Settlement").

3 In addition to the MECP Belleville Settlement and the Brockville Settlement, NNL and the Monitor have also entered into settlements regarding all other claims asserted against the Canadian Debtors relating to the Belleville Property and the Brockville Property (each as defined below).

4 The Monitor reports that the MECP Belleville Settlement, the Brockville Settlement and the other settlements are the result of extensive good faith, arms-length negotiations among the Canadian Debtors, the Monitor, MECP, SCI and various other environmental stakeholders that have been carried out over the past several years in an attempt to reach a consensual resolution regarding environmental matters pertaining to the Belleville Property and the Brockville Property and the Director's Orders in respect thereof.

5 The Monitor reports that the settlements provide significant benefits to the Canadian Debtors and their stakeholders by crystalizing the liabilities of NNL, which in turn allows for a reduction of related reserves and facilitates a further distribution to creditors.

6 Although the Director's Orders vary on a case by case basis, each required NNL to prepare, seek MECP approval of, and implement a remediation work plan for the particular Property or portions thereof.

7 In addition to the Director's Orders, various proofs of claim totaling in excess of Cdn. $230 million were filed against the Canadian Debtors asserting claims with respect of the environment impacts that the various properties and, in some cases, lands adjacent thereto by various third parties. In addition, the MECP also filed an Omnibus Proof of Claim against NNL in respect of costs of remediating environmental impacts related to the properties for Cdn. $100 million (the "MECP Claims").

8 Excluding the MECP Claims, the filed claims relating to the Belleville Property and the Brockville Property total approximately $142 million and $35 million, respectively.

9 Nortel's Plan of Compromise and Arrangement (the "Plan") received court approval in 2017. In light of the implementation of the Plan in May 2017, the Canadian Debtors and Monitor communicated to the MECP and other environmental stakeholders that, in order to facilitate the wind-down of the Canadian Estates and distributions to creditors, final resolutions of the Belleville Property and Brockville Property environmental claims was required in the near term.

10 On October 1, 2018, counsel to the Monitor advised that all claims relating to the Belleville Property and the Brockville Property had been resolved and that the parties were in the process of finalizing documentation.

11 The proposed MECP Belleville Settlement provides for the full and final settlement of all matters at issue among NNL, the Monitor and the MECP with respect to the Belleville Property, including the Director's Order related to the Belleville Property and the MECP Claim.

12 The principle terms of the MECP Settlement provide that on the effective date, the parties agree that MECP shall have a Proven, Affected, Unsecured Claim against the Canadian Estates under the Plan in the amount of Cdn. $3,500,000. On the effective date, MECP releases the Canadian Debtors, the Monitor and related parties from all claims the MECP in any way have arising out of or connected to the Belleville Property and all manner or regulatory actions and any liability arising therefrom. Further, from and after the date of the MECP Belleville Settlement, none of the released parties shall be required to perform or satisfy any environmental obligations in connection with the subject property.

13 The parties brought to the Court's attention that the MECP Belleville Settlement is subject to the satisfaction or waiver of certain conditions precedent, including: (i) court approval; and (ii) the Director's Orders shall have been revoked against NNL and a withdrawal of the NNL appeal of the Director's Orders shall be accepted and the NNL appeal dismissed by order of the Environmental Review Tribunal (the "ERT").

14 A hearing to have the Director's Orders revoked as against NNL by order of the ERT is scheduled for October 23, 2018.

15 In addition to the MECP Belleville Settlement, NNL and the Monitor also entered into settlement agreement with each of the three other claimants who asserted claims relating to the Belleville Property. The three settlements are for proven, unsecured claims aggregating approximately Cdn. $3 million, include comprehensive releases in favour of the Canadian Debtors and are conditional upon the revocation of the Belleville Property Director's Order against NNL and the withdrawal of the NNL appeal by the Director's Order by final order of the ERT.

16 The Monitor advises that the individual claimants have received claims based upon alleged damages specific to them and unlike the MECP, do not have a claim in relation to the remediation of the Belleville Property. As a result, the Monitor is satisfied that the various claims accepted relating to the Belleville Property comply with the rule against double proofs.

17 With respect to the Brockville Property, a former wholly-owned subsidiary of NNL was the owner of the Brockville Property until 1999 when the issued and outstanding shares of the subsidiary were sold to a predecessor to SCI. At the time of the sale, the Brockville Property was subject to certain environmental impacts. In connection with the sale, NNL agreed to indemnify SCI against certain environmental liabilities. Following the CCAA filing, NNL ceased to perform any remedial work at the Brockville Property effective April 23, 2012. SCI filed a Proof of Claim against NNC asserting a claim of approximately $21.2 million, plus Cdn, $254,206.97 (the "SCI Claim"). Apex Logistics Inc. ("Apex"), the current owner of the Brockville Property, also filed a Proof of Claim in the amount of Cdn. $16,500,000.

18 The proposed Brockville Settlement provides for a full and final settlement of all matters among NNL, the Monitor, SCI and Sanmina Corporation, including the Director's Order relating to the Brockville Property and the Proof of Claim filed by SCI. The principle terms of the settlement provide that the parties agree that SCI shall have a Proven, Effected, Unsecured Claim against the Canadian Estates in the amount of Cdn. $10,735,000 (the "SCI Proven Claim"). Further,

SCI agrees that it will perform any and all investigatory and remediation work in respect of the Brockville Property as may be required by the MECP and, on the effective date, this Sanmina parties will release the Canadian Debtors, the Monitor and their related parties from all claims the Sanmina parties may have in respect of the Brockville Property.

19 Settlement is subject to certain conditions precedent including: (i) court approval; (ii) the Director's Orders shall have been irrevocably withdrawn against NNL by order of the ERT; (iii) the MECP consents to the Brockville Settlement, irrevocably withdraws the MECP Claim and delivers an executed release to the Canadian Debtors; and (iv) Apex consents to the settlement, irrevocably withdraws its Proof of Claim and delivers and executed release to the Canadian Debtors. The MECP has executed a consent to the Brockville Settlement and release pursuant to which, in exchange for payment of Cdn. $10, the MECP consents to the Brockville Settlement, agrees to take steps necessary to ensure that the Director's Order as against NNL is revoked, and on the effective date irrevocably withdraws the MECP Claim and delivers a release to the Canadian Debtors and the Monitor.

20 The Monitor also advises that NNL and the Monitor have reached a settlement agreement with Apex to settle Apex's Proof of Claim in exchange for acceptance of a general unsecured claim against NNL in the amount of Cdn. $250,000.

21 Finally, a hearing date of the Director's Order revoked as against NNL is scheduled for October 22, 2018.

22 Further, the NNL and the Monitor have also entered into agreement with the MECP and Apex relating the Brockville Property. The settlement has been structured such that SCI has received a claim that relates to the historic and future anticipated costs to perform investigatory remediation work at the Brockville Property, whereas Apex received a claim based upon alleged loss specific to it, but not in relation to the remediation. As a result, the monitor is satisfied that the various claims accepted relating to the Brockville Property comply with the rules against double proofs.

23 The Monitor has recommended approval of the MECP Belleville Settlement and the Brockville Settlement.

24 When approving a settlement under the CCAA, the court must be satisfied that:

(i) The transaction is fair and reasonable;

(ii) The transaction would be beneficial to the debtor and its stakeholders generally; and

(iii) The settlement is consistent with the purpose and spirit of the CCAA (see: *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.*, 2013 ONSC 1078 (Ont. S.C.J. [Commercial List]) at para. 49, leave to appeal to CA refused, 2013 ONCA 456 (Ont. C.A.), leave to appeal to SCC refused [2013] S.C.C.A. No. 395 (S.C.C.)).

25 The Monitor submits that both settlements will provide significant benefit to the Canadian Debtors and their stakeholders and assist in advancing these proceedings. In particular, the settlements will provide certainty in respect of the Canadian Debtors environmental liabilities by crystalizing the liabilities of NNL, which in turn will allow for the reduction of related reserves and facilitate a further distribution to creditors.

26 Counsel to the Monitor points out that, over the past several years, the Canadian Debtors and the Monitor have worked with the MECP and other environmental stakeholders an interested parties in good faith in an attempt to reach a consensual and final resolution in respect of the Director's Orders, the ERT proceedings and the various claims asserted against NNL in the CCAA proceedings. I am satisfied that both settlements have been arrived at following the exchange of significant information in respect of the claim and following an extensive negotiation process among the parties.

27 I am also satisfied that the Monitor has a thorough understanding of the issues involved and in such circumstances I am prepared to place significant weight on the recommendation of the Monitor in support of the settlement.

28 The proposed form of orders provide a court ordered release of the "released parties" from any liability to any person in respect of the Belleville Property and the Brockville Property, respectively, save for:

(i) the claims that have been accepted by the Monitor under the MECP Belleville Settlement, the Brockville Settlement and the other settlements; and

(ii) any claim that is not permitted to be released pursuant to s. 5.1(2) of the CCAA or with respect to fraud on the part of any released party.

29 The "released parties" include the Canadian Debtors, the Monitor (both in its capacity as Monitor and in its personal capacity) and each of their respective counsel and former affiliates, directors, officers, employees, agents, trustees, beneficiaries, lawyers, personal representatives and authorized representatives.

30 I note that courts have previously approved and granted releases, in favour of third parties, in connection with court approved settlement agreements and specifically, the court has granted a release similar to the requested releases in connection with the approval of the settlement pertaining to the London Property (see *Nortel Networks Corp., Re*, 2010 ONSC 1708 (Ont. S.C.J. [Commercial List]); *Grace Canada Inc., Re* (2008), 50 C.B.R. (5th) 25 (Ont. S.C.J. [Commercial List]);, and London Settlement Agreement Order dated November 28, 2017 (Court File No.: 09-CL-7950).

31 In *Nortel Networks, (Re)*, the court determined that a settlement agreement containing a third-party release would be found to be fair and reasonable where the release (1) is necessary and connected to a resolution of claims against the debtor, (2) will benefit creditors generally, and (3) is not overly broad or offensive to public policy (see *Nortel*, *supra* at para. 79 and *Grace*, *supra* at para. 40).

32 I am satisfied in these circumstances that the releases contemplated by the proposed orders are fair and reasonable and satisfy the guidelines set by the court in *Nortel* and *Grace*.

33 In arriving at this conclusion, I am satisfied that the releases are necessary and connected to a resolution of claims against the Canadian Debtors and once implemented, represent a final resolution of all issues pertaining to the Belleville Property and the Brockville Property with respect to the CCAA proceedings.

34 It is noted that the settlements follow on years of negotiations among the relevant parties. The Nortel proceedings have been ongoing for nearly a decade and I am satisfied that potential claimants have been given every opportunity to assert claims against the Canadian Debtors and their former directors and officers, including in respect of alleged environmental liabilities. In these circumstances, the granting of the relief sought is both fair and reasonable and will ensure finality with respect to these claims against the Canadian Estates.

35 I also note that in addition to owners or former owners of property, environmental legislation permits the MECP to issue orders against a person who has or had "management or control" of a property, for example, former directors and officers. If pursued by the MECP, such persons could, in turn, assert claims for indemnity against the Canadian Debtors. As the settlements are intended to represent a final settlement of the liability of the Canadian Estates in relation to the Belleville Property and the Brockville Property, I am satisfied that the requested third party relief is inextricably linked to the resolution of environmental claims against the Canadian Estates and will ensure closure in respect of the Belleville Property and the Brockville Property.

36 This closure will allow the Monitor to reduce the significant administrative and unsecured claims and reserves that were established in respect of the Canadian Debtors, potential environmental liabilities, which in turn facilitates the further distribution to creditors. As such, the proposed relief will also benefit creditors generally.

37 I am also satisfied that the proposed releases are neither over broad nor offensive to public policy. As in *Nortel*, *supra*, the claims being released specifically relate to the subject matter of the agreement and the party granting the release received consideration in respect thereof. The releases sought are specifically tied to potential liabilities to the Canadian Debtors and their related parties and the claimants are receiving significant consideration in the form of unsecured claims totally approximately Cdn. $17.5 million. In my view, the relief sought is narrowly tailored to the specific subject matter

and is not overly broad or offensive to public policy. Moreover, in my view, the releases do not purport to release any liability that cannot be released under s. 5.1(2) of the CCAA or any liability for fraud, and as such, are appropriately tailored.

38 In the result, the requested relief is granted and the MECP Belleville Settlement Order and the Brockville Settlement Order have been signed in the form submitted.

Motion granted.

TAB 18

Court File No. CV-17-11846-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR. JUSTICE HAINEY	)	THURSDAY, THE 13TH DAY OF JULY, 2017

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 SEARS CANADA INC., CORBEIL ÉLECTRIQUE INC., S.L.H. TRANSPORT INC., THE CUT INC., SEARS CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM TRADING AND SOURCING CORP., SEARS FLOOR COVERING CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741 CANADA INC., 10011711 CANADA INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD., 4201531 CANADA INC., 168886 CANADA INC., AND 3339611 CANADA INC.
(each, an "**Applicant**", and collectively, the "**Applicants**")

ORDER
(Suspension of Special Payments, Supplemental Plan Payments and PRB Plan Payments, Approval of the Term Sheet and Stay Extension)

THIS MOTION, made by the Applicants pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), for an order, *inter alia*: (i) authorizing the suspension of the Special Payments (as defined below); (ii) approving the suspension of the Supplemental Plan Payments (as defined below); (iii) approving the suspension of the PRB Plan Payments (as defined below); (iv) declaring that the directors, officers, officials and agents of the Applicants and SearsConnect (the "**Partnership**" and collectively with the Applicants, the "**Sears Canada Entities**") shall not incur any liability as a result of the failure of the Sears Canada Entities to make any of the Special Payments during the Stay Period (as

defined below), and during any extension of same; (v) approving the Term Sheet (as defined below); and (vi) extending the Stay Period to and including October 4, 2017, and certain related relief, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion of the Applicants, the Affidavit of Billy Wong sworn July 5, 2017 including the exhibits thereto (the "**Second Wong Affidavit**"), the First Report of FTI Consulting Canada Inc., in its capacity as Monitor (the "**Monitor**"), and the Supplement to the First Report of the Monitor (the "**Supplemental Report**"), filed, and on hearing the submissions of respective counsel for the Sears Canada Entities, counsel to the Monitor, counsel to the Board of Directors and the Special Committee of the Board of Directors of Sears Canada Inc., counsel to Wells Fargo Capital Finance Corporation Canada as administrative agent under the DIP ABL Credit Agreement, counsel to GACP Finance Co., LLC as administrative agent under the DIP Term Credit Agreement, and such other counsel as were present, no one else appearing although duly served as appears from the Affidavits of Service of Sonja Pavic sworn July 6, 2017, filed:

SERVICE AND DEFINITIONS

1. THIS COURT ORDERS that the time for service of the Notice of Motion and the Motion Record herein is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

2. THIS COURT ORDERS that any capitalized term used and not defined herein shall have the meaning ascribed thereto in the Second Wong Affidavit.

SUSPENSION OF SPECIAL PAYMENTS

3. THIS COURT ORDERS that the obligation of the Sears Canada Entities to make special payments (whether pursuant to the Ontario *Pension Benefits Act*, RSO 1990, c. P-8 and regulations made thereunder or to the terms of the Sears Pension Plan) in respect of the defined benefit component of the Sears Pension Plan (such payments being the "**Special Payments**"), shall be suspended effective on and after October 1, 2017, for the duration of the Sears Canada Entities' CCAA proceedings (the "**CCAA Proceedings**"), subject to further Order of this Court. For greater certainty, the obligations of the Sears Canada Entities to make Special Payments prior to October 1, 2017 are expressly subject to the terms set forth in the Term Sheet, and the

suspension of Special Payments hereunder does not constitute a disclaimer or termination by the Sears Canada Entities of any component of the Sears Pension Plan.

4. THIS COURT ORDERS that for the duration of the CCAA Proceedings, no Person (as defined in the Initial Order), including employees and former employees of the Sears Canada Entities (or the surviving spouse of any such person) entitled to a benefit under the defined benefit component of the Sears Pension Plan (whether or not such member was represented by a union when the member was employed by the Sears Canada Entities) (the "**Retirees**") or the Superintendent of Financial Services, shall commence any action or other proceeding in connection with the suspension of the Special Payments or because the Sears Canada Entities have not made the Special Payments.

5. THIS COURT ORDERS that the Sears Canada Entities and each of their respective directors, officers, officials, and agents shall not incur any obligation or liability, whether by way of debt, damages for breach of any duty whether statutory, fiduciary, common law or otherwise, or for breach of trust, nor shall any trust be imposed, whether express, implied, constructive, resulting, deemed or otherwise, as a result of the suspension of the Special Payments in accordance with the terms of this Order.

6. THIS COURT ORDERS that if any claim, lien, charge or trust, including deemed trust, arises as a result of the suspension of the Special Payments, no such claim, lien, charge or trust, including deemed trust, shall have priority over the Charges (as defined in the Initial Order) in these CCAA Proceedings, or in any subsequent receivership, interim receivership or bankruptcy of the Sears Canada Entities.

SUSPENSION OF SUPPLEMENTAL PLAN PAYMENTS

7. THIS COURT ORDERS that the obligation of the Sears Canada Entities to make (i) any payments in respect of the Supplemental Plan to the Post-2010 SP Pensioners and (ii) any payment required in respect of any SP Shortfall Amounts in respect of the Pre-2010 SP Pensioners (collectively, such payments being the "**Supplemental Plan Payments**"), shall be suspended effective on and after October 1, 2017, for the duration of the CCAA Proceedings, subject to further Order of this Court. For greater certainty, the obligations of the Sears Canada Entities to make Supplemental Plan Payments prior to October 1, 2017 are expressly subject to

the terms set forth in the Term Sheet, and the suspension of Supplemental Plan Payments, hereunder does not constitute a disclaimer or termination by the Sears Canada Entities of the Supplemental Plan.

8. THIS COURT ORDERS that for the duration of the CCAA Proceedings, no Person, including employees and former employees of the Sears Canada Entities (or the surviving spouse of any such person) entitled to a benefit under the Supplemental Plan (whether or not such member was represented by a union when the member was employed by the Sears Canada Entities) shall commence any action or other proceeding in connection with the suspension of the Supplemental Plan Payments or because the Sears Canada Entities have not made the Supplemental Plan Payments.

SUSPENSION OF PRB PLAN PAYMENTS

9. THIS COURT ORDERS that the obligation of the Sears Canada Entities to make any payments in respect of the post-retirement health and dental benefits under the PRB Plan (such payments being the "**PRB Health and Dental Payments**"), shall be suspended effective on and after October 1, 2017, for all claims submitted and received after such date, for the duration of the CCAA Proceedings, subject to further Order of this Court. For greater certainty, the obligations of the Sears Canada Entities to make PRB Health and Dental Payments prior to October 1, 2017 are expressly subject to the terms set forth in the Term Sheet, and the suspension of PRB Health and Dental Payments, hereunder does not constitute a disclaimer or termination by the Sears Canada Entities of the PRB Plan.

10. THIS COURT ORDERS that the obligation of the Sears Canada Entities to make any payments in respect of the life insurance benefits under the PRB Plan, including premiums for life insurance coverage (such payments, together with the PRB Health and Dental Payments, the "**PRB Plan Payments**"), shall be suspended effective on and after October 1, 2017, for the duration of the CCAA Proceedings, subject to further Order of this Court. For greater certainty, the obligations of the Sears Canada Entities to make PRB Plan Payments prior to October 1, 2017 are expressly subject to the terms set forth in the Term Sheet, and the suspension of the PRB Plan Payments hereunder does not constitute a disclaimer or termination by the Sears Canada Entities of the PRB Plan.

11. THIS COURT ORDERS that for the duration of the CCAA Proceedings, no Person, including the Retirees and surviving spouses who have coverage with respect to post-retirement health and dental benefits and/or with respect to life insurance benefits under the PRB Plan (whether or not such member was represented by a union when the member was employed by the Sears Canada Entities) shall commence any action or other proceeding in connection with the suspension of the PRB Plan Payments or due to the Sears Canada Entities having not made the PRB Plan Payments.

APPROVAL OF TERM SHEET

12. **THIS COURT ORDERS** that the term sheet attached as Appendix "A" to the Supplemental Report (the "**Term Sheet**") between: (a) the Sears Canada Entities; (b) the Superintendent of Financial Services, as Administrator of the Pension Benefits Guarantee Fund; (c) Koskie Minsky LLP, as Representative Counsel and on behalf of the Representatives (as each such term is defined in the Representative Counsel Order for Pensions and Post-Retirement Benefits issued by this Court in the CCAA Proceedings on July 13, 2017); (d) the Representatives; (e) Ursel Phillips Fellows Hopkinson LLP, as Employee Representative Counsel and on behalf of the Employee Representatives (as each such term is defined in the Employee Representative Counsel Order issued by this Court in the CCAA Proceedings on July 13, 2017); and (f) the Employee Representatives, is hereby approved and the parties thereto shall comply with their obligations thereunder.

EXTENSION OF STAY PERIOD

13. THIS COURT ORDERS that the Stay Period (as defined in paragraph 14 of the Initial Order) is hereby extended from July 22, 2017 until and including October 4, 2017.

GENERAL

14. THIS COURT ORDERS that this Order shall have full force and effect in all provinces and territories in Canada.

15. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body, having jurisdiction in Canada or in the United States of America, to give effect to this Order and to assist the Applicants, the Monitor and their

respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

Hainey J.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

JUL 13 2017

PER / PAR:

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 SEARS CANADA INC., CORBEIL ÉLECTRIQUE INC., S.L.H. TRANSPORT INC., THE CUT INC., SEARS CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM TRADING AND SOURCING CORP., SEARS FLOOR COVERING CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741 CANADA INC., 10011711 CANADA INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD., 4201531 CANADA INC., 168886 CANADA INC., AND 3339611 CANADA INC. (collectively, the "Applicants")

Court File No. CV-17-11846-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding commenced at Toronto

ORDER

(Suspension of Special Payments, Supplemental Plan Payments and PRB Plan Payments, Approval of the Term Sheet and Stay Extension)

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Lawyers for the Applicants

TAB 19

Court File No. CV-12-9667-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	WEDNESDAY, THE
	)	
MR. JUSTICE MORAWETZ	)	
		20TH DAY OF MARCH, 2013

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 OF SINO-FOREST CORPORATION

Court File No.: CV-11-431153-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA, THE TRUSTEES OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 793 PENSION PLAN FOR OPERATING ENGINEERS IN ONTARIO, SJUNDE AP-FONDEN, DAVID GRANT and ROBERT WONG

Plaintiffs

- and –

SINO-FOREST CORPORATION, ERNST & YOUNG LLP, BDO LIMITED (formerly known as BDO MCCABE LO LIMITED), ALLEN T.Y. CHAN, W. JUDSON MARTIN, KAI KIT POON, DAVID J. HORSLEY, WILLIAM E. ARDELL, JAMES P. BOWLAND, JAMES M.E. HYDE, EDMUND MAK, SIMON MURRAY, PETER WANG, GARRY J. WEST, PÖYRY (BEIJING) CONSULTING COMPANY LIMITED, CREDIT SUISSE SECURITIES (CANADA), INC., TD SECURITIES INC., DUNDEE SECURITIES CORPORATION, RBC DOMINION SECURITIES INC., SCOTIA CAPITAL INC., CIBC WORLD MARKETS INC., MERRILL LYNCH CANADA INC., CANACCORD FINANCIAL LTD., MAISON PLACEMENTS CANADA INC., CREDIT SUISSE SECURITIES (USA) LLC and MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED (successor by merger to Banc of America Securities LLC)

Defendants

ORDER

THIS MOTION made by the Ad Hoc Committee of Purchasers of the Applicant's Securities, including the plaintiffs in the action commenced against Sino-Forest Corporation ("Sino-Forest" or the "Applicant") in the Ontario Superior Court of Justice, bearing (Toronto) Court File No. CV-11-431153-00CP (the "Ontario Plaintiffs" and the "Ontario Class Action", respectively), in their own and proposed representative capacities, for an order giving effect to the Ernst & Young Release and the Ernst & Young Settlement (as defined in the Plan of Compromise and Reorganization of the Applicant under the *Companies' Creditors Arrangement Act* ("CCAA") dated December 3, 2012 (the "Plan") and as provided for in section 11.1 of the Plan, such Plan having been approved by this Honourable Court by Order dated December 10, 2012 (the "Sanction Order")), was heard on February 4, 2013 at the Court House, 330 University Avenue, Toronto, Ontario.

WHEREAS the Ontario Plaintiffs and Ernst & Young (as defined in the Plan) entered into Minutes of Settlement dated November 29, 2012.

AND WHEREAS this Honourable Court issued the Sanction Order approving the Plan containing the framework and providing for the implementation of the Ernst & Young Settlement and the Ernst & Young Release, upon further notice and approval;

AND WHEREAS the Supervising CCAA Judge in this proceeding, the Honourable Justice Morawetz, was designated on December 13, 2012 by Regional Senior Justice Then to hear this motion for settlement approval pursuant to both the CCAA and the *Class Proceedings Act, 1992*;

AND WHEREAS this Honourable Court approved the form of notice and the plan for distribution of the notice to any Person with an Ernst & Young Claim, as defined in the Plan, of this settlement approval motion by Order dated December 21, 2012 (the "Notice Order");

AND ON READING the Ontario Plaintiffs' Motion Record, including the affidavit and supplemental affidavit of Charles Wright, counsel to the plaintiffs, and the exhibits thereto, the affidavit of Joe Redshaw and the exhibits thereto, the affidavit of Frank C. Torchio and the exhibits thereto, the affidavit of Serge Kalloghlian and the exhibits thereto, the affidavit of Adam

Pritchard and the exhibits thereto, and on reading the affidavit of Mike P. Dean and the exhibits thereto, and on reading the affidavit of Judson Martin and the exhibits thereto and on reading the Responding Motion Record of the Objectors to this motion (Invesco Canada Ltd., Northwest & Ethical Investments L.P., Comité Syndical National de Retraite Bâtirente Inc., Matrix Asset Management Inc, Gestion Férique and Montrusco Bolton Investments) including the affidavits of Eric J. Adelson and the exhibits thereto, Daniel Simard and the exhibits thereto and Tanya J. Jemec, and the exhibits thereto, and on reading the Responding Motion Record of Poyry (Beijing) Consulting Company Limited including the affidavit of Christina Doria, and on reading the Fourteenth Report, the Supplement to the Fourteenth Report and the Fifteenth Report of FTI Consulting Canada Inc., in its capacity as Monitor of the Applicant (in such capacity, the "Monitor") dated January 22 and 28, 2013 and February 1, 2013 including any notices of objection received, and on reading such other material, filed, and on hearing the submissions of counsel for the Ontario Plaintiffs, Ernst & Young LLP, the Ad Hoc Committee of Sino-Forest Noteholders, the Applicant, the Objectors to this motion, Derek Lam and Senith Vel Kanagaratnam, the Underwriters, (Credit Suisse Securities (Canada) Inc., TD Securities Inc., Dundee Securities Corporation, RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lynch Canada Inc., Canaccord Financial Ltd., Maison Placements Canada Inc., Credit Suisse Securities (USA) LLC and Merrill Lynch, Pierce, Fenner & Smith Incorporated (successor by merger to Banc of America Securities LLC)), BDO Limited, the Monitor and those other parties present, no one appearing for any other party although duly served and such other notice as required by the Notice Order,

Sufficiency of Service and Definitions

1. **THIS COURT ORDERS** that the time for service and manner of service of the Notice of Motion and the Motion Record and the Fourteenth Report, the Supplement to the Fourteenth Report and the Fifteenth Report of the Monitor on any Person are, respectively, hereby abridged and validated, and any further service thereof is hereby dispensed with so that this Motion was properly returnable February 4, 2013 in both proceedings set out in the styles of cause hereof.

2. **THIS COURT ORDERS** that capitalized terms not otherwise defined in this order shall have the meanings attributed to those terms in the Plan.

3. **THIS COURT FINDS** that all applicable parties have adhered to, and acted in accordance with, the Notice Order and that the procedures provided in the Notice Order have provided good and sufficient notice of the hearing of this Motion, and that all Persons shall be and are hereby forever barred from objecting to the Ernst & Young Settlement or the Ernst & Young Release.

Representation

4. **THIS COURT ORDERS** that Ontario Plaintiffs are hereby recognized and appointed as representatives on behalf of those Persons described in **Appendix "A"** hereto (collectively, the "Securities Claimants") in these insolvency proceedings in respect of the Applicant (the "CCAA Proceedings") and in the Ontario Class Action, for the purposes of and as contemplated by section 11.1 of the Plan, and more particularly the Ernst & Young Settlement and the Ernst & Young Release.

5. **THIS COURT ORDERS** that Koskie Minsky LLP, Siskinds LLP and Paliare Roland Rosenberg Rothstein LLP are hereby recognized and appointed as counsel for the Securities Claimants for all purposes in these proceedings and as contemplated by section 11.1 of the Plan, and more particularly the Ernst & Young Settlement and the Ernst & Young Release ("CCAA Representative Counsel").

6. **THIS COURT ORDERS** that the steps taken by CCAA Representative Counsel pursuant to the Orders of this Court dated May 8, 2012 (the "Claims Procedure Order") and July 25, 2012 (the "Mediation Order") are hereby approved, authorized and validated as of the date thereof and that CCAA Representative Counsel is and was authorized to negotiate and support the Plan on behalf of the Securities Claimants, to negotiate the Ernst & Young Settlement, to bring this motion before this Honourable Court to approve the Ernst & Young Settlement and the Ernst & Young Release and to take any other necessary steps to effectuate and implement the Ernst & Young Settlement and the Ernst & Young Release,

including bringing any necessary motion before the court, and as contemplated by section 11.1 of the Plan.

Approval of the Settlement & Release

7. **THIS COURT DECLARES** that the Ernst & Young Settlement and the Ernst & Young Release are fair and reasonable in all the circumstances and for the purposes of both proceedings.

8. **THIS COURT ORDERS** that the Ernst & Young Settlement and the Ernst & Young Release be and hereby are approved for all purposes and as contemplated by s. 11.1 of the Plan and paragraph 40 of the Sanction Order and shall be implemented in accordance with their terms, this Order, the Plan and the Sanction Order.

9. **THIS COURT ORDERS** that this Order, the Ernst & Young Settlement and the Ernst & Young Release are binding upon each and every Person or entity having an Ernst & Young Claim, including those Persons who are under disability, and any requirements of rules 7.04(1) and 7.08(4) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 are dispensed with in respect of the Ontario Class Action.

Payment, Release, Discharge and Channelling

10. **THIS COURT ORDERS** that upon satisfaction of all the conditions specified in section 11.1(a) of the Plan, Ernst & Young shall pay CDN $117,000,000 (the "Settlement Fund") into the Settlement Trust (as defined in paragraph 16 below) less any amounts paid in advance as set out in paragraph 15 of this order or the Notice Order.

11. **THIS COURT ORDERS** that upon receipt of a certificate from Ernst & Young confirming it has paid the Settlement Fund to the Settlement Trust in accordance with the Ernst & Young Settlement as contemplated by paragraph 10 of this Order and upon receipt of a certificate from the trustee of the Settlement Trust confirming receipt of such Settlement Fund, the Monitor shall deliver to Ernst & Young the Monitor's Ernst & Young Settlement Certificate (as defined in the Plan) substantially in the form attached hereto as **Appendix**

"B". The Monitor shall thereafter file the Monitor's Ernst & Young Settlement Certificate with the Court.

12. **THIS COURT ORDERS** that pursuant to the provisions of section 11.1(b) of the Plan,

a. upon receipt by the Settlement Trust of the Settlement Fund, all Ernst & Young Claims, including but not limited to the claims of the Securities Claimants, shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled, barred and deemed satisfied and extinguished as against Ernst & Young in accordance with section 11.1(b) of the Plan;

b. on the Ernst & Young Settlement Date, section 7.3 of the Plan shall apply to Ernst & Young and the Ernst & Young Claims *mutatis mutandis*;

c. upon receipt by the Settlement Trust of the Settlement Fund, none of the plaintiffs in the Class Actions or any other actions in which the Ernst & Young Claims could have been asserted shall be permitted to claim from any of the other defendants that portion of any damages, restitutionary award or disgorgement of profits that corresponds with the liability of Ernst & Young, proven at trial or otherwise, that is the subject of the Ernst & Young Settlement ("Ernst & Young's Proportionate Liability");

d. upon receipt by the Settlement Trust of the Settlement Fund, Ernst & Young shall have no obligation to participate in and shall not be compelled to participate in any disputes about the allocation of the Settlement Fund from the Settlement Trust and any and all Ernst & Young Claims shall be irrevocably channeled to the Settlement Fund held in the Settlement Trust in accordance with paragraphs 16 and 17 of this order and the Claims and Distribution Protocol defined below and forever discharged and released against Ernst & Young in accordance with paragraph 12(a) of this order, regardless of whether the Claims and Distribution Protocol is finalized as at the Ernst & Young Settlement Date;

e. on the Ernst & Young Settlement Date, all Class Actions, as defined in the Plan, including the Ontario Class Action shall be permanently stayed as against Ernst & Young; and

f. on the Ernst & Young Settlement Date, the Ontario Class Action shall be dismissed against Ernst & Young.

13. **THIS COURT ORDERS** that on the Ernst & Young Settlement Date, any and all claims which Ernst & Young may have had against any other current or former defendant, or any affiliate thereof, in the Ontario Class Action, or against any other current or former defendant, or any affiliate thereof, in any Class Actions in a jurisdiction in which this order has been recognized by a final order of a court of competent jurisdiction and not subject to further appeal, any other current or former defendant's insurers, or any affiliates thereof, or any other Persons who may claim over against the other current or former defendants, or any affiliate thereof, or the other current or former defendants' insurers, or any affiliate thereof, in respect of contribution, indemnity or other claims over which relate to the allegations made in the Class Actions, are hereby fully, finally, irrevocably and forever compromised, released, discharged, cancelled, barred and deemed satisfied and extinguished.

14. **THIS COURT ORDERS** that nothing in this order shall fetter the discretion of any court to determine Ernst & Young's Proportionate Liability at the trial or other disposition of an action for the purposes of paragraph 12(c) above, whether or not Ernst & Young appears at the trial or other disposition (which, subject to further order of the Court, Ernst & Young has no obligation to do) and Ernst & Young's Proportionate Liability shall be determined as if Ernst & Young were a party to the action and any determination by the court in respect of Ernst & Young's Proportionate Liability shall only apply in that action to the proportionate liability of the remaining defendants in those proceedings and shall not be binding on Ernst & Young for any purpose whatsoever and shall not constitute a finding against Ernst & Young for any purpose in any other proceeding.

15. **THIS COURT ORDERS** that the Ontario Plaintiffs shall incur and pay notice and administration costs that are incurred in advance of the Ernst & Young Settlement Date, as a

result of an order of this Honourable Court, up to a maximum of the first $200,000 thereof (the "Initial Plaintiffs' Costs"), which costs are to be immediately reimbursed from the Settlement Fund after the Ernst & Young Settlement Date. Ernst & Young shall incur and pay such notice and administration costs which are incurred in advance of the Ernst & Young Settlement Date, as a result of an order of this Honourable Court, over and above the Initial Plaintiffs' Costs up to a maximum of a further $200,000 (the "Initial Ernst & Young Costs"). Should any costs in excess of the cumulative amount of the Initial Plaintiffs' Costs and the Initial Ernst & Young Costs, being a total of $400,000, in respect of notice and administration as ordered by this Honourable Court be incurred prior to the Ernst & Young Settlement Date, such amounts are to be borne equally between the Ontario Plaintiffs and Ernst & Young. All amounts paid by the Ontario Plaintiffs and Ernst & Young as provided herein are to be deducted from or reimbursed from the Settlement Fund after the Ernst & Young Settlement Date. Should the settlement not proceed, the Ontario Plaintiffs and Ernst & Young shall each bear their respective costs paid to that time.

Establishment of the Settlement Trust

16. **THIS COURT ORDERS** that a trust (the "Settlement Trust") shall be established under which a claims administrator, to be appointed by CCAA Representative Counsel with the consent of the Monitor or with approval of the court, shall be the trustee for the purpose of holding and distributing the Settlement Fund and administering the Settlement Trust.

17. **THIS COURT ORDERS** that after payment of class counsel fees, disbursements and taxes (including, without limitation, notice and administration costs and payments to Claims Funding International) and upon the approval of a Claims and Distribution Protocol, defined below, the entire balance of the Settlement Fund shall, subject to paragraph 18 below, be distributed to or for the benefit of the Securities Claimants for their claims against Ernst & Young, in accordance with a process for allocation and distribution among Securities Claimants, such process to be established by CCAA Representative Counsel and approved by further order of this court (the "Claims and Distribution Protocol").

18. **THIS COURT ORDERS** that notwithstanding paragraph 17 above, the following Securities Claimants shall not be entitled to any allocation or distribution of the Settlement

Fund: any Person or entity that is as at the date of this order a named defendant to any of the Class Actions (as defined in the Plan) and their past and present subsidiaries, affiliates, officers, directors, senior employees, partners, legal representatives, heirs, predecessors, successors and assigns, and any individual who is a member of the immediate family of the following Persons: Allen T.Y, Chan a.k.a. Tak Yuen Chan, W. Judson Martin, Kai Kit Poon, David J. Horsley, William E. Ardell, James P. Boland, James M.E. Hyde, Edmund Mak, Simon Murray, Peter Wang, Garry J. West, Albert Ip, Alfred C.T. Hung, George Ho and Simon Yeung. For greater certainty, the Ernst & Young Release shall apply to the Securities Claimants described above.

19. **THIS COURT ORDERS** that the fees and costs of the claims administrator and CCAA Representative Counsel shall be paid out of the Settlement Trust, and for such purpose, the claims administrator and the CCAA Representative Counsel may apply to the court to fix such fees and costs in accordance with the laws of Ontario governing the payment of counsel's fees and costs in class proceedings.

Recognition, Enforcement and Further Assistance

20. **THIS COURT ORDERS** that the Court in the CCAA proceedings shall retain an ongoing supervisory role for the purposes of implementing, administering and enforcing the Ernst & Young Settlement and the Ernst & Young Release and matters related to the Settlement Trust including any disputes about the allocation of the Settlement Fund from the Settlement Trust. Any disputes arising with respect to the performance or effect of, or any other aspect of, the Ernst & Young Settlement and the Ernst & Young Release shall be determined by the court, and that, except with leave of the court first obtained, no Person or party shall commence or continue any proceeding or enforcement process in any other court or tribunal, with respect to the performance or effect of, or any other aspect of the Ernst & Young Settlement and the Ernst & Young Release.

21. **THIS COURT ORDERS** that the Ontario Plaintiffs and Ernst & Young with the assistance of the Monitor, shall use all reasonable efforts to obtain all court approvals and orders necessary for the implementation of the Ernst & Young Settlement and the Ernst & Young Release and shall take such additional steps and execute such additional agreements and

documents as may be necessary or desirable for the completion of the transactions contemplated by the Ernst & Young Settlement, the Ernst & Young Release and this order.

22. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or the United States or elsewhere, to give effect to this order and to assist the Applicant, the Monitor, the CCAA Representative Counsel and Ernst & Young LLP and their respective agents in carrying out the terms of this order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicant, the Monitor as an officer of this Court, the CCAA Representative Counsel and Ernst &Young LLP, as may be necessary or desirable to give effect to this order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicant, the Monitor, the CCAA Representative Counsel and Ernst & Young LLP and their respective agents in carrying out the terms of this order.

23. **THIS COURT ORDERS** that each of the Applicant, the Monitor, CCAA Representative Counsel and Ernst & Young LLP be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this order, or any further order as may be required, and for assistance in carrying out the terms of such orders.

24. **THIS COURT ORDERS** that the running of time for the purposes of the Ernst & Young Claims asserted in the Ontario Class Action, including statutory claims for which the Ontario Plaintiffs have sought leave pursuant to Part XXIII.1 of the Ontario *Securities Act*, R.S.O. 1990, c. S-5 and the concordant provisions of the securities legislation in all other provinces and territories of Canada, shall be suspended as of the date of this order until further order of this CCAA Court.

25. **THIS COURT ORDERS** that in the event that the Ernst & Young Settlement is not completed in accordance with its terms, the Ernst & Young Settlement and paragraphs 7-14 and 16-19 of this order shall become null and void and are without prejudice to the rights of the parties in the Ontario Class Action or in any proceedings and any agreement between the

parties incorporated into this order shall be deemed in the Ontario Class Action and in any proceedings to have been made without prejudice.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

MAR 2 8 2013

Morawetz J.

APPENDIX "A" TO SETTLEMENT APPROVAL ORDER
DEFINITION OF SECURITIES CLAIMANTS

"Securities Claimants" are all Persons and entities, wherever they may reside, who acquired any securities of Sino-Forest Corporation including securities acquired in the primary, secondary and over-the-counter markets.

For the purpose of the foregoing,

"Securities" means common shares, notes or other securities defined in the *Securities Act,* R.S.O. 1990, c. S.5, as amended.

APPENDIX "B" TO SETTLEMENT APPROVAL ORDER
MONITOR'S ERNST & YOUNG SETTLEMENT CERTIFICATE

Court File No. CV-12-9667-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF SINO-FOREST CORPORATION

Court File No.: CV-11-431153-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA, THE TRUSTEES OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 793 PENSION PLAN FOR OPERATING ENGINEERS IN ONTARIO, SJUNDE AP-FONDEN, DAVID GRANT and ROBERT WONG

Plaintiffs

- and –

SINO-FOREST CORPORATION, ERNST & YOUNG LLP, BDO LIMITED (formerly known as BDO MCCABE LO LIMITED), ALLEN T.Y. CHAN, W. JUDSON MARTIN, KAI KIT POON, DAVID J. HORSLEY, WILLIAM E. ARDELL, JAMES P. BOWLAND, JAMES M.E. HYDE, EDMUND MAK, SIMON MURRAY, PETER WANG, GARRY J. WEST, PÖYRY (BEIJING) CONSULTING COMPANY LIMITED, CREDIT SUISSE SECURITIES (CANADA), INC., TD SECURITIES INC., DUNDEE SECURITIES CORPORATION, RBC DOMINION SECURITIES INC., SCOTIA CAPITAL INC., CIBC WORLD MARKETS INC., MERRILL LYNCH CANADA INC., CANACCORD FINANCIAL LTD., MAISON PLACEMENTS CANADA INC., CREDIT SUISSE SECURITIES (USA) LLC and MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED (successor by merger to Banc of America Securities LLC)

Defendants

All capitalized terms not otherwise defined herein shall have the meanings ascribed thereto in the Order of the Court dated March 20, 2013 (the "Ernst & Young Settlement Approval Order") which, *inter alia*, approved the Ernst & Young Settlement and the Ernst & Young Release and established the Settlement Trust (as those terms are defined in the plan of compromise and reorganization dated December 3, 2012 (as the same may be amended, revised or supplemented in accordance with its terms, the "Plan") of Sino-Forest Corporation ("SFC"), as approved by the Court pursuant to an Order dated December 10, 2012).

Pursuant to section 11.1 of the Plan and paragraph 11 of the Ernst & Young Settlement Approval Order, FTI Consulting Canada Inc. (the "Monitor") in its capacity as Court-appointed Monitor of SFC delivers to Ernst & Young LLP this certificate and hereby certifies that:

1. Ernst & Young has confirmed that the settlement amount has been paid to the Settlement Trust in accordance with the Ernst & Young Settlement;

2. ■, being the trustee of the Settlement Trust has confirmed that such settlement amount has been received by the Settlement Trust; and

3. The Ernst & Young Release is in full force and effect in accordance with the Plan.

DATED at Toronto this ___ day of _____, 2013.

FTI CONSULTING CANADA INC. solely in its capacity as Monitor of Sino-Forest Corporation and not in its personal capacity

_____

Name:
Title:

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 OF SINO-FOREST CORPORATION

Court File No: CV-12-9667-00CL

THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA. et al.

Plaintiffs

SINO-FOREST CORPORATION, et al.

Defendants

Court File No. CV-11-431153-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

ORDER

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LAWYERS FOR AN AD HOC COMMITTEE OF PURCHASERS OF THE APPLICANT'S SECURITIES

TAB 20

2012 ONSC 4471
Ontario Superior Court of Justice [Commercial List]

Timminco Ltd., Re

2012 CarswellOnt 10568, 2012 ONSC 4471, [2012] O.J. No. 4008, 222 A.C.W.S. (3d) 932, 93 C.B.R. (5th) 326

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
Timminco Limited and Bécancour Silicon Inc. (Applicants)

Morawetz J.

Heard: June 4, 2012
Judgment: August 3, 2012
Docket: CV-12-9539-00CL

Counsel: Maria Konyukhova for Applicants
Robin B. Schwill for J. Thomas Timmins
Steven J. Weisz for Monitor
Debra McPhail for Superintendent of Financial Services
Thomas McRae for B51 Non-Union Employee Pension Committee and B51 Union Employee Pension Committee
Charles Sinclair for United Steelworkers
James Harnum for Mercer Canada

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Proceedings subject to stay — Miscellaneous

T resigned from his position as CEO of T Inc. in May 2001 but remained director until mid-2007, at which time he resigned from board and sold all of his remaining equity interests — Pursuant to 1996 consulting agreement, T Inc. was to provide T with monthly payment of $29,166.66 less amount due to T under any pension or retirement plan — At time of T's resignation as CEO, 1996 agreement was amended by letter agreement pursuant to which T was to receive monthly amount of $20,833.33 — T brought motion for order requiring T Inc. to comply with 1996 agreement — T Inc. brought cross-motion for order that its obligations under 1996 agreement, as amended by letter agreement, were pre-filing obligations stayed by initial order granted in reorganization proceedings — Motion by T was dismissed; cross-motion by T Inc. was granted — Benefits conferred on T were, in substance, termination and/or retirement benefits, and as such were unsecured claims — T Inc. was insolvent and not able to honour its obligations to all creditors — If benefits conferred on T were not stayed, T would, in effect, receive enhanced priority over other unsecured creditors, contrary to scheme and purpose of Companies Creditors Arrangement Act — Overriding objective of CCAA was to ensure that creditors in same classification were treated equitably, which would enhance prospects of viable compromise or arrangement being made in respect of debtor company — Disclaimer of agreement with T, if necessary, was fair, reasonable, advantageous, and beneficial to T Inc. restructuring process — Court could not conclude that disclaimer would likely cause significant financial hardship to T.

Table of Authorities

Cases considered by *Morawetz J.*:

Fraser Papers Inc., Re (2009), 2009 CarswellOnt 4469, 55 C.B.R. (5th) 217, 2009 C.E.B. & P.G.R. 8350, 76 C.C.P.B. 254 (Ont. S.C.J. [Commercial List]) — referred to

Homburg Invest Inc., Re (2011), 2011 QCCS 6376, 2011 CarswellQue 13411 (Que. Bktcy.) — 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
Nortel Networks Corp., Re (2009), 2009 CarswellOnt 3583, 55 C.B.R. (5th) 68, 75 C.C.P.B. 233 (Ont. S.C.J. [Commercial List]) — referred to
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.) — considered

Statutes considered:

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

s. 11 — considered

s. 32 — considered

s. 32(2) — considered

s. 32(4) — considered

s. 32(4)(b) — considered

MOTION for order requiring company to comply with agreement providing retirement benefits towards former CEO; MOTION by company for order that its obligations under agreement were pre-filing obligations stayed by initial order in reorganization proceedings.

***Morawetz J.*:**

Overview

1 Mr. J. Thomas Timmins, a former Chief Executive Officer ("CEO") of Timminco Limited ("Timminco") moves for an order that Timminco be ordered to comply with its obligations under a consulting agreement between Timminco and Mr. Timmins dated September 19, 1996 (the "1996 Agreement") and to remit to Mr. Timmins the monthly amounts that he claims to be entitled to under the 1996 Agreement.

2 In response, Timminco brought a cross-motion for an order declaring that Timminco's obligations under the 1996 Agreement, as amended by letter agreement effective May 28, 2011 (the "Letter Agreement" and, together with the 1996 Agreement, the "Agreement"), constitute pre-filing obligations which are stayed by the Initial Order granted in these proceedings on January 3, 2012.

3 Alternative positions have also been presented by the parties.

4 Timminco puts forth the alternative that, if Mr. Timmins' motion is granted, Timminco seeks an order that the 1996 Agreement be disclaimed in accordance with section 32 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") and that the effective date of the disclaimer of the Agreement (if such a disclaimer is held to be required) should be April 30, 2012.

5 In response to this alternative position, Mr. Timmins seeks an order that the court deny Timminco's request to have the 1996 Agreement disclaimed and, in any event, if the 1996 Agreement is disclaimed, Timminco should not be relieved of its obligation to pay the monthly fees that have and continue to accrue from the date Timminco commenced CCAA proceedings until the date that any such disclaimer is effective.

6 Mr. Timmins asks that the court deny Timminco's request to have the 1996 Agreement disclaimed in accordance with section 32 of the CCAA as the disclaimer would not necessarily enhance the prospects of a viable arrangement being made in respect of Timminco, and would objectively result in significant financial hardship to Mr. Timmins.

Facts

7 Mr. Timmins resigned from his position as CEO on May 28, 2001, but remained a director of Timminco until mid-2007, at which time he resigned from the board and sold all of his remaining equity interests.

8 The preamble to the 1996 Agreement provides:

> The Consultant is an executive of the Corporation who has gained such a level of knowledge, experience and competence in the Corporation's business that it is in the Corporation's interest, following his retirement from employment, to ensure that the Corporation continues to have access to the Consultant for advice and consultation and the Corporation wishes to ensure that the Consultant shall not engage in activities which are competitive with the Corporation's business.

9 The 1996 Agreement provides that Timminco agreed to pay Mr. Timmins a monthly amount by which $29,166.66 exceeds the monthly amount to which [Mr. Timmins] is entitled on [Mr. Timmins] retirement under any pension or retirement plans of [Timminco].

10 The monthly payments were to commence on the first day of the month following Mr. Timmins retirement and terminate only on Mr. Timmins death (subject to earlier termination due to any breach of obligations by Mr. Timmins). There has been no alleged breach on the part of Mr. Timmins of any such obligations.

11 Under the 1996 Agreement, Mr. Timmins was to consult with Timminco "within the time limits from time to time of his physical and other abilities...; provided, however, that consultation and advice shall never occupy [Mr. Timmins] time to such an extent as shall prevent him from devoting the greater portion of his time to other activities".

12 At the time of his resignation as CEO, the 1996 Agreement was amended by the Letter Agreement.

13 Pursuant to the Letter Agreement, Timminco agreed to pay Mr. Timmins a monthly amount of $20,833.33 without further deduction except as may be required by law, commencing on July 1, 2001.

14 The Letter Agreement also provided that Timminco would terminate various employment benefits of Mr. Timmins (such as car lease and parking) and would cease to provide Mr. Timmins with office space and secretarial assistance after September 30, 2001.

15 In connection with the Letter Agreement, Mr. Timmins executed a release and indemnity which provides, in part, as follows:

> Whereas I have agreed to retire voluntarily as Chief Executive Officer and an employee of Timminco Limited and as a director and/or officer of any subsidiaries of Timminco Limited (hereinafter referred to collectively as "Timminco") effective immediately.
>
> And whereas I have agreed to accept the consideration described in the attached letter to me from Timminco dated May 28, 2001 and in the agreement between Timminco and me dated as of September 19, 1996 (collectively, the "Retirement Agreement"), in full settlement of any and all claims I may have relating to my employment with Timminco or the termination thereof;...I understand and agree that the consideration described above satisfies all obligations of Timminco, arising from or out of my employment with Timminco or the termination of my employment with Timminco, including without limitation obligations pursuant to the *Employment Standards Act*

> *(Ontario)* and the *Human Rights Code (Ontario)*. For the said consideration, I covenant that I will not file any claims or complaints under the *Employment Standards Act (Ontario)* or the *Human Rights Code (Ontario)*.

16 Following his retirement in 2001, Mr. Timmins remained a member of Timminco's board of directors until October 2007 and served as a member of several board committees until that time, including the strategic committee of the board from June 2003 until October 2007. He received director fees and was reimbursed for his expenses in connection with his services as a member of the board of directors of Timminco and its various committees.

17 Mr. Timmins states that he has fulfilled all contractual obligations imposed on him by the 1996 Agreement and that he has always been prepared to provide his consulting services to Timminco, as required by the 1996 Agreement, whenever from time to time requested by Timminco.

18 The evidence of Mr. Kalins, President, General Counsel and Corporate Secretary of Timmins, is that Timminco has not sought or received any consulting services from Mr. Timmins following his retirement.

19 Mr. Timmins has a different view. His evidence is that he provided consulting services during the early period of Dr. Schimmelbuch's term as CEO.

20 Since the execution of the Letter Agreement, Timminco has paid Mr. Timmins approximately $2.625 million. Mr. Kalins states that the payments under the Letter Agreement constitute the entirety of Mr. Timmins' entitlements from Timminco following his retirement.

21 Timminco has filed statements of pension, retirement, annuity and other income ("T4A Forms") and/or statements of amounts paid or credited to non-residents of Canada ("NR4 Forms") with the Canada Revenue Agency in connection with payments made by Timminco to Mr. Timmins in each year from 2002 to 2011. The T4A Forms and NR4 Forms filed by Timminco with respect to Mr. Timmins in each of those years list amounts paid to Mr. Timmins under the category of "retiring allowances". Mr. Kalins deposed that Timminco is not aware of any requests from Mr. Timmins to amend or refile any of the T4A Forms or NR4 Forms filed by Timminco since 2002.

22 Timminco complied with its obligations to pay the monthly consulting fee to Mr. Timmins until December 2011.

23 Payment was due on January 1, 2012, which was not made. The Initial Order was granted on Tuesday, January 3, 2012.

24 On February 8, 2012, a debtor-in-possession financing agreement (the "DIP Agreement") between Timminco and QSI Partners Ltd. ("QSI" or the "DIP Lender") was approved. Mr. Timmins was not served with notice of the motion to approve the DIP Agreement.

25 On March 30, 2012, counsel for Timminco sent a letter to counsel for Mr. Timmins enclosing a formal notice of disclaimer of the 1996 Agreement pursuant to section 32 of the CCAA. According to the correspondence, the 1996 Agreement was to be disclaimed effective April 30, 2012.

Analysis

26 Counsel to Mr. Timmins set out four issues:

> (a) Was Timminco entitled to stop paying the monthly consulting fee to Mr. Timmins, notwithstanding Mr. Timmins' position that these payments are post-filing obligations under the 1996 Agreement between the parties?
>
> (b) Should Timminco be entitled to disclaim the 1996 Agreement notwithstanding that:

(i) the company's ongoing obligations under the 1996 Agreement have not impeded its ability to effect a successful sale of its assets; and

(ii) the disclaimer would result in significant financial hardship to Mr. Timmins.

(c) In the event that Timminco was not entitled to stop paying the monthly consulting fee, is Mr. Timmins entitled to payments for the period from January 1, 2012 up to the effective date (if any) of the disclaimer?

(d) In the event that Timminco is entitled to disclaim the 1996 Agreement, what should the effective date of that disclaimer be?

27 Counsel to Timminco set forth the issue as being whether Timminco's obligations under the Agreement constitute pre-filing obligations which are stayed by the Initial Order.

28 In a supplementary factum, counsel to Timminco broadened the issue to read as follows:

(a) Should Mr. Timmins' motion for an order that the 1996 Agreement is not to be disclaimed or resiliated be granted; and

(b) If Mr. Timmins' motion referenced in (a) above be granted, should the effective date of the disclaimer of the 1996 Agreement be extended past April 30, 2012 (the day that was 30 days after the day on which Timminco gave notice of the disclaimer to Mr. Timmins).

29 Counsel to Mr. Timmins submits that the 1996 Agreement is clear and unambiguous and that Timminco's attempts to describe the unpaid monthly consulting fees as a pre-filing claim inappropriately mischaracterizes the nature of the 1996 Agreement. Counsel submits that the unpaid amounts can only be characterized as the pre-filing claim if Mr. Timmins earned the right to be paid an amount during his employment with Timminco (which amount was then to be paid out to him over time after the termination of his employment), without further obligations owing from Mr. Timmins to Timminco. Counsel to Mr. Timmins submits that clearly is not the case as the monthly consulting fees do not constitute compensation deferred from a prior employment agreement between the parties and the fees cannot be said to be owing for employment services previously performed by Mr. Timmins.

30 Mr. Timmins takes the position that, while the Letter Agreement dealt with a number of termination of employment issues, it specifically did not amend the 1996 Agreement other than to fix the monthly consulting fee and, in other respects, the 1996 Agreement was to remain in full force and effect.

31 Specifically, from Mr. Timmins standpoint, there were no pension or retirement benefits to forego at the time he entered into the Letter Agreement as the pension plan in which he had participated prior to his resignation was terminated and wound up in 1998 with a lump sum entitlement having been paid out.

32 Counsel for Mr. Timmins goes on to submit that the purpose and effect of the 1996 Agreement is clear and unambiguous on its face - (i) to ensure that Mr. Timmins advice remains available to Timminco; (ii) to ensure that he or his investment company do not engage in activities which are competitive to Timminco's business; and (iii) to ensure that Mr. Timmins does not disclose or otherwise use confidential information.

33 Counsel submits that Mr. Timmins' and Timminco's obligations under the 1996 Agreement are ongoing post-filing obligations, and as such cannot be stayed and suspended in the CCAA proceedings.

34 In my opinion, the arguments of Mr. Timmins are flawed.

35 It seems to me that the benefits conferred on Mr. Timmins under the 1996 Agreement, as amended by the Letter Agreement are, in substance, termination and/or retirement benefits. These are unsecured claims. Counsel to the

Applicant has summarized the following attributes or characteristics of the Agreement in support of the Applicant's position that the claim of Mr. Timmins is, in substance, for termination and/or retirement benefits:

> (a) the amount of Mr. Timmins' monthly fee under the 1996 Agreement was essentially a "top up" to any other retirement and pension benefit that Mr. Timmins would receive from Timminco;
>
> (b) the "consulting" term of the 1996 Agreement was to commence the first day of the month following Mr. Timmins' retirement;
>
> (c) under the Agreement, Mr. Timmins is not entitled to any retirement or pension benefits from Timminco following his retirement other than the payments;
>
> (d) neither the 1996 Agreement nor the Letter Agreement provide for any minimum amount of consulting to be provided by Mr. Timmins in order to be entitled to receive the monthly payments;
>
> (e) all other employment benefits and provision of services to enable Mr. Timmins to provide employment services to Timminco were terminated by the Letter Agreement; and
>
> (f) Mr. Timmins has not provided any consulting services to Timminco following his retirement as CEO.

36 From the standpoint of Timminco, for all intents and purposes, the Letter Agreement concluded whatever employment relationship remained between Mr. Timmins and Timminco.

37 In addition, in connection with the Letter Agreement and his retirement, Mr. Timmins also executed a release in indemnity wherein he released any and all claims he may have had relating to his employment with Timminco or the termination thereof and agreed that the consideration described in the Agreement satisfies all of the obligations of Timminco arising from or out of his employment with Timminco or the termination of his employment.

38 It is especially significant that the release and indemnity specifically references both the 1996 Agreement and the Letter Agreement.

39 Further, the filings made by Timminco with the Canada Revenue Agency constitute further evidence of the payments made to Mr. Timmins under the Agreement are, in substance, unsecured termination and/or retirement benefits. Mr. Timmins discounts this point indicating that it is the responsibility of Timminco to issue the tax forms. However, it is the responsibility of Mr. Timmins to file the return and to ensure its accuracy.

40 In my view, the inescapable conclusion is that when the 1996 Agreement is considered together with the amendments set out in the Letter Agreement, in substance, the parties entered into an arrangement that addressed termination and/or retirement benefits.

41 The law in this area is clear. The courts have repeatedly found that termination and/or retirement benefits are pre-filing unsecured obligations of debtor companies undergoing CCAA proceedings. See *Indalex Ltd., Re* (2009), 55 C.B.R. (5th) 64 (Ont. S.C.J. [Commercial List]), *Nortel Networks Corp., Re* [Recommencement of Benefit Motion] (2009), 55 C.B.R. (5th) 68 (Ont. S.C.J. [Commercial List]) [Nortel] and *Fraser Papers Inc., Re* (2009), 55 C.B.R. (5th) 217 (Ont. S.C.J. [Commercial List]).

42 Further, the debtor company's obligation to make retirement, termination, severance and other related payments to unionized and non-unionized employees have been held to be prefiling obligations. See Nortel, paras. 10, 12, 67. At para. 67, I stated:

> ...The exact time of when the payment obligation crystallized is not, in my view, the determining factor under section 11.3 [of the CCAA]. Rather, the key factor is whether the employee performed services after the date of the Initial Order. If so, he or she is entitled to compensation benefits for such current service.

43 It is clear in this case that Mr. Timmins did not provide any services after the date of the Initial Order.

44 The Timminco Entities are insolvent and are not able to honour their obligations to all creditors. If the benefits conferred on Mr. Timmins under the Agreement are not stayed, Mr. Timmins would, in effect, receive an enhanced priority over other unsecured creditors, which would be contrary to the scheme and purpose of the CCAA. In this respect, it is noted that the position of the Applicant on this motion was supported by counsel to FSCO, both the Non-Union and Union Employee Pension Committee, the United Steelworkers and Mercer Canada.

45 The Monitor expressed no view on whether the monthly payment obligations were a prefiling or a post-filing obligation. The Monitor did, however, approve of the proposed disclaimer (see below).

46 In my view, it is necessary to briefly address the submission made by counsel to Mr. Timmins that the CCAA order does not preclude Mr. Timmins' claim for the unpaid monthly consulting fees and the related submission that the CCAA order does not stay pre-filing obligations. Paragraph 11 of the CCAA clearly provides that the Timminco Entities are directed to make no payments of principal, interest or otherwise on account of monies owing by the Timminco Entities to any of their creditors as of January 3, 2012. Having made the determination that the obligation of Timminco to Mr. Timmins under the Agreement constitutes a pre-filing claim, this provision is broad enough to cover any and all pre-filing obligations owing to Mr. Timmins.

47 The foregoing is sufficient to dispose of the issues raised in the motion and cross-motion. However, in the event that I am in error in my conclusion, the secondary issue has to be addressed; namely, whether Timminco should be entitled to disclaim the 1996 Agreement and, if so, what should be the effective date of the disclaimer.

48 Section 32 of the CCAA permits a counter-party to a contract disclaimed by the debtor company to apply to court for an order that the agreement is not to be disclaimed or resiliated.

49 Section 32(4) sets out factors to be considered by the court, among other things, in deciding whether to make the order:

> (a) whether the monitor approved the proposed disclaimer or resiliation;
>
> (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
>
> (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

50 In alternative submissions, counsel to Timminco takes the position that the motion of Mr. Timmins should be dismissed because:

> (a) the Monitor has approved the proposed disclaimer;
>
> (b) the disclaimer will enhance the prospects of a viable compromise or arrangement being made in respect of Timminco;
>
> (c) the disclaimer is expected to benefit the stakeholders of Timminco as a whole in that it will permit Timminco to maximize recoveries to its stakeholders;
>
> (d) the disclaimer will not cause any significant financial hardship to Mr. Timmins; and
>
> (e) prohibiting Timminco from disclaiming the Agreement will result in a windfall to Mr. Timmins at the expense of the other unsecured creditors of the Timminco Entities.

51 In analyzing this aspect of the motion, I accept the submission of counsel to Timminco that the scope of the CCAA and the various protections it affords debtor companies should not be interpreted so narrowly as to apply only in the context of a restructuring process leading to a plan arrangement for a newly restructured entity. The Court of Appeal for Ontario stated in *Nortel Networks Corp., Re*, 2009 ONCA 833 (Ont. C.A.), there is "no reason...why the same analysis cannot apply during a sale process that requires the business to be carried as a going concern".

52 In my view, the section 32 (4)(b) requirement that a disclaimer of an agreement with a debtor company enhance the prospects of a viable compromise or arrangement being made should be interpreted with a view to the expanded scope of the statute.

53 In this particular case, the overriding objective of the CCAA must be to ensure that creditors in the same classification are treated equitably. Such treatment will enhance the prospects of a viable compromise or arrangement being made in respect of the debtor company.

54 Similar views were expressed by the court in *Homburg Invest Inc., Re*, 2011 QCCS 6376 (Que. Bktcy.) where the Quebec Superior Court held, among other things, that it is not necessary to demonstrate that a proposed disclaimer is essential for the restructuring period. It merely has to be advantageous and beneficial.

55 It is also noted that counsel to the Applicants submitted that at the commencement of the CCAA proceedings, the Timminco Entities ceased making payments with respect to many of their pre-filing obligations in order to preserve their ability to continue operating and to implement a successful sale of their assets. The continued existence of the Agreement and of the requirement to make the payments thereunder would have further strained the Timminco Entities already severely constrained cash flows. Further, counsel contends that disclaimer of the Agreement and the cessation of payments to Mr. Timmins thereunder improved the Timminco Entities' cash flows and their ability to continue implementing a sales process with respect to their assets.

56 Counsel to Timminco also points out that under the DIP Agreement, approved on February 8, 2012, the Timminco Entities are restricted to use the proceeds of the DIP Facility for the purpose of funding operating costs, expenses and liabilities in accordance with the cash flow projections. Although the DIP Agreement does not prohibit the payment of amounts akin to the amounts owing under the Agreement, the cash flow projections approved by the DIP Lender do not provide for a payment of the monthly payments under the Agreement; making such payments would accordingly result in an event of default under the DIP Agreement. Further, counsel adds that without access to the DIP Facility, the Timminco Entities would have been unable to implement a sales process designed to maximize the benefits to their stakeholders.

57 I am satisfied that, in the context of this alternative argument, the disclaimer of the Agreement, if necessary, is fair, reasonable, advantageous and beneficial to the Timminco Entities' restructuring process.

58 Counsel to Mr. Timmins also raised the issue that the disclaimer of the 1996 Agreement would objectively result in significant financial hardship to Mr. Timmins.

59 However, Mr. Timmins did acknowledge that, if the test of whether the disclaimer of an agreement that pays a party $250,000 per year will cause "significant financial hardship to that party" depends on the individual characteristics and circumstances of that party, the disclaimer of the 1996 Agreement will not cause significant financial hardship to Mr. Timmins.

60 I am in agreement with the submission of the Timminco Entities that the test of whether a disclaimer of an agreement will cause significant financial hardship to the counter party depends and is centered on an examination of the individual characteristics and circumstances of such counter party. Further, an objective test for "significant financial hardship" would make it difficult to debtor companies to disclaim large contracts regardless of the financial ability of

the counter parties to absorb the resultant losses. It seems to me that such a result would be contrary to the purpose of principles of the CCAA.

61 Based on the record, I am unable to conclude that the disclaimer would likely cause significant financial hardship to Mr. Timmins.

62 I have also taken into account that the effect of acceding to the argument put forth by counsel to Mr. Timmins would result in an improvement to his position relative to, and at the expense of, the unsecured creditors and other stakeholders of the Timminco Entities. If the Agreement is disclaimed, however, the monthly amounts that would otherwise be paid to Mr. Timmins would be available for distribution to all of Timminco's unsecured creditors, including Mr. Timmins. This equitable result is dictated by the guiding principles of the CCAA.

63 For the foregoing reasons, the alternative relief sought by Mr. Timmins, to the effect that the Agreement is not to be disclaimed, is denied.

64 The remaining outstanding issue is whether or not the disclaimer of the Agreement should be effective April 30, 2012. Counsel to Mr. Timmins takes the position that the effective date of the disclaimer should be no earlier than the date of the determination of this motion.

65 On March 30, 2012, counsel for Timminco sent a letter to Mr. Timmins' counsel enclosing a formal notice of disclaimer which was to be effective April 30, 2012. In accordance with section 32 (2) of the CCAA, on April 13, 2012, Mr. Timmins filed his motion objecting to the disclaimer. Counsel to Mr. Timmins sought to have the motion heard in advance of April 30, but on account of scheduling issues, the motion did not proceed until June 4, 2012. Counsel to Mr. Timmins takes the position that given that the CCAA Order prohibits Mr. Timmins from ceasing to comply with his obligations under the 1996 Agreement, it is only fair that payment for such obligations should be made up until the date that the court makes its determination on this motion.

66 The contrary position put forth by counsel to Timminco is that the Timminco Entities did not deliver a notice of disclaimer until March 30, 2012 because they were of the view that the obligations under the Agreement constitute Timminco's unsecured pre-filing obligations which were stayed by Initial Order and that Timminco was authorized to stop making the payments under the Agreement without being required to disclaim the Agreement. Consequently, counsel submits that the Timminco Entities only delivered a notice of disclaimer in response to correspondence with Mr. Timmins' counsel and did so expressly without prejudice to their position that the obligations under the Agreement were pre-filing obligations.

67 Counsel to Timminco acknowledged that, if the court found that Timminco's obligations did not constitute pre-filing obligations and the Agreement needed to be disclaimed prior to Timminco being entitled to cease making payments, Timminco would be obligated to make the payments that became due prior to the effective day of the disclaimer, namely, April 30, 2012.

68 I am satisfied that the delay between the commencement of this motion by Mr. Timmins and its hearing was attributable to scheduling issues and the demands on Timminco's management and counsel's time placed by the Timminco Entities' CCAA Proceedings, including the sales process being undertaken by the Timminco Entities for the benefit of their stakeholders. Given these competing priorities, it seems to me that it would be unfair to extend the effective date of the disclaimer, if necessary, beyond April 30, 2012.

69 As noted, my comments with respect to the disclaimer issue are for the assistance of the parties, in the event that my determination of the pre-filing issue is found to be in error.

Disposition

70 In the result, the motion of Mr. Timmins is dismissed. The relief requested by Timminco in the cross-motion is granted.

Motion by former CEO dismissed; Motion by company granted.

TAB 21

2016 ONSC 7899
Ontario Superior Court of Justice

U.S. Steel Canada Inc., Re

2016 CarswellOnt 20449, 2016 ONSC 7899, 275 A.C.W.S. (3d) 247, 31 C.C.P.B. (2nd) 131, 44 C.B.R. (6th) 133

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO U.S. STEEL CANADA INC.

H. Wilton-Siegel J.

Heard: December 15, 2016
Judgment: December 22, 2016
Docket: CV-14-10695-00CL

Counsel: Paul Steep, Steve Fulton, Jamey Gage, for Applicant, U.S. Steel Canada Inc.
Robert Staley, Kevin J. Zych, for Monitor, Ernst & Young Inc.
Alan Mark, Gale Rubenstein, Logan Willis, for Province of Ontario
Ken Rosenberg, for United Steelworkers International Union and United Steelworkers International Union, Local 8782
Andrew Hatnay, for Non-unionized active Employees and Retirees
Robert Thornton, Michael Barrack, Mitch Grossell, for United States Steel Corporation
Sharon White, for United Steelworkers International Union, Local 1005
Michael Kovacevic, Justyna Hidalgo, for City of Hamilton
Lou Brzezinski, for Robert and Sharon Milbourne
Waleed Malik, for Brookfield Capital Partners Ltd.
Mario Forte, for Bedrock Industries Canada LLC and Bedrock Industries L.P.
Bryan Finlay, Marie-Andrée Vermette, for Board of Directors of U.S. Steel Canada Inc.

Subject: Civil Practice and Procedure; Insolvency

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Miscellaneous

Debtor steel company obtained Companies' Creditors Arrangement Act protection and conducted extensive sales and marketing process over almost two years — Initial order contemplated eight business days' notice of motions, subject to further court order in respect of urgent motions — Agreement was reached on principal terms of Proposed Transaction by which purchaser would acquire business and operations of debtor — Debtor brought motion for order declaring purchaser to be successful bidder as defined in court's sales and investment solicitation process order, and sought authorization to enter into Plan Sponsor Agreement and Province Support Agreement — Motion was served on Friday after close of business, which objecting parties alleged gave them only three business days' notice of motion — Debtor sought leave to bring motion on short service on grounds that motion was urgent — Leave granted to shorten service to that actually provided — There was real urgency — After almost two years of marketing, Proposed Transaction was only viable proposal, and was also best offer for stakeholders generally — There was no evidence of prejudice to objecting parties — There was no reasonable likelihood that additional delay of five business days would result in resolution of any claims of objecting parties that required negotiation.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous

Debtor steel company obtained Companies' Creditors Arrangement Act (CCAA) protection and conducted extensive sales and marketing process over two years — Agreement was reached on principal terms of Proposed Transaction by which purchaser would acquire business and operations of debtor, terms of which were set out in CCAA Acquisition and Plan Sponsor Agreement (PSA) — Debtor brought motion for order declaring purchaser to be successful bidder as defined in court's sales and investment solicitation process (SISP) order, and sought authorization to enter into PSA and Province Support Agreement — Motion granted — Proposed Transaction approved as successful bid for purposes of SISP order — There was no other viable bid which would provide as much value to stakeholders — SISP was transparent, robust, fair, reasonable and considered all available alternatives — Proposed Transaction included maintenance of debtor as going concern and would provide significant funding for debtor's pensions and other post-employment benefits — Monitor viewed Proposed Transaction as best available option, and strongly recommended approval of authorization order — Debtor authorized to enter into Province Support Agreement and PSA — Authorization order did not affect legal rights of creditors, constitute approval of plan of arrangement, or affect bargaining power of creditors — Only alternative to Proposed Transaction was liquidation of debtor — PSA was intrinsic to success of prospective plan of arrangement — Requirements for sealing un-redacted versions of PSA and Province Support Agreement were met.

Table of Authorities

Cases considered by *H. Wilton-Siegel J.*:

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

Stelco Inc., Re (2005), 2005 CarswellOnt 6283, 15 C.B.R. (5th) 288, 204 O.A.C. 216, 78 O.R. (3d) 254 (Ont. C.A.) — considered

Statutes considered:

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

Generally — referred to

s. 11 — considered

s. 11.02(2) [en. 2005, c. 47, s. 128] — considered

Competition Act, R.S.C. 1985, c. C-34

Generally — referred to

Investment Canada Act, R.S.C. 1985, c. 28 (1st Supp.)

Generally — referred to

MOTION by debtor for order declaring purchaser to be successful bidder as defined in court's sales and investment solicitation process order, and for authorization to enter into plan sponsor agreement and province support agreement.

***H. Wilton-Siegel J.*:**

1 The applicant, U.S. Steel Canada Inc. (the "applicant" or "USSC"), seeks an order declaring that Bedrock Industries Canada LLC (the "Purchaser" or "Bedrock") is the Successful Bidder as that term is defined in paragraph 27 of the sales and investment solicitation process order of the Court dated January 21, 2016 (the "SISP Order"). In addition, it seeks authorization to enter into an agreement with Bedrock and Bedrock Industries L.P. dated as of December 9, 2016 referred to as the "CCAA Acquisition and Plan Sponsor Agreement" (the "PSA"). The applicant also seeks related ancillary relief as described below. At the conclusion of the hearing, the Court advised the parties that it was prepared to grant the requested relief for written reasons to follow. This Endorsement sets out the written reasons of the Court for its determination.

Background

2 On September 16, 2014, the applicant obtained an initial order pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") (as amended and restated from time to time, the "Initial Order").

3 Over the course of more than 18 months, the applicant conducted extensive sales and marketing efforts within these CCAA proceedings. The initial marketing exercise was conducted pursuant to an order of the Court dated April 2, 2015, which authorized the applicant to commence a sale and restructuring/recapitalizing process (the "SARP"). The applicant did not receive any viable offers for a transaction or series of transactions under the SARP. By order of the Court dated October 9, 2015, the applicant was authorized to discontinue the SARP.

4 Pursuant to the SISP Order, the applicant was authorized to commence a new sales and investment solicitation process (the "SISP"). The course of the SISP is set out in the various reports of the Monitor, Ernst & Young Inc. (the "Monitor"), including its most recent report, the thirty-third report dated December 13, 2016 (the "Monitor's Report"), and the affidavit sworn by the chief restructuring officer of the applicant, William Aziz (the "CRO") on December 13, 2016.

5 In summary, as with the SARP, more than 100 strategic and financial parties were contacted to solicit potential interest. The first phase of the SISP ended on February 29, 2016. After that date, the applicant, the financial advisor to the applicant, and the CRO assessed the bids received and selected a number of bidders as "Phase 2 Qualified Bidders" after obtaining input from key stakeholders and with the concurrence of the Monitor. The deadline for Phase 2 Qualified Bidders to submit a binding offer was May 13, 2016. After that date, the applicant, together with its financial advisor, the CRO and the Monitor, evaluated the offers received, discussed the offers with the key stakeholders, and facilitated numerous meetings and negotiations between the bidders and various key stakeholders.

6 At the end of July 2016, as a result of this review and the various meetings and negotiations, the applicant, with the assistance of the financial advisor and the support of the Monitor, concluded that the proposal of Bedrock was the most promising bid and designated the proposal as a "Qualified Bid" for the purposes of the SISP Order.

7 Since that time, Bedrock has held discussions and negotiations with the principal stakeholders of the applicant, being the United Steelworkers International Union ("USW"), the USW Locals 8782 and 1005, the Province of Ontario (the "Province"), United States Steel Corporation ("USS") and Representative Counsel on behalf of the non-unionized salaried employees and retirees ("Representative Counsel").

8 On September 21, 2016, the Province announced that it had entered into a memorandum of understanding with Bedrock (the "Province/Bedrock MOU"). On November 1, 2016, USS announced that it had agreed to proposed terms regarding the sale and transition of ownership of USSC to Bedrock, which are reflected in a term sheet (the "USS/Bedrock Term Sheet"). On November 22, 2016, USW Locals 8782 and 8782(b) (collectively, "Local 8782") delivered a letter to Bedrock confirming that the executive of these locals had approved a form of collective bargaining agreement to be entered into upon completion of Bedrock's purchase of USSC (the "Local 8782 Letter of Support"). The letter indicated that the executive was prepared to recommend the agreement to their respective memberships, conditional on satisfaction of certain arrangements relating to the funding of other post-employment benefits ("OPEBs") and the legacy and future pension plans of USSC.

9 In addition, as a result of direct discussions between Bedrock and USSC during this period, the parties reached agreement on the principal terms of a proposed transaction by which Bedrock would acquire the business and operations of USSC (the "Proposed Transaction"). These terms of the Proposed Transaction are set out in the PSA. The PSA is largely consistent with the terms of the Province/Bedrock MOU, the USS/Bedrock Term Sheet and the understanding between Bedrock and USW Local 8782. The PSA provides that it is not binding on USSC until USSC obtains an order of this Court authorizing it to enter into the PSA and to pursue the Proposed Transaction in accordance with the PSA (the "Authorization Order").

10 In connection with the PSA, USSC and Bedrock also requested the Province to enter into an agreement with USSC in respect of the Proposed Transaction. To this end, the Province and USSC have entered into an agreement dated December 9, 2016 (the "Province Support Agreement"). The Province Support Agreement also provides that it does not become effective unless and until the Authorization Order is granted.

The Proposed Transaction

11 The basic structure of the Proposed Transaction is summarized in the Monitor's Report as follows:

> (a) the Purchaser will acquire substantially all of USSC's operating assets and business on a going concern basis and the outstanding shares of USSC through a CCAA plan of arrangement. Substantially all of the existing operations at both the Hamilton Works and the Lake Erie Works will continue;
>
> (b) the Purchaser will not acquire USSC's real property in Hamilton (the "HW Lands") and at Lake Erie (the "Lake Erie Lands") but will cause USSC to lease the part of the real property needed to continue steel operations. USSC's real property will be contributed to a Land Vehicle (as defined below) to be sold, leased or developed for the benefit of USSC's five main registered pension plans (the "Stelco Plans") and OPEBs. There is an expectation that these lands will have value when redeveloped. The Land Vehicle will initially be funded by a $10 million secured revolving loan from the Province, and an amount to be agreed upon from USSC. Any proceeds generated from these lands would be available to:
>
> (i) fund the operations of the Land Vehicle in an agreed amount;
>
> (ii) provide reimbursement to the Ontario Ministry of the Environment and Climate Change ("MOECC") for costs, if actually incurred, to test, monitor and investigate environmental conditions on the land; and
>
> (iii) provide additional funding to be distributed equally towards the benefit of the Stelco Plans and OPEBs;
>
> (c) the Purchaser will provide an equity contribution to implement the Transaction and will arrange new debt financing in an amount with borrowing availability not less than $125,000,000 after satisfying all exit costs and the payment of other amounts associated with USSC's emergence from protection under the CCAA;
>
> (d) a new administrator will be appointed for the Stelco Plans and USSC's ongoing obligations with respect to the legacy liabilities under the Stelco Plans will be fixed as described below. The Stelco Plans will continue to be covered by the Pension Benefits Guarantee Fund. In addition to any funding received by the Stelco Plans from the Land Vehicle, USSC will make various lump sum and ongoing contributions into these pension plans including:
>
> (i) a $30 million upfront payment upon the closing of the Proposed Transaction;
>
> (ii) a $20 million payment prior to any dividend distribution by USSC to Bedrock; and
>
> (iii) 10% of USSC's Free Cash Flow (as defined in the PSA), subject to a minimum of $10 million per year for the first five years, and a minimum of $15 million for the next 15 years. Bedrock will guarantee $160 million of these total annual contributions required from USSC;
>
> (e) one or more entities (the "OPEB Entity") satisfactory to USSC, the USW and the Province will be established for the purpose of receiving, holding and distributing funds on account of OPEBs. In addition to any funding received by the OPEB Entity from the Land Vehicle as referred to above, USSC will make various lump sum and ongoing contributions to the OPEB Entity, including:
>
> (i) $15 million annual fixed payments (the "OPEB Fixed Contribution");

(ii) 6.5% of USSC's Free Cash Flow, subject to a maximum of $11 million per year; and

(iii) $30 million (the "Advance OPEB Payment") on the earlier of the date on which USSC first pays a dividend, redeems any capital stock, or makes any distribution to Bedrock or its affiliates, investors or funds, or the date that is three years after the closing of the Proposed Transaction. The Advance OPEB Payment is to be amortized in the fourth through ninth years following the closing date and applied against the OPEB Fixed Contribution described above for those years in accordance with a formula as set out in the OPEB Term Sheet (as defined below);

(f) USS will receive full payment for its secured claims and will assign its unsecured claims to the Purchaser;

(g) the Province will receive US$61 million and the MOECC will provide releases of certain legacy environmental liabilities associated with USSC's real property. The US$61 million would be used:

(i) to reimburse the professional fees of the Province related to USSC's restructuring;

(ii) as financial assurance, held by the MOECC, to cover any costs that may be incurred by the MOECC in connection with environmental conditions on USSC's real property; and

(iii) for any portion of the amount held as financial assurance that is not required by the MOECC, to be equally distributed towards the benefit of USSC's OPEBs and the Stelco Plans;

(h) USSC will be required to continue to comply with all environmental laws and regulations going forward and to enter into an environmental management plan with the MOECC going forward. USSC will fund the costs of any environmental baseline testing and monitoring;

(i) all other secured claims, as determined in accordance with the claims process order of the Court made November 13, 2014 (the "Claims Process Order"), will be paid in full or as otherwise agreed by the Purchaser and USSC; and

(j) the remaining unsecured claims will receive a distribution pursuant to the CCAA plan from a distribution pool in an amount to be determined.

12 The Monitor believes that, if the Proposed Transaction is completed, USSC will emerge as a stand-alone steel manufacturer with a restructured balance sheet and sufficient liquidity such that it will have stability and be able to compete in challenging steel market conditions. A successful completion of the Proposed Transaction is expected to result in the preservation of jobs, ongoing business for suppliers, and ancillary economic benefits for the communities in which USSC operates its business.

The Plan Sponsor Agreement

13 The following summarizes the significant terms of the PSA and is based on the description thereof in the Monitor's Report.

14 The principal commitments of USSC and Bedrock are set out in sections 2.01(1) and (2) of the PSA which read as follows:

2.01 Transaction

(1) The Corporation and the Purchaser will each use commercially reasonable efforts to give effect to a restructuring of the Corporation by way of a plan of arrangement under the CCAA (the "CCAA Plan") and the Stakeholder Agreements prior to the Outside Date, on the terms set out in and consistent in all material respects with the Term Sheets and this Agreement (the "Transaction").

(2) The Corporation and the Purchaser agree to cooperate with each other in good faith and use commercially reasonable efforts to complete the following steps in accordance with the following timeline in support of the Transaction:

(a) obtain the Authorization Order by December 31, 2016;

(b) obtain the Meeting Order [being an order of the court for the convening of a meeting or meetings of the creditors to consider and vote on the CCAA Plan] by January 31, 2017;

(c) obtain the Sanction Order [being an order of the court for the approval of the CCAA Plan] by March 10, 2017; and

(d) implement the CCAA Plan and close the Proposed Transaction by the Outside Date [being March 31, 2017 or such later date as USSC and the Purchaser may designate by mutual agreement].

15 The PSA attaches term sheets setting out the principal terms of the Proposed Transaction agreed to between USSC and Bedrock regarding the following matters (collectively, the "Term Sheets"):

1. the CCAA Plan contemplated to implement the Proposed Transaction;

2. the arrangements pertaining to the environmental conditions at the Hamilton Works and the Lake Erie Works;

3. the arrangements pertaining to the ownership of the HW Lands and the Lake Erie Lands after completion of the Proposed Transaction by a newly established entity (the "Land Vehicle");

4. the lease arrangements pertaining to the lands to be owned by the Land Vehicle that USSC will require for its operations at the Hamilton Works and the Lake Erie Works;

5. proposed terms for OPEBs, including the funding thereof (the "OPEB Term Sheet");

6. proposed terms regarding the Stelco Plans including the funding thereof (the "Pension Term Sheet"); and

7. arrangements concerning the tax aspects of the Proposed Transaction.

16 The Proposed Transaction is subject to a number of important conditions, which are for the benefit of the Purchaser and USSC and must be complied with at or prior to the closing of the Proposed Transaction. Such conditions include, among others:

(a) *Competition Act* compliance and *Investment Canada Act* approval will have been obtained;

(b) the Sanction Order of the court will have been obtained;

(c) amendments to the collective agreements with USW Local 1005, USW Local 8782 and USW Local 8782(b) shall have been executed and ratified;

(d) the closing conditions to implement the arrangements described in the Term Sheets will have been satisfied on terms and conditions acceptable to the Purchaser and USSC;

(e) implementation of arrangements satisfactory to the Purchaser and USSC regarding the following:

(i) the payment in full to USS of its secured claim;

(ii) the assignment to the Purchaser of the USS unsecured claims and the issued and outstanding shares in the capital of USSC;

(iii) the execution of a transitional services agreement between USS and USSC;

(iv) the execution of an agreement with respect to intellectual property and trade secrets between USS and USSC; and

(v) the execution of an ore supply agreement between USS and USSC;

(f) the execution and delivery of a new loan agreement, security and related documentation with not less than $125,000,000 of credit available, after satisfying all exit costs and other amounts associated with USSC's emergence from protection under the CCAA, to the Purchaser and USSC by the lenders and to be available at or prior to closing of the Proposed Transaction;

(g) the execution and delivery of all other agreements contemplated by the Term Sheets, or required to satisfy the closing conditions described above, that are required to be executed prior to the time of closing between Bedrock or USSC or both, as applicable, with one or more stakeholders as applicable;

(h) the execution and delivery of all releases among each of the key stakeholders and USSC; and

(i) the satisfaction or waiver of the conditions to the implementation of the CCAA Plan giving effect to the Proposed Transaction as described in the PSA.

Preliminary Matter

17 The relief sought in this proceeding is opposed by three parties: USW Local 1005 ("Local 1005"), the City of Hamilton ("Hamilton"), and Robert J. Milbourne and Sharon P. Milbourne (collectively, the "Milbournes"). These parties (collectively, the "Objecting Parties") each raise a common issue, the short service of the motion materials, which I will address first.

18 The notice of motion and motion record in this matter were served on the service list on Friday, December 9, 2010 after the close of business. The Objecting Parties say that this effectively gave them three business days' notice of the motion. In paragraph 55, the Initial Order contemplates eight business days' notice of a motion, subject to further order of the Court in respect of urgent motions. To the extent necessary, the applicant seeks leave of the Court to bring this motion on short service on the grounds that it is an urgent motion.

19 The Objecting Parties seek dismissal of the motion or, in the alternative, an adjournment of this motion for five business days. Counsel for Local 1005 and for Hamilton say that a delay would permit their clients to better understand the terms of the Proposed Transaction. In addition, Hamilton and the Milbournes suggest that such an adjournment might permit resolution of their respective issues.

20 It would have been preferable for the applicant to have provided the full notice contemplated by the Initial Order for motions in the ordinary course. However, I am prepared to grant leave to shorten the service to that actually provided in this case for the following reasons.

21 First, there is real urgency to this motion in several respects. After almost two years of marketing USSC, the Proposed Transaction is not only the only viable proposal but also the best offer for USSC's stakeholders generally. However, Bedrock is not currently legally obligated to proceed with any transaction. Moreover, the economic circumstances generally, and the economics of the steel industry in particular, are subject to great uncertainty. In addition, there are no currently operating timelines for the resolution of the outstanding issues necessary to finalize the Proposed Transaction. Time does not normally improve the prospects for a successful restructuring. It is therefore imperative that Bedrock be committed to using commercially reasonable efforts to complete the Proposed Transaction at the present time.

22 Second, there is no evidence whatsoever of any prejudice to the Objecting Parties that would result from granting the requested relief. As discussed below, none of their rights are affected by the Authorization Order. Further, there is no indication that any of them has been unable to understand the PSA in the time available or to represent their clients properly in this hearing. Indeed, they have very ably presented the principal issues of their clients. I would observe as well that Local 1005 has had knowledge of the principal terms of the Proposed Transaction in respect of pensions and OPEBs since early September through its participation in discussions regarding the Proposed Transaction.

23 Lastly, there is no reasonable likelihood that a delay of five business days will result in the resolution of any of the claims of the Objecting Parties that require negotiation. As all of the parties acknowledge, this is a highly complex restructuring with a number of inter-related issues. I would also note that, to the extent that the position of the Milbournes under the Proposed Transaction is a matter of clarification rather than negotiation, there is no need for any delay in hearing this motion.

Declaration of Bedrock as the Successful Bidder

24 As mentioned, the applicant seeks a declaration that Bedrock is the Successful Bidder as defined in paragraph 27 of the SISP Order with the result, among other things, that all other bids and proposals made by any other person are deemed to be rejected.

25 Paragraph 27 of the SISP Order reads as follows:

> USSC and the Financial Advisor, in consultation with and with the approval of the Monitor, (a) will review and evaluate each Qualified Bid, provided that each Qualified Bid may be negotiated among USSC, in consultation with the Financial Advisor and the Monitor, and the applicable Phase 2 Qualified Bidder, and may be amended, modified or varied to improve such Phase 2 Qualified Bid as a result of such negotiations, and (b) identify the highest or otherwise best bid (the "Successful Bid", and the Phase 2 Qualified Bidder making such Successful Bid, the "Successful Bidder") for any particular Property or the Business in whole or part. The determination of any Successful Bid by USSC, with the assistance of the Financial Advisor, and the Monitor shall be subject to approval by the Court.

26 The applicant, with the assistance of its financial advisor and the Monitor, has determined that Bedrock is the Successful Bidder and that the Proposed Transaction is the Successful Bid. Such determination is therefore now subject to the approval of the Court.

27 The applicant says that such determination is, in effect, governed by the business judgment rule. On this basis, the determination of the applicant's board of directors should be respected absent evidence of negligence, fraud or patent unreasonableness. There is no such evidence filed in opposition to the motion, notwithstanding the objections discussed below.

28 I am inclined to agree with the standard proposed by the applicant. In any event, however, there are the following additional considerations which weigh in favour of the granting of the Court's approval if, instead, the Court is required to address the reasonableness of the applicant's determination.

29 First, the Proposed Transaction is the outcome of an extended search for a buyer or investor pursuant to which USSC has been very extensively marketed. There is no other viable bid or proposal before the Court which would provide as much value to the stakeholders generally. The Monitor is of the view that the Proposed Transaction is the best option for USSC and its stakeholders in the present circumstances.

30 Second, on the evidence before the Court in the earlier reports of the Monitor, and in the opinion of the Monitor as expressed in the Monitor's Report, the SISP process which resulted in the Proposed Transaction was transparent, robust, fair and reasonable and considered all available alternatives.

31 Third, despite the fact that the Proposed Transaction does not meet the objectives of all parties, it creates a number of benefits for stakeholders. These include the maintenance of USSC as a going concern with the attendant preservation of employment and related social benefits. In addition, the Proposed Transaction would provide significant funding for USSC's pensions and OPEBs, including through the Land Vehicle created to hold the lands not required for the operations of the Hamilton Works. It also provides for a distribution to the applicant's unsecured creditors as well as repayment of its secured creditors.

32 Fourth, as a related matter, there is considerable support for the PSA from principal stakeholders of USSC. While Local 1005 argues that support for the Proposed Transaction has not reached "the tipping point", because of the opposition to the PSA of the Objecting Parties addressed below, the reality is the opposite. The Authorization Order is supported by the applicant's board of directors, the Province and USW Local 8782. While USS, the USW and Representative Counsel take no position on the motion, they are not raising any objections. In particular, USS is not opposed to the terms of the Proposed Transaction as set out in the PSA but is withholding its consent until the remaining issues are resolved to its satisfaction. In addition, Representative Counsel stated on behalf of his clients that his clients take reassurance from the fact that the Authorization Order does not purport to affect the legal rights of the parties and that negotiations will continue regarding the matters of significance to his clients. Further, the board of directors of USSC is supportive of the PSA, notwithstanding the fact that an important issue to them personally remains an unresolved issue, being the operation of existing indemnities in their favour from USS. Lastly, the CRO of the applicant also recommends that Bedrock be approved as the Successful Bidder.

33 Fifth, the Objecting Parties submit that particular provisions are intrinsically unfair and, on this basis, urge the Court to reject the Proposed Transaction, or to withhold its approval of Bedrock as the Successful Bidder. In so doing, they are implicitly urging the Court to apply its own view of fairness. I do not think that the Court's view of the fairness of the Proposed Transaction is the appropriate standard at this stage of the proceedings for the following reasons.

34 First, the Proposed Transaction is not yet finalized. It would therefore be premature to reach any conclusion regarding the terms of the Proposed Transaction. In addition, while the Objecting Parties raise legitimate concerns regarding particular issues of importance to them or their members and retirees, such issues cannot be examined in a vacuum. They must be measured for present purposes against the alternative. In this case, as mentioned, there is no alternative transaction against which to assess these provisions of the Proposed Transaction. The only alternative would appear to be a liquidation scenario.

35 Further, to the extent that the Court must address the fairness of a transaction, it must do so having regard to the entirety of the transaction, including the pre-existing rights of the stakeholders and the manner in which the interests of the parties are resolved given the need for concessions on the part of the stakeholders to achieve a successful restructuring. In this context, a significant consideration in assessing the fairness of any transaction is whether or not it has received the approval of the affected stakeholders. In other words, the fairness of the issues raised by Local 1005, which are important issues, are more properly addressed by the members and retirees of Local 1005 themselves in the creditors' meeting or otherwise after the Proposed Transaction and CCAA Plan are finalized.

36 Sixth, as discussed below, the Monitor has provided a strong recommendation in favour of the Court granting approval of the Authorization Order. The Monitor is of the view that the Proposed Transaction represents the best available option for USSC and its stakeholders in the present circumstances.

37 Accordingly, I am satisfied that the Court should approve the Proposed Transaction as the Successful Bid for the purposes of the SISP Order.

Authorization to Enter into the PSA and the Province Support Agreement

38 The applicant also seeks the authorization of the Court to enter into the PSA and the Province Support Agreement. I will address this matter by dealing first with the authority of the Court to grant such authorization, then with the reasons

for the Court's determination to authorize the applicant to sign these agreements, next with two particular terms of the PSA for which the applicant has sought specific authorization, and finally with the objections of the Objecting Parties.

Authority of the Court to Authorize the Execution of the PSA and the Province Support Agreement by the Applicant

39 Section 11 of the CCAA provides the Court with broad powers to "make any order that it considers appropriate in the circumstances" and section 11.02(2) provides specific authority to vary a stay of proceedings. The Court therefore has the authority to authorize a debtor company in CCAA proceedings to enter into an agreement to facilitate a prospective restructuring.

40 The issue of the authority of a court was addressed in *Stelco Inc., Re* (2005), 78 O.R. (3d) 254 (Ont. C.A.). In that case, the Court of Appeal upheld an order of the motion judge authorizing the debtor company to enter into three agreements with the provincial government, the USW and a proposed financing party. The three agreements were said to be "intrinsic to the success" of the proposed plan of arrangement. The debtor company had negotiated those agreements "in an attempt to successfully emerge from CCAA protection." They established the framework for the proposed transaction which would in turn form the basis of the proposed plan of arrangement. It appears that these agreements served a similar purpose in that case as the Province/Bedrock MOU, the USS/Bedrock Term Sheet and the Local 8782 Letter of Support in the present proceeding.

41 In reaching its decision, the Court of Appeal expressed the following test at paras. 18 and 19, which I think is equally applicable in the present context:

> In my view, the motions judge had jurisdiction to make the orders he did authorizing Stelco to enter into the agreements. Section 11 of the CCAA provides a broad jurisdiction to impose terms and conditions on the granting of the stay. In my view, s.11(4) [the predecessor of section 11.02] includes the power to vary the stay and allow the company to enter into agreements to facilitate the restructuring, provided that the creditors have the final decision under s. 6 whether or not to approve the Plan. The court's jurisdiction is not limited to preserving the status quo. The point of the CCAA process is not simply to preserve the status quo but to facilitate restructuring so that the company can successfully emerge from the process. This point was made by Gibbs J.A. in *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*, [1990] B.C.J. No. 2384, 4 C.B.R. (3d) 311 (C.A.), at para. 10:
>
> [Excerpt omitted.]
>
> In my view, provided the orders do not usurp the right of the creditors to decide whether to approve the Plan the motions judge had the necessary jurisdiction to make them. The orders made in this case do not usurp the s. 6 rights of the creditors and do not unduly interfere with the business judgment of the creditors. The orders move the process along to the point where the creditors are free to exercise their rights at the creditors' meeting.

Authorization of the PSA and the Province Support Agreement

42 I will address the authorization of the applicant's execution of the PSA first and will then briefly address authorization of the Province Support Agreement.

Authorization of the Plan Sponsor Agreement

43 The following sets out the four principal reasons of the Court for its determination to authorize the applicant to enter into the PSA.

44 First, the Authorization Order does not alter or otherwise affect any legal rights of any of the creditors. As it is not a plan sanction order, it does not alter the right of creditors to approve or reject a plan of arrangement, based on a finalized Proposed Transaction, when it is presented to the creditors. Nor does it constitute approval of a plan of arrangement. For that, the applicant requires a finalized Proposed Transaction upon which to base such a plan. It does not even constitute approval of a final Proposed Transaction. It constitutes no more than authorization to USSC to

enter into the PSA and thereby commit to use commercially reasonable efforts to pursue finalization of a transaction based on the framework of the Proposed Transaction described therein, as well as an authorization to enter into the Province Support Agreement.

45 In order to finalize a binding agreement for the Proposed Transaction that is capable of being completed, the applicant will have to negotiate the final terms of the agreement and take the necessary actions to be in a position to satisfy the conditions of closing contemplated in the PSA. The former requires resolution of a number of outstanding issues among the stakeholders who have already been involved as well as consultation and negotiation with other stakeholders who have not been involved to date, including Hamilton and the Milbournes, among others, regarding the treatment of their claims and interests. The latter requires negotiation of a number of agreements giving effect to the arrangements contemplated by the Term Sheets as well as new collective agreements with each of Local 1005 and Local 8782. There is nothing in the Authorization Order that prohibits USSC from continuing negotiations with its creditors on these matters. Rather, the PSA expressly contemplates that such discussions and negotiations are necessary to finalize all of the terms of the Proposed Transaction and of the proposed plan of arrangement.

46 Second, while the Objecting Parties' concern that granting the Authorization Order will limit or constrain their bargaining power in such negotiations is understandable, the fact is that the Order itself does not affect the bargaining power or "leverage" of any of the creditors. Nor is it correct to say that future negotiations will take place in a "take it or leave it" atmosphere.

47 On the one hand, there is scope for negotiations between the stakeholders and USSC and Bedrock. As mentioned, the PSA itself expressly contemplates serious negotiations on a large number of issues that are important to various stakeholders and that ultimately require their approval or consent. It does not predetermine or foreclose the outcome of these negotiations, which are integral to the proposed restructuring of USSC. Further, as mentioned above, the extent to which particular creditors are able to achieve their priorities or objectives in such negotiations will continue to depend, among other factors, on the overall economics of the Proposed Transaction and the willingness of other parties to make concessions or tradeoffs to complete a transaction, rather than on the existence of the Authorization Order.

48 On the other hand, and more significantly, while the terms of the Authorization Order grant exclusivity to Bedrock while the necessary consultations and negotiations are proceeding, this merely reflects the reality of the current situation even without the Order. To the extent that any of the creditors believe themselves to be constrained in some manner in future negotiations, that is a reflection of the circumstances in which the parties find themselves quite apart from the Order. The Court's authorization of the applicant's request to enter into the PSA does not alter the environment in which future negotiations will take place if there is to be a successful restructuring of USSC. While that could be the case if the effect of the Authorization Order were to prevent stakeholders from negotiating simultaneously with two or more potential purchasers, this is no longer a realistic possibility. The SISP has run its course and the stakeholders must now address its outcome. The Proposed Transaction is not only the option that provides the most value to the stakeholders of USSC, it is the only viable option. There is no competing offer for the business and operations of USSC on a going concern basis. The only alternative to proceeding to finalize the Proposed Transaction is a liquidation of USSC on a controlled or an uncontrolled basis.

49 Third, there are real benefits that will flow from execution of the PSA. In general terms, the commitments of the applicant and Bedrock in the PSA will increase the likelihood of a successful restructuring to the benefit of all of the stakeholders. In this regard, the present circumstances are very similar to those in *Stelco Inc., Re*. The PSA is a necessary step in the progression toward finalization of a plan of arrangement for submission to the creditors. The PSA establishes the framework for the Proposed Transaction which would, in turn, form the basis of a proposed plan of arrangement. As in *Stelco Inc., Re*, the PSA is therefore intrinsic to the success of the prospective plan of arrangement and it is doubtful that the proposed plan could proceed if the Authorization Order were not granted.

50 More particularly, the execution of the PSA provides a binding commitment of Bedrock to use commercially reasonable efforts to finalize a restructuring of USSC based on the terms of the Proposed Transaction. As Bedrock is

not otherwise obligated in respect of the Proposed Transaction, this commitment, even with the qualifications in the PSA, is important to maintain the confidence of the applicant's employees, suppliers and customers in the continued progress of the restructuring. As mentioned, it provides a framework for future negotiations among stakeholders as well as transparency regarding the interests of the other stakeholders, which will facilitate such negotiations. In addition, it provides some momentum to the process of finalizing the Proposed Transaction by bringing the creditors who have not been involved to date into the consultations and negotiations on an informed basis. Lastly, the PSA sets timelines for completion of a finalized Proposed Transaction and a plan of arrangement based on such Proposed Transaction, which are critical if there is to be successful restructuring.

51 Fourth, an important consideration for the Court is the strong recommendation of the Monitor that the Court grant the Authorization Order. The Monitor's recommendation is based on the following:

- the integrity of the SISP process used to arrive at the Proposed Transaction;
- the Monitor's judgment that the Proposed Transaction set out in the PSA is the best available option for USSC and its stakeholders in the circumstances and has only been possible to achieve after two marketing processes that took more than 18 months;
- the Monitor's view that the Proposed Transaction provides a foundation upon which a successful restructuring of USSC can be built; and
- the Monitor's belief that approval of the PSA should assist in focusing the efforts of the key stakeholders towards completing the negotiations of the definitive agreements and arrangements contemplated by the PSA.

Authorization of the Province Support Agreement

52 At the hearing of this motion, the focus of the arguments of all parties was on approval of the PSA, with little attention paid to the related issue of the request for the Court's authorization for the applicant to enter into the Province Support Agreement. I have proceeded on the basis that the opposition of the Objecting Parties also extended to opposition to authorization of the Province Support Agreement, given that it was also necessary in order to progress the Proposed Transaction.

53 In any event, to the extent that there is any opposition to this relief, the Court is satisfied that the applicant should be authorized to enter into the Province Support Agreement for the same reasons as it authorized the applicant to enter into the PSA.

Non-Solicitation and Expense Reimbursement Provisions of the PSA

54 The applicant also seeks approval of the Court of the non-solicitation provision in section 5.06 of the PSA and the expense reimbursement provision in section 7.02(2) of the PSA.

55 The non-solicitation provision runs in favour of Bedrock until such time as the PSA is terminated. Given the Court's approval of the applicant's determination of Bedrock as the Successful Bidder and the Court's authorization of the PSA, this is a commercially reasonable provision. It would be unreasonable to expect that Bedrock would commit the time and resources necessary to finalize and implement the Proposed Transaction, and a plan of arrangement giving effect to the Proposed Transaction, without the assurance that it could not be displaced by a subsequent offer. In addition, the significant level of stakeholder support in favour of the Authorization Order described above also weighs in favour of authorization of this covenant.

56 The expense reimbursement provision contemplates reimbursement of Bedrock's transaction-related expenses up to a maximum of $4 million in the event Bedrock terminates the PSA under section 7.01(a) thereof. However, this provision relates only to termination in the event of a material breach of any representation, warranty, covenant, obligation or other

provisions of the PSA by the other party — i.e. by the applicant. Accordingly, Bedrock is only entitled to reimbursement of its expenses in the event of a material breach of the PSA by the applicant.

57 In my view, given the complexity and attendant cost of the Proposed Transaction, including the remaining actions required to complete a successful transaction, this is an eminently reasonable provision from a commercial perspective.

58 Based on the foregoing, the Court is satisfied that both provisions should be approved as commercially reasonable, given the context in which the PSA has been negotiated and executed. In addition, each of these provisions enhances the prospects for a successful restructuring of USSC and, as such, are consistent with the purposes of the CCAA.

The Objections

59 In reaching the Court's determination to authorize the applicant to enter into the PSA, the Court considered the following substantive objections to the Authorization Order and rejected them for the reasons expressed below.

The City of Hamilton

60 Hamilton objects to the declaration of Bedrock as the Successful Bidder and to the authorization of USSC to enter into the PSA. Hamilton says it has been excluded from meaningful consultation and negotiation regarding the Proposed Transaction. It says such consultation was due given its status as a creditor of the applicant and its role as the approval authority for land use and development on the HW Lands.

61 In its Notice of Objection dated December 13, 2016, Hamilton says it has three main areas of concern: (1) pension and benefits for retirees of USSC; (2) payment of past (accrued and unpaid) and future property taxes; and (3) the future of the HW Lands.

62 Of these matters, its principal objection pertains to the uncertainty regarding the treatment of the accrued and unpaid past property taxes on the HW Lands as well as the payment of future property taxes. It asks the Court to order, as a condition of the authorization of the PSA, that the PSA confirm that USSC will pay its accrued past taxes and all future property taxes on the HW Lands.

63 It is not entirely clear that the City has been excluded from negotiations with Bedrock, as counsel for the City suggests. However, the more important point is that on each of the two issues that are of direct concern to the City — payment of its accrued and future taxes and the regime pertaining to the HW Lands — the effect of the relief granted is to permit consultations and negotiations to take place among Bedrock, Hamilton and the other parties involved in these issues. It is inappropriate for the Court to order that Hamilton's rights be enshrined in the provisions of the PSA pending the outcome of such discussions and negotiations. Moreover, the Authorization Order does not impair or otherwise affect its rights in any manner whatsoever. Among other things, Hamilton retains the right to oppose the prospective CCAA Plan, both at the creditors' meeting and in the sanction hearing, if it believes that the Proposed Transaction is not fair to it given its legal rights.

The Milbournes

64 The Milbournes have filed an objection dated December 14, 2016. The Milbournes say that they object to the Authorization Order because the PSA "fails to provide for treatment of the pension benefits and OPEBs for individuals in uniquely situated positions", including, in particular, themselves. They say the resulting uncertainty is prejudicial to their interests, given that these benefits stand to be compromised under the proposed plan of arrangement.

65 In addition to registered pension benefits, the Milbournes receive non-registered pension benefits under a retirement compensation agreement. They submit that, if the Authorization Order is granted, the Court should require that the PSA confirm their continued entitlement to these benefits.

66 The circumstances of the Milbournes, and any other parties who currently receive similar benefits, are not before the Court, although the Court understands that there may be a trust established to fund some or all of these benefits. In any event, it would be premature to address the treatment of these benefits at the present time.

67 As with the issues raised by Hamilton, the intended treatment of these benefits under the Proposed Transaction will be the subject of discussion and negotiation, depending, among other things, upon the extent to which such benefits are currently entitled to the benefit of a trust. Further, the Milbournes' rights are not affected in any way by the Authorization Order. They retain the right to oppose the fairness of any plan of arrangement in the sanction hearing to the extent they consider that their rights have been unfairly affected by such plan.

Local 1005

68 I have addressed above the principal objections of Local 1005 to approval of Bedrock as the Successful Bidder for purposes of the SISP Order. Local 1005 also opposes authorizing the applicant to enter into the PSA. It says that, if the PSA is authorized, significant issues outstanding among the parties will essentially be presented to stakeholders on a "take it or leave it basis". I do not agree with this characterization of the situation for the reasons set out above.

69 The Proposed Transaction is a multiparty transaction. The principal stakeholders have reached agreement on governing principles regarding a number of critical issues. However, Local 1005 is not bound by those arrangements as a legal matter. They are free to negotiate based on their own priorities. As mentioned, the extent to which they are able to achieve those priorities or objectives will depend, among other factors, on the overall economics of the Proposed Transaction and the willingness of other parties to make concessions or tradeoffs in order to complete a transaction. However, in the present circumstances, it will not be affected by the execution of the PSA and the exclusivity that the SISP Order and the PSA grant Bedrock.

70 Local 1005 also refers to the fact that the PSA and the CCAA Term Sheet stipulate that changes to Local 1005's collective agreement must be agreed to, as well as changes to the pension and OPEB arrangements. It says that, if the PSA is authorized, these conditions will have a significant impact on collective bargaining and contractual rights. The CCAA Term Sheet does contemplate amendments to existing arrangements affecting employees and retirees of USSC. I do not agree, however, that the authorization of the PSA has a significant impact by itself on the negotiation process.

71 After a lengthy search process, this is the transaction that is on the table. It reflects what Bedrock is prepared to offer and, in a larger sense, what the market assesses as the value of USSC. There remains considerable scope for negotiations between the parties. However, the scope of such negotiation is defined by the financial limitations imposed by the broad terms of the Bedrock offer and, in a larger sense, by the market. Any sense of constraint in this negotiating process is a reflection of these economic realities, not the authorization of the PSA. Moreover, the consequences of not approving the PSA would establish constraints of a more immediate and draconian nature.

72 Lastly, Local 1005 objects that certain provisions are, in its opinion, unfair to its members and retirees. This includes their treatment in respect of OPEBs relative to the treatment of members and retirees of Local 8782. Local 1005 also says the arrangements regarding the pension plans and OPEBs are unfair in that they do not provide retirees and beneficiaries, as well as future retirees and future beneficiaries, with any security regarding their pensions and benefits.

73 It is premature to address these issues at this time. They remain the subject of further negotiations among the stakeholders. They will also be addressed in the context of negotiations regarding satisfaction of the conditions to implementation of the Proposed Transaction. Concerns of this nature are also more properly addressed, as mentioned, by the creditors in the creditors' meeting or in the sanction hearing before the Court if a plan of arrangement is approved.

Sealing Order

74 The applicant also requests a sealing order regarding the un-redacted versions of the PSA and the Province Support Agreement. These versions differ from the redacted versions in only one respect: disclosure of the minimum equity contribution of Bedrock.

75 It is my understanding that none of the parties oppose this relief. In any event, I am satisfied that the requirements for sealing the un-redacted versions of the PSA and the Province Support Agreement contemplated by the test in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, 211 D.L.R. (4th) 193 (S.C.C.), at para. 53, have been met at this stage of the CCAA proceedings. The minimum equity figure is commercially sensitive information, disclosure of which could be prejudicial to Bedrock and/or USSC and, ultimately, to the prospects for a successful restructuring. The benefits of protecting this information in furthering the restructuring far outweigh any negative impact from its redaction. More generally, there is no obvious reason why the other stakeholders should know the position taken by their counterparty, Bedrock, in its negotiations with the applicant. Accordingly, the ability of stakeholders to negotiate the remaining outstanding issues is not reasonably affected in any manner by the non-disclosure of this information.

Motion granted.

End of Document

TAB 22

Court File No. CV-14-10695-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE	)	FRIDAY, THE 9th
	)	
JUSTICE WILTON-SIEGEL	)	DAY OF OCTOBER 2015

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 WITH RESPECT TO
U. S. STEEL CANADA INC.
(the "**Applicant**")

CASH CONSERVATION AND BUSINESS PRESERVATION ORDER

THIS MOTION, made by the Applicant, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of William E. Aziz sworn September 17, 2015 (the "**Aziz Affidavit**"), the supplemental affidavit from William E. Aziz sworn September 28, 2015 (the "**Aziz Supplemental Affidavit**"), the affidavit of William E. Aziz sworn October 7, 2015, and the reports dated August 31, 2015, September 22, 2015, October 2, 2015 and October 7, 2015 of Ernst & Young Inc. in its capacity as the monitor of the Applicant (the "**Monitor**"), and on hearing the submissions of counsel for the Applicant, the Monitor, and such other counsel as were present, no other person appearing although duly served as appears from the affidavit of service of Sharon Kour sworn September 17, 2015, the affidavit of service of Stephen Fulton sworn September 28, 2015 and the affidavit of service of Kelly Peters sworn September 30, 2015.

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

DEFINITIONS

2. The following terms shall have the meanings ascribed thereto:

(a) "**Initial Order**" means the order of Morawetz R.S.J. dated September 16, 2014 as amended and restated from time to time.

(b) "**Normal Cost Contributions**" means normal cost contributions, if any, determined in accordance with the general funding regime of the *Pension Benefits Act* (Ontario) and Regulation 909 thereunder.

(c) "**OPEB Claim**" means any claim of any former salaried or unionized employee, a surviving spouse of a deceased former salaried or unionized employee, or any other Person, under or in relation to the OPEB Plan.

(d) "**OPEB Plan**" means the post-employment benefit plan maintained by the Applicant, including, without limiting the generality of the foregoing, (i) prescription drugs, dental, other medical, hospital and vision benefits for eligible former salaried and unionized employees of the Applicant and their eligible spouses and dependents, which benefits are administered through Green Shield Canada ("**Green Shield**") on an administrative service only basis with the Applicant, but (ii) excluding life insurance benefits for former salaried and unionized employees of the Applicant provided pursuant to a group insurance

policy between the Applicant and Desjardins Financial Security Life Assurance Company ("**Desjardins**") under Policy number 530005.

(e) "**OPEB Claims Suspension Date**" means October 9, 2015.

(f) "**PBGF**" means the Pension Benefits Guarantee Fund under the *Pension Benefits Act* (Ontario).

(g) "**Pre-Suspension Claims**" means OPEB Claims for amounts incurred but not paid on or prior to the OPEB Claims Suspension Date.

(h) "**Pre-Suspension Claims Bar Date**" means October 31, 2015 or such date as specified by Green Shield with the approval of the Monitor;

(i) "**RCA Trust**" means the retirement compensation arrangement trust maintained by the Applicant pursuant to a Trust Agreement with CIBC Mellon Trust Company dated May 1, 2003 for supplementary pension and retirement payments for certain former salaried employees and their surviving spouses.

(j) "**Salary Continuance Payments**" means salary continuance payments being made by the Applicant to 18 employees, including, without limiting the generality of the foregoing, pension accrual and group benefits coverage, who are no longer actively employed by or providing services to the Applicant.

(k) **"Stelco Regulation"** means Regulation 99/06 of the Ontario *Pension Benefits Act*, the *Stelco Inc. Pension Plans Regulation.*

(l) "**Supplementary Pension Payments**" means all unfunded, unregistered supplementary pension and retirement payments that are payable by the Applicant from time to time to certain former salaried and unionized employees and their

surviving spouses, as applicable, including, without limiting the generality of the foregoing, (i) payments made pursuant to the terms of retirement benefit contracts entered into by the Applicant and employees on or around the employee's retirement date, (ii) retiring allowances paid to former Stelpipe unionized employees and their surviving spouses pursuant to the Basic Agreement between Stelpipe Ltd. and Local Union No. 523 CWA-TCA Canada dated April 2, 2001 and related documents, and (iii) special retiring allowances for certain former salaried and unionized employees and their surviving spouses in accordance with individual arrangements between the Applicant and the former salaried and unionized employees and/or their surviving spouses, as applicable. For greater certainty, Supplementary Pension Payments do not include supplementary pension benefits payable to former employees and their surviving spouses from the RCA Trust.

All capitalized terms referred to in this Order and not otherwise defined, are as defined in the Initial Order.

SARP DISCONTINUATION

3. THIS COURT ORDERS that the Applicant is authorized and directed to discontinue immediately its Sale and Restructuring/Recapitalization Process ("**SARP**"), approved by order of this Court on April 2, 2015 (the "**SARP Order**"), in relation to all of the assets and business of the Applicant other than the Hamilton Lands (as defined in the SARP Order), with the SARP continuing in respect of the Hamilton Lands and the SARP Order continuing to govern that process until further Order of the Court.

CASH CONSERVATION MEASURES AND BUSINESS PRESERVATION PLAN

4. THIS COURT ORDERS that the Applicant is hereby authorized to implement the Business Preservation Plan (as described in the Aziz Affidavit) and to take any steps and operating initiatives as determined by the Applicant, in consultation with the Monitor, to be necessary to permit the Applicant to implement the Business Preservation Plan and cash conservation measures contemplated therein (the "**Cash Conservation Measures**"), subject to the terms of this Order and the terms of the Initial Order.

5. THIS COURT ORDERS that, without limitation to the requirements of the Initial Order, no Person shall discontinue, fail to honour, interfere with, repudiate, terminate or cease to perform any existing agreement or arrangement with the Applicant as a result of the implementation of the Business Preservation Plan and Cash Conservation Measures.

6. THIS COURT ORDERS that all Persons are hereby directed to assist and cooperate with the Applicant and the Monitor in the implementation of the Business Preservation Plan and the Cash Conservation Measures.

DIP AMENDMENT

7. THIS COURT ORDERS that the Applicant is hereby authorized and empowered to enter into the Amended and Restated Interim Financing Term Sheet among the Applicant, Brookfield Capital Partners Ltd. (the "**Replacement DIP Lender**") and the other parties thereto substantially in the form attached as Exhibit "A" to the Aziz Supplemental Affidavit (the "**Amended and Restated Replacement DIP Term Sheet**"), which amends and restates the Replacement DIP Term Sheet, as defined in the order of the Court dated July 24, 2015 (the "**Replacement DIP Order**").

8. THIS COURT ORDERS that Amended and Restated Replacement DIP Term Sheet be and is hereby approved.

9. THIS COURT ORDERS that from and after the date of this Order, all references in the Replacement DIP Order to the "Replacement DIP Term Sheet" shall refer to the Amended and Restated Replacement DIP Term Sheet, and the terms "Replacement DIP Facility", "Replacement DIP Lender" and "Replacement DIP Definitive Documents" shall refer to such terms as defined in, relating to or used with respect to the Amended and Restated Replacement DIP Term Sheet.

10. THIS COURT ORDERS that the Applicant is authorized and empowered to borrow under the credit facility (the "**Replacement DIP Facility**") provided for under, and subject to the terms of, the Amended and Restated Replacement DIP Term Sheet and that the obligations thereunder and under the Replacement DIP Definitive Documents (as defined in the Replacement DIP Order) or any other definitive documents entered into in respect of the Amended and Restated DIP Term Sheet shall continue to have the benefit and the priority of the Replacement DIP Lender's Charge (as defined in the Replacement DIP Order) and all other security granted pursuant to the Replacement DIP Definitive Documents.

11. THIS COURT ORDERS that the Replacement DIP Lender shall be entitled to rely on this Order and the Replacement DIP Order (including paragraphs 30 and 31 thereof), each as issued, and the Replacement DIP Lender's Charge for all advances made and all obligations owing under the Replacement DIP Term Sheet, the Amended and Restated Replacement DIP Term Sheet and the Replacement DIP Definitive Documents.

12. THIS COURT ORDERS AND DECLARES that this Order is subject to provisional execution and that if any of the provisions of this Order in respect of or in connection with the Amended and Restated Replacement DIP Term Sheet, the Replacement DIP Facility or the Replacement DIP Order shall subsequently be stayed, modified, varied, amended, reversed or vacated in whole or in part (collectively, "**Variation**") whether by subsequent order of this Court on or pending an appeal from this Order, such Variation shall not in any way impair, limit or lessen the protections, rights or remedies of the Replacement DIP Lender, whether under this Order (as made prior to the Variation), under the Amended and Restated Replacement DIP Term Sheet, under the Replacement DIP Order or under any of the documentation delivered hereto or thereto (including the Replacement DIP Definitive Documents), with respect to any advances made prior to the Replacement DIP Lender being given notice of the Variation and the Replacement DIP Lender shall be entitled to rely on this Order as issued for all advances so made.

13. THIS COURT ORDERS AND DECLARES that any motion for a Variation by this Court of paragraphs 7 to 13 of this Order or any other provisions of this Order in respect of the Amended and Restated DIP Term Sheet, the Replacement DIP Facility or the Replacement DIP Order may only be brought by a party that has not been served with notice of the within motion and any such motion must be brought and be returnable no later than ten (10) business days after the date of this Order and on not less than eight (8) business days' notice to the Applicant, the Monitor, the Replacement DIP Lender and any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

SUSPENSION OF BENEFITS UNDER THE OPEB PLANS

14. THIS COURT ORDERS that, until further order of this Court, all payments in respect of OPEB Claims shall be suspended effective on and after the OPEB Claims Suspension Date in accordance with this Order and no payment of or in respect of an OPEB Claim incurred after the OPEB Claims Suspension Date shall be made during the remainder of the Stay Period. For greater certainty, the suspension of the payments in respect of OPEB Claims does not constitute a disclaimer or termination by the Applicant of the OPEB Plans.

15. THIS COURT ORDERS that the Applicant shall not make any payments on account of any OPEB Plan-related costs and expenses incurred on or after the OPEB Claims Suspension Date or benefits arising on or after the OPEB Claims Suspension Date.

16. THIS COURT ORDERS that the Applicant shall:

(a) within 10 days of the date of this Order, prepare and send by regular pre-paid mail, courier, fax, or email, notice of the suspension of payments of OPEB Claims, which are suspended subject to further order of the Court, and the OPEB Claims Suspension Date (the "**OPEB Claims Suspension Date Notice**") substantially in the form attached hereto as Schedule "A" to the President of USW Local 1005, the President of USW Local 8782, Representative Counsel for Salaried Employees and each Person identified as an OPEB Plan member in the Applicant's records on the date of this Order, including former salaried and unionized employees, certain separated spouses of former employees and surviving spouses of deceased former employees; and

(b) post the OPEB Claims Suspension Date Notice on the Monitor's website.

PRE-SUSPENSION CLAIMS

17. THIS COURT ORDERS that any individual holder of a Pre-Suspension Claim seeking reimbursement from the Applicant or Green Shield shall be required to submit to Green Shield, before the Pre-Suspension Claims Bar Date, the required claim form and supporting documentation relating to the Pre-Suspension Claim, failing which such Pre-Suspension Claims shall not be assessed for payment or paid by the Applicant or Green Shield and in such case, the individual holder may file a claim in a claims process within these CCAA Proceedings or a receivership or bankruptcy of the Applicant, as the case may be, which, if accepted, shall constitute a claim of the claimant against the Applicant.

18. THIS COURT ORDERS that any Pre-Suspension Claims and supporting documentation submitted prior to or on the Pre-Suspension Claims Bar Date in accordance with this Order shall be assessed by the Applicant, Green Shield, and/or the Monitor and shall not be paid without approval of the Monitor.

SUSPENSION OF THE SUPPLEMENTARY PENSION PAYMENTS

19. THIS COURT ORDERS that, until further order of this Court, all Supplementary Pension Payments shall be temporarily suspended effective on and after October 9, 2015 in accordance with this Order and no such payments shall be made during the remainder of the Stay Period. For greater certainty, the suspension of the Supplementary Pension Payments does not constitute a disclaimer or termination by the Applicant of the agreements relating to the Supplementary Pension Payments.

20. THIS COURT ORDERS that the Applicant shall:

(a) within 10 days of the date of this Order, prepare and send by regular pre-paid mail, courier, fax, or email, notice of the temporary suspension of Supplementary Pension Payments substantially in the form attached hereto as Schedule "B" (the "**Supplementary Pension Payments Suspension Notice**") to the President of USW Local 1005, Representative Counsel for Salaried Employees and each Person identified as a recipient of Supplementary Pension Payments in the Applicant's records on the date of this Order, including former salaried and unionized employees and surviving spouses of deceased former employees entitled to Supplementary Pension Payments benefits; and

(b) post the Supplementary Pension Payments Suspension Notice on the Monitor's website.

SUSPENSION OF SALARY CONTINUANCE PAYMENTS

21. THIS COURT ORDERS that, until further order of this Court, all Salary Continuance Payments that have not been processed as of October 9, 2015 shall be temporarily suspended in accordance with this Order and no such payments shall be made during the remainder of the Stay Period. For greater certainty, the suspension of Salary Continuance Payments does not constitute a disclaimer or termination by the Applicant of the agreements relating to the Salary Continuance Payments.

22. THIS COURT ORDERS that the Applicant shall:

(a) within 10 days of the date of this Order, prepare and send by regular pre-paid mail, courier, fax, or email, notice of the temporary suspension of Salary Continuance Payments substantially in the form attached hereto as Schedule "C"

(the "**Salary Continuance Payments Suspension Notice**") to Representative Counsel for Salaried Employees and each Person identified as a recipient of Salary Continuance Payments in the Applicant's records; and

(b) post the Salary Continuance Payments Suspension Notice on the Monitor's website.

SUSPENSION OF REGISTERED PENSION PLAN CONTRIBUTIONS, RCA TRUST CONTRIBUTIONS AND PBGF ASSESSMENTS

23. THIS COURT ORDERS that, until further order of this Court, effective from and after September 29th, 2015 the Applicant shall:

(a) pay only Normal Cost Contributions to the DB Registered Plans and paragraph 11(a) of the Initial Order shall cease to apply to any payments other than Normal Cost Contributions;

(b) shall not pay any contributions that would otherwise be required under the Stelco Regulation or any past service contributions or special payments to fund any going concern unfunded liability or solvency deficiency of any of the DB Registered Plans as long as the Stay Period remains in effect;

(c) shall not pay any amounts to the PBGF in respect of assessments relating to the DB Registered Plans as long as the Stay Period remains in effect; and

(d) shall not pay any amounts to the RCA Trust as long as the Stay Period remains in effect (the amounts described in (b), (c) and (d), the "**Stayed Pension Amounts**").

For greater certainty, the suspension of the payments in paragraph 23(d) above does not constitute a disclaimer or termination by the Applicant of the agreements relating to the payments in paragraph 23(d) above.

24. THIS COURT ORDERS that (i) the Applicant, (ii) the Monitor, (iii) the trustee(s) and custodian(s) of the assets held in respect of the DB Registered Plans and the RCA Trust, and (iv) their respective officers, directors and advisors shall not incur any obligation or liability whether by way of debt, damages for breach of any duty whether statutory, fiduciary, common law or otherwise, or for breach of trust, nor shall any trust be imposed, whether express, implied, constructive, resulting, deemed or otherwise, as a result of the implementation of the Business Preservation Plan or any Cash Conservation Measures taken by the Applicant in accordance with the terms of this Order, including, without limiting the generality of the foregoing, the non-payment of the Stayed Pension Amounts and any other obligations suspended hereunder. Notwithstanding the above, nothing in this paragraph shall be taken to extinguish or compromise the obligations of the Applicant in respect of the DB Registered Plans and the RCA Trust.

25. THIS COURT ORDERS that if any claim, lien, charge or trust, including deemed trust, arises as a result of the failure to contribute any Stayed Pension Amount while the Stay Period is in effect, no such claim, lien, charge or trust shall have priority over the Charges as set out in the Initial Order or in the Replacement DIP Order in these proceedings, or in any subsequent receivership, interim receivership or bankruptcy of the Applicant.

26. THIS COURT ORDERS AND DECLARES that nothing in this Order shall be taken to extinguish or compromise the claim of any Person having a claim against the Applicant in respect of the DB Registered Plans, the RCA Trust, PBGF assessments with respect to the DB

Registered Plans, the OPEB Plans or any Supplementary Pension Payments or Salary Continuance Payments.

CRITICAL SUPPLIER CHARGE

27. THIS COURT ORDERS that United States Steel Corporation ("**USS**") shall be entitled to the benefit of and is hereby granted a charge (the "**Critical Supplier Charge**") on the Property of the Applicant in an amount equal to the value of goods and services supplied by USS and received by the Applicant after the date of this Order less all amounts paid to USS in respect of such goods and services. The Critical Supplier Charge shall be subordinate to the Administration Charge (Part 1), Directors' Charge, DIP Lender's Charge, Replacement DIP Lender's Charge, but shall rank in priority to all other Encumbrances (other than the Permitted Priority Liens (as defined in the Replacement DIP Order)), including for greater certainty, the Administration Charge (Part 2).

SUSPENSION OF MUNICIPAL REALTY TAXES

28. THIS COURT ORDERS that, until further Order of this Court, the Applicant's obligation to remit or pay any amount payable in respect of municipal realty, business, or other taxes, assessments or levies of any nature or kind pursuant to paragraph 11(d) of the Initial Order shall be suspended.

NOTICE

29. THIS COURT ORDERS that the sending and publication of the notices described herein in the manner set forth in this Order shall constitute good and sufficient service upon all Persons affected by this Order, notwithstanding the service and notice procedure set out in the Initial Order, and that no other or further notice to shall be required.

CONFLICT

30. THIS COURT ORDERS that the provisions of this Order shall be interpreted in a manner complementary and supplementary to the provisions of the Initial Order, provided that in the event of a conflict between the provisions of this Order and the provisions of the Initial Order, the provisions of this Order shall govern.

31. THIS COURT ORDERS that the Applicant and the Monitor may, at any time, and with such notice as the Court may require, seek directions from the Court in respect of this Order, the Business Preservation Plan and the Cash Conservation Measures.

Hon. J.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

OCT 28 2015

Schedule "A"

Date: October • , 2015

To: Gary Howe, President, United Steelworkers Of America ("**USW**"), Local 1005, on behalf of retirees represented by USW Local 1005 and surviving spouses of deceased retirees who were represented by USW Local 1005

Bill Ferguson, President, USW, Local 8782, on behalf of retirees represented by USW Local 8782 and surviving spouses of deceased retirees who were represented by USW Local 8782

Andrew Hatnay, Koskie Minsky LLP, Representative Counsel for retirees of U. S. Steel Canada Inc. ("**USSC**") not represented by USW and surviving spouses of deceased retirees not represented by USW

Retirees of USSC, certain spouses of USSC retirees and surviving spouses of deceased retirees of USSC who have coverage under USSC's post-employment benefit plans

From: Michael McQuade, President, U. S. Steel Canada Inc.

Subject: Notice of Benefit Termination Date

Pursuant to the Order of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") made on September 16, 2014 (the "**Initial Order**"), USSC commenced court-supervised restructuring proceedings under the *Companies' Creditors Arrangement Act* (the "**CCAA**").

Pursuant to the Initial Order, USSC was permitted but not required to continue to pay expenses in respect of post-employment benefit plans relating to prescription drugs, dental, other medical, and hospital and vision coverage for eligible former USSC employees and their surviving spouses and dependants (collectively referred to as the "OPEB Plans"). USSC was also permitted but not required to provide life insurance for eligible former USSC employees. A further Court order dated October 8, 2014, appointed Koskie Minsky LLP as representative legal counsel for individuals representing all beneficiaries of USSC pension and benefit plans who are not represented by the USW in these CCAA proceedings (subject to those individuals who elected to opt out of such representation).

Pursuant to an Order of the Court dated October 9, 2015, benefits payable under the OPEB Plans shall be suspended after October 9, 2015. In other words, after October 9, 2015, your entitlement to benefits coverage under the OPEB Plans will be suspended. The Order does not apply to life insurance.

For eligible prescription drugs, dental, other medical, hospital and vision coverage incurred under the OPEB Plans on or prior to October 9, 2015, you must submit applicable claims, invoices, or benefit forms to Green Shield Canada in the normal manner but the submission must be made prior to October 31, 2015, in order to be reimbursed. If you fail to submit applicable claims, invoices, or benefit forms to Green Shield Canada prior to October 31, 2015, any eligible claim shall constitute an unsecured claim against USSC in the CCAA proceeding.

While October 31, 2015 is the final deadline to submit applicable claims, invoices, or benefit forms for expenses incurred on or prior to October 9, 2015, you are strongly encouraged to submit any claims as soon as possible.

The suspension of coverage under the OPEB Plans does not impact the pension benefits payable under a registered pension plan maintained by USSC.

Schedule "B"

Date: October •, 2015

To: Gary Howe, President, United Steelworkers Of America ("**USW**"), Local 1005, on behalf of retirees represented by USW Local 1005 and surviving spouses of deceased retirees who were represented by USW Local 1005, who are in receipt of an individual unfunded retiring allowance ("**Unfunded RA**")

Andrew Hatnay, Koskie Minsky LLP, Representative Counsel for retirees of U. S. Steel Canada Inc. ("**USSC**") not represented by USW and surviving spouses of deceased retirees not represented by USW, who are in receipt of an individual unfunded retirement benefit contract ("**Unfunded RBC**") or an Unfunded RA

Retirees of USSC and surviving spouses of deceased retirees who are in receipt of an Unfunded RBC or RA

From: Michael McQuade, President, U. S. Steel Canada Inc.

Subject: Notice of Cessation of Unfunded RBC and RA Payments

Pursuant to an Order of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") made on September 16, 2014 (the "**Initial Order**"), USSC commenced court-supervised restructuring proceedings under the *Companies' Creditors Arrangement Act* (the "**CCAA**"). A further Court order dated October 8, 2014, appointed Koskie Minsky LLP as representative legal counsel for individuals representing all beneficiaries of USSC pension and benefit plans who are not represented by the USW in these CCAA proceedings (subject to those individuals who elected to opt out of such representation).

Pursuant to the Initial Order, USSC was permitted but not required to continue to make payments to eligible former employees and their surviving spouses who are entitled to receive an Unfunded RBC or RA, sometimes referred to as an unregistered supplemental pension or retirement payment, in the ordinary course of business and consistent with existing compensation policies and arrangements.

On October 9, 2015, the Court ordered that supplemental pension and retirement payments under the Unfunded RBCs and RAs to all eligible former employees and their surviving spouses shall cease on and after October 9, 2015. In other words, eligible former employees and their surviving spouses will not receive any payment under their Unfunded RBC or RA that would have been payable on or after October 9, 2015.

The cessation of payments under the Unfunded RBCs and RAs does not impact any pension benefits payable under a registered pension plan maintained by USSC.

Schedule "C"

Date: October •, 2015

To: Andrew Hatnay, Koskie Minsky LLP, Representative Counsel for employees of U. S. Steel Canada Inc. ("**USSC**") not represented by United Steelworkers Of America ("**USW**"), who are in receipt of salary continuance payments and who are no longer reporting to work at USSC

Employees who are in receipt of salary continuance payments and who are no longer required to report to work at USSC

From: Michael McQuade, President, U. S. Steel Canada Inc.

Subject: Notice of Cessation of Salary Continuance Payments

Pursuant to an Order of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") made on September 16, 2014 (the "**Initial Order**"), USSC commenced court-supervised restructuring proceedings under the *Companies' Creditors Arrangement Act* (the "**CCAA**"). A further Court order dated October 8, 2014, appointed Koskie Minsky LLP as representative legal counsel for individuals representing all beneficiaries of USSC pension and benefit plans who are not represented by the USW in these CCAA proceedings (subject to those individuals who elected to opt out of such representation).

Pursuant to the Initial Order, USSC was permitted but not required to continue to make salary continuance payments to you as an employee who is no longer required to report to work at USSC, in the ordinary course of business and consistent with existing compensation policies and arrangements.

On October 9, 2015, the Court ordered that unprocessed salary continuance payments payable to employees who are no longer actively employed by or providing services to USSC shall be temporarily suspended on and after October 31, 2015. In other words, employees receiving such salary continuance payments will not receive payments that would have been payable on or after October 31, 2015.

The temporary suspension of these salary continuance payments does not impact your eligibility for any pension benefits under a registered pension plan maintained by USSC.

IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO U. S. STEEL CANADA INC.

Court File No. CV-14-10695-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding Commenced at Toronto

CASH CONSERVATION AND BUSINESS PRESERVATION ORDER

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Lawyers for U. S. Steel Canada Inc.
14819129

TAB 23

2018 BCSC 1135
British Columbia Supreme Court

Walter Energy Canada Holdings, Inc. (Re)

2018 CarswellBC 1818, 2018 BCSC 1135, 294 A.C.W.S. (3d) 692, 61 C.B.R. (6th) 251

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

And In the Matter of the Business Corporations Act, S.B.C. 2002, c. 57, as Amended

And In the Matter of a Plan of Compromise and Arrangement of New Walter Energy Canada Holdings, Inc., New Walter Canadian Coal Corp., New Brule Coal Corp., New Willow Creek Coal Corp., New Energybuild Holdings ULC

Fitzpatrick J.

Heard: July 3, 2018
Judgment: July 9, 2018
Docket: Vancouver S1510120

Proceedings: additional reasons to *Walter Energy Canada Holdings, Inc. (Re)* (2017), 2017 CarswellBC 3037, 2017 BCSC 1968, 54 C.B.R. (6th) 57, Fitzpatrick J. (B.C. S.C.)

Counsel: Marc Wasserman, Patrick Riesterer, for Petitioners
Tevia Jeffries, for United Mine Workers of America 1974 Pension Plan and Trust
Matthew Nied, for Warrior Met Coal, LLC
Stephanie Drake, for United Steelworkers, Local 1-424
Peter Reardon, Vicki Tickle, for Monitor, KPMG Inc.

Subject: Civil Practice and Procedure; Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Discretion of court

US coal business, W Inc. (US), bought another company's coal mining operations in Canada and organized them under laws of BC as W Group — W Inc. (US) was party to pension plan (Plan) covering US retirees and beneficiaries — W Inc. (US) commenced bankruptcy proceedings in US — W Group was granted protection under Companies' Creditors Arrangement Act (CCAA) — W Inc. (US)'s assets were sold under stalking horse agreement relieving purchaser of liability under Plan — Plan's claim against W Group under US legislation was rejected on W Group's application — Parties' settlement of most of outstanding issues was approved by court as fair and reasonable, beneficial to stakeholders, consistent with CCAA and as permitting distribution to creditors while avoiding delay of appeal and risk that 1974 Plan would succeed — Settlement was amended — Petitioners brought application for sanction order in relation to amended Plan — Application granted; W Group and monitor were authorized to implement amended Plan — W Group and monitor determined there were sufficient funds to make distributions contemplated in Settlement Term Sheet after establishing certain reserves — Section 6(1) of CCAA gave court express jurisdiction to sanction plan of compromise or arrangement where requisite double majority of creditors approved plan — There was strict compliance with provisions of CCAA — Nothing had been done that was not authorized by CCAA — Monitor updated court and, on each stay extension application, advised that petitioners were acting in good faith and with due diligence throughout course of proceedings — As Settlement Term Sheet was found to be fair and reasonable and amended Plan simply implemented its terms with one minor exception, it followed that amended Plan was also fair and reasonable — Amended Plan would

result in full payment of proven claims owed to affected creditors, result rarely achieved in insolvency proceeding — Amended Plan would resolve heavily contested claim advanced by sophisticated litigants who no doubt fully assessed merits of amended Plan after receiving legal advice — Only issue was in relation to fairness and reasonableness of original Plan related to CCAA Plan Releases — Although CCAA did not contain express provision permitting or prohibiting granting of releases as part of plan of compromise or arrangement, there was authority to effect that court could approve releases — Amended Plan considerably narrowed persons released and scope of some releases — Releases in amended Plan were appropriate in circumstances and did not detract from overall fairness and reasonableness of amended Plan.

Table of Authorities

Cases considered by *Fitzpatrick J.*:

Arctic Glacier Income Fund, Re (2012), 2012 CarswellMan 827 (Man. Q.B.) — considered

Bul River Mineral Corp., Re (2015), 2015 BCSC 113, 2015 CarswellBC 156, 22 C.B.R. (6th) 301 (B.C. S.C.) — followed

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

Canadian Airlines Corp., Re (2000), 2000 ABCA 238, 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, 266 A.R. 131, 228 W.A.C. 131 (Alta. C.A. [In Chambers]) — referred to

Canadian Airlines Corp., Re (2000), 2001 ABCA 9, 2000 CarswellAlta 1556, 277 A.R. 179, 242 W.A.C. 179, 88 Alta. L.R. (3d) 8, [2001] 4 W.W.R. 1 (Alta. C.A.) — referred to

Canwest Global Communications Corp., Re (2010), 2010 ONSC 4209, 2010 CarswellOnt 5510, 70 C.B.R. (5th) 1 (Ont. S.C.J. [Commercial List]) — referred to

Sino-Forest Corp., Re (2012), 2012 ONSC 7050, 2012 CarswellOnt 15913 (Ont. S.C.J. [Commercial List]) — followed

Sino-Forest Corp., Re (2013), 2013 ONCA 456, 2013 CarswellOnt 8896 (Ont. C.A.) — referred to

TLC The Land Conservancy of British Columbia, Inc. No. S36826, Re (2015), 2015 BCSC 656, 2015 CarswellBC 1089, 24 C.B.R. (6th) 255 (B.C. S.C.) — followed

Statutes considered:

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

Generally — referred to

s. 4 — referred to

s. 5.1(2) [en. 1997, c. 12, s. 122] — referred to

s. 6 — considered

s. 6(1) — considered

s. 6(3) — considered

s. 6(5) — considered

s. 6(6) — considered

s. 6(8) — considered

APPLICATION to sanction and approve amended plan of arrangement approved in judgment reported at *Walter Energy Canada Holdings, Inc. (Re)* (2017), 2017 BCSC 1968, 2017 CarswellBC 3037, 54 C.B.R. (6th) 57 (B.C. S.C.).

***Fitzpatrick J.*:**

INTRODUCTION

1 This is the final chapter of these *Companies' Creditors Arrangement Act*, R.S.C. 1985, c C-36, as amended (the "CCAA") proceedings.

2 These proceedings began approximately two-and-a-half years ago. The realizations from the significant assets of the petitioners, now called the "New Walter Canada Group", consisted primarily of coal mining assets located in British Columbia and the United Kingdom.

3 The main issue within the proceedings was the distribution of asset recoveries in light of various claims advanced by the stakeholders. Those stakeholders include the unionized workers in British Columbia, represented by the United Steelworkers, Local 1-424 (the "USW"), the United Mine Workers of America 1974 Pension Plan and Trust (the "1974 Plan") and Warrior Met Coal, LLC ("Warrior").

4 After significant contested proceedings, appeals filed and extensive negotiations between the New Walter Canada Group and all stakeholders, assisted by the CRO and the Monitor, a settlement was reached in September 2017. The provisions of the Settlement Term Sheet, as defined and approved in accordance with my earlier reasons should be read with these reasons: *Walter Energy Canada Holdings, Inc. (Re)*, 2017 BCSC 1968 (B.C. S.C.) (the "Settlement Reasons").

5 After the completion of further procedures in these *CCAA* proceedings, the petitioners now apply for a Sanction Order. In these reasons, I have capitalized certain terms, as set out in various court orders and related documents, including the plan.

BACKGROUND

6 On December 7, 2015, this Court granted an Initial Order in favour of the initial corporate group comprising the petitioners, called "Old Walter Canada Group", pursuant to the *CCCA*. The stay granted in the Initial Order has been extended numerous times in this proceeding and presently expires December 31, 2018.

7 The realization procedures undertaken and results achieved by Mr. Aziz, the CRO, have been very successful. At present, the Monitor estimates that approximately $61.5 million will be available in December 2018 for distribution to the stakeholders.

8 On August 16, 2016, this Court granted a Claims Process Order to establish a claims process to be implemented by the Old and New Walter Canada Groups.

9 As stated above, in September 2017, the New Walter Canada Group, the 1974 Plan and Warrior agreed to a Settlement Term Sheet that resulted in a full and final settlement of most of the outstanding issues among these stakeholders in these *CCAA* proceedings: Settlement Reasons at paras. 11-30. The Settlement Term Sheet is a complex document, but can be generally summarized as providing for:

(a) payment in full of Proven Claims of Affected Creditors;

(b) payment of $13 million to the 1974 Plan in full satisfaction of its claim against the New Walter Canada Group within these proceedings;

(c) payment of $75,000 to the USW in respect of its costs in these proceedings; and

(d) a substantial distribution to Warrior in respect of its Deemed Interest Claim in full satisfaction of that Claim.

10 On October 6, 2017, the Settlement Term Sheet was approved by this Court, after considering in particular that the Affected Claims (which included those advanced by the USW) were to be paid in full: Settlement Reasons at paras. 31-42.

11 The implementation of the Settlement Term Sheet was conditional upon the completion of the claims process to identify any further claims. On August 15, 2017, this Court granted a Claims Process Amendment Order to identify remaining Restructuring Claims and Directors/Officers Claims that had not yet been solicited.

12 That further claims process has now been completed and the New Walter Canada Group and the Monitor have determined that there are sufficient funds to make the distributions contemplated in the Settlement Term Sheet after establishing certain reserves for Disputed Claims and other matters. In particular, it is anticipated that there will be sufficient Available Funds to pay the Affected Creditors in full, pay the 1974 Plan Settlement Amount and pay the USW Settlement Amount with significant sums remaining to pay a large amount to Warrior in respect of its Deemed Interest Claim.

13 On May 28, 2018, the New Walter Canada Group filed its Original Plan, as developed by it in consultation with the Monitor and certain stakeholders. On May 31, 2018, the New Walter Canada Group obtained a Meeting Order granting leave to file the Original Plan and authorizing certain amendments to the Original Plan, pursuant to s. 4 of the *CCAA*.

14 A somewhat unusual aspect of the Meeting Order was that the New Walter Canada Group's class of unsecured creditors (including the Affected Creditors and Warrior) would be deemed to hold meetings and deemed vote their Claims in favour of the Original Plan or, if amended, any later filed plan. I considered that this was an expeditious manner to proceed since the Settlement Term Sheet provided for payment in full to the Affected Creditors and in light of Warrior's agreement to the Settlement Term Sheet. On May 21, 2014, such a deeming provision was granted by Justice Spivak in a *CCAA* meeting order where the affected creditors were similarly to be paid in full under the plan filed in those proceedings (*Arctic Glacier Income Fund, Re* [2012 CarswellMan 827 (Man. Q.B.)], The Queen's Bench, Winnipeg Centre, File No. CI 12-01-76323).

15 The essential terms of the Original Plan were to implement what was contained in the Settlement Term Sheet, including payment in full of Proven Claims owed to Affected Creditors.

16 The Meeting Order authorized the New Walter Canada Group to call the Creditors Meetings and outlined the notice that was to be provided to creditors regarding the meetings. On June 22, 2018, in advance of the deemed meetings, the New Walter Canada Group amended the Original Plan, as I will describe in more detail below (the "Amended Plan"). The materials establish that the notice procedures in respect of the Amended Plan have been followed. The notice provisions included specific mailings to the Affected Creditors, specific notice to Warrior, posting of materials on the Monitor's website and newspaper notices.

17 The notice to Affected Creditors included a request that any person with a concern regarding the Amended Plan should advise the Monitor of such concerns by June 25, 2018. Twelve such Affected Creditors did provide responses, but no person took exception to the substance of the Amended Plan or the meeting and voting process set out in the Meeting Order. For the most part, the responses were to express frustration in the delay of distribution.

18 On June 27, 2018, the deemed meetings and voting took place:

(a) the consolidated class of creditors, comprised of all of the Affected Creditors, including Warrior with respect to its Shared Services Claim (the "Affected Creditors Class") was established to vote on the Amended Plan. The Affected Creditors Class were deemed to have met and voted unanimously in favour of a resolution to approve the Amended Plan; and

(b) Warrior was the only creditor entitled to vote its Deemed Interest Claim and it was deemed to have voted in favour of a resolution to approve payment of that Claim in accordance with the Amended Plan.

DISCUSSION

19 Section 6(1) of the *CCAA* provides this Court with express jurisdiction to sanction a plan of compromise or arrangement where the requisite double majority of creditors has approved the plan.

20 The general requirements for court approval of a *CCAA* plan are well established:

(a) there must be strict compliance with all statutory requirements;

(b) all materials filed and procedures carried out must be examined to determine if anything has been done or purported to have been done which is not authorized by the CCAA; and

(c) the plan must be fair and reasonable.

See *Canadian Airlines Corp., Re*, 2000 ABQB 442 (Alta. Q.B.) at para. 60, leave to appeal denied, 2000 ABCA 238 (Alta. C.A. [In Chambers]), aff'd 2001 ABCA 9 (Alta. C.A.); *Sino-Forest Corp., Re*, 2012 ONSC 7050 (Ont. S.C.J. [Commercial List]) at para. 51, leave to appeal denied, 2013 ONCA 456 (Ont. C.A.); *Bul River Mineral Corp., Re*, 2015 BCSC 113 (B.C. S.C.) at para. 40; *TLC The Land Conservancy of British Columbia, Inc. No. S36826, Re*, 2015 BCSC 656 (B.C. S.C.) at para. 47.

a) Has there been strict compliance with statutory requirements?

21 I am satisfied that there has been strict requirements with all provisions of the *CCAA*. This is supported by the evidence of Mr. Aziz, the CRO, including that found in his most recent affidavit #23 sworn June 26, 2018.

22 In addition, in its Nineteenth Report dated June 27, 2018, the Monitor states that to the best of its knowledge, the petitioners have met all *CCAA* requirements and complied with all court orders granted in this proceeding.

23 Further, s. 6 of the *CCAA* has been complied with in terms of a sanction order being only available if the plan contains certain specified provisions concerning crown claims, employee claims and pension claims:

a) the Amended Plan satisfies the requirements of s. 6(3) because it provides that the Monitor shall, within six months after the Plan Sanction Date, pay in full, on behalf of the New Walter Canada Group, to Her Majesty in Right of Canada or any province all amounts of any kind that could be subject to a demand under s. 6(3) of the *CCAA* that were outstanding on the Filing Date and which have not been paid by the Plan Implementation Date;

b) the Amended Plan does not provide for payment of any "Employee Priority Claims" or "Pension Priority Claims" pursuant to ss. 6(5) and 6(6) of the *CCAA* because no such claims exist; and

c) the Amended Plan complies with s. 6(8) of the *CCAA* in that the New Walter Canada Group are distributing all their available assets to or on behalf of their creditors. No distribution is to be made on account of equity claims.

b) *Has anything been done that is not authorized by the CCAA?*

24 Again, no issues arise in this respect. No stakeholder has raised any such concerns.

25 Throughout these proceedings, the Monitor has updated the Court on the progress of the proceedings and its review of the activities of the petitioners, citing no irregularities. Indeed, on each stay extension application, the Monitor has advised that, in its view, the petitioners were acting in good faith and with due diligence throughout the course of these proceedings. See *Canwest Global Communications Corp., Re*, 2010 ONSC 4209 (Ont. S.C.J. [Commercial List]) at para. 17.

c) Is the Amended Plan fair and reasonable?

26 In the Settlement Reasons at paras. 31-42, I found the Settlement Term Sheet to be fair and reasonable. As the Amended Plan simply implements the terms of that document, it must necessarily follow, with one minor exception discussed below, that the Amended Plan is also fair and reasonable.

27 This is not a restructuring plan by which the New Walter Canada Group is to re-emerge. The Amended Plan is simply a means by which the monies realized from the asset dispositions by the petitioners and the CRO will be distributed to the stakeholders. In that circumstance, in addition to the other benefits outlined in the Settlement Reasons:

> (a) the Amended Plan will result in full payment of Proven Claims owed to Affected Creditors, which comprise the vast majority of the New Walter Canada Group's creditors. By any measure, such a result in an insolvency proceeding is rarely achieved;
>
> (b) the Amended Plan will also resolve the heavily contested claim advanced by the 1974 Plan. The compromise of that claim at $13 million has been accepted by the 1974 Plan, a sophisticated litigant who no doubt has fully assessed the merits of doing so after receiving legal advice; and
>
> (c) similarly, Warrior, another sophisticated litigant, has agreed to a compromise of its claim as against the Available Net Proceeds, having agreed that the settlement amount for the 1974's Plan's claim is to come from that fund, rather than detract from the full payment to the Affected Creditors.

28 The only issue that arose in relation to the fairness and reasonableness of the Original Plan related to the releases provided for in Article 9, and specifically Article 9.1 entitled "CCAA Plan Releases".

29 At the hearing on May 31, 2018, when the Meeting Order was sought, I questioned the New Walter Canada Group's counsel as to the appropriateness of the broad range of releases in the Original Plan and the naming of some of the releasees set out in Article 9.1. For example, the Original Plan provided for a general release in favour of the Financial Advisor, PJT Partners LP, despite that entity having only a limited role in the sales and solicitation process. In addition, there was an amorphous reference to an "auditor, financial advisor . . . . consultant, and agent" of the primary releasees, being the petitioners, the Monitor, the CRO and Directors and Officers of the petitioners

30 In *Bul River*, I discussed the court's jurisdiction to approve a plan of arrangement that includes releases and relevant considerations in terms of whether such releases are fair and reasonable:

> [77] The *CCAA* does not contain any express provisions either permitting or prohibiting the granting of releases, including third party releases, as part of a plan of compromise or arrangement. Nevertheless, there is authority to the effect that the court may approve releases found in a plan of arrangement while exercising its statutory jurisdiction under the *CCAA*. The leading decision is *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (CanLII), leave to appeal to S.C.C. refused (2008), 390 N.R. 393 (note). At paras. 40-52 of *Metcalfe*, a plan containing third party releases was sanctioned. At para. 46, the court stated that such jurisdiction may be exercised where the releases are "reasonably related to the proposed restructuring".
>
> [78] The approach in *Metcalfe* was adopted in *Canwest* at paras. 28-30. The court in *Canwest* noted that third party releases should be the exception and not requested or granted as a matter of course: para. 29.
>
> [79] In *Kitchener Frame Ltd. (Re)*, 2012 ONSC 234 (CanLII), although in the context of a proposal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, the court summarized the requirements that would justify third party releases:
>
> > [80] In *Metcalfe*, the Court of Appeal for Ontario held that the requirements that must be satisfied to justify third-party releases are:
> >
> > 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 creditors generally.

[80] *Metcalfe* has been applied in numerous decisions where third party releases have been approved: see, for example, *Sino-Forest Corp. (Re)*, 2012 ONSC 7050 (CanLII) at paras. 70-77; *SkyLink Aviation Inc. (Re)*, 2013 ONSC 2519 (CanLII) at paras. 30-33. In British Columbia, see *Angiotech Pharmaceuticals, Inc. (Re)*, 2011 BCSC 450 (CanLII) at para. 12, where the court sanctioned a plan that included releases in favour of various persons, including the monitor, financial advisors and the interim lender.

[81] It remains the case that any person proposing releases in a plan of arrangement, and any party seeking a court order sanctioning or even supplementing such releases, must ensure, from the outset, that a proper rationale exists for them.

31 In his affidavit, Mr. Aziz describes that, arising from concerns expressed by the Court, the Original Plan was amended to considerably narrow not only those persons who will be released, but also the scope of some releases. He states that, broadly speaking, the Amended Plan now provides for full and final releases for three groups of releasees:

(a) The New Walter Canada Group Parties: the New Walter Canada Group, the Directors, the Officers, and all present and former Employees who filed or could have filed indemnity claims against the Old Walter Canada Group or the New Walter Canada Group, and all affiliates and legal counsel thereof;

(b) The Restructuring Support Parties: the Monitor, KPMG Inc., and its affiliates; the CRO; Philip L. Evans Jr., in his capacity as consultant to the Old and New Walter Canada Groups; the Financial Advisor, but only with respect to its activities regarding the sale and investor solicitation process conducted in connection with the SISP Order; and, all affiliates, partners, members and legal counsel thereof; and

(c) The Derivative Released Parties: any person claiming to be liable derivatively through any of the foregoing persons.

32 The Monitor considers the releases contained in the Amended Plan to be fair and reasonable in the circumstances.

33 I conclude:

a) the Restructuring Support Parties have made necessary and tangible contributions to this *CCAA* proceeding. As noted by all counsel, courts have routinely sanctioned releases in favour of third parties such as the monitor, legal counsel, financial advisors, and other parties retained to advise the petitioner(s) or the Court throughout the conduct of a *CCAA* proceeding and who, by doing so, contribute to the success of a *CCAA* proceeding;

b) the narrowing of the releases has resulted in a more focussed basis for the releases such that they are more rationally connected to the purposes of the *CCAA* and the Amended Plan given their respective contributions toward this successful restructuring. For example, the release in favour of the Financial Advisor has been limited to its activities conducted in connection with the SISP Order. In addition, the Amended Plan is consistent with the scope of protections for the Financial Advisor set out in the SISP Order. The releases previously proposed for the "financial advisors, auditor, agents and consultants" were eliminated. The Amended Plan retained a release only for one consultant, Mr. Evans, who assisted the Old and New Walter Canada Groups throughout the sales process. Mr. Evans also assisted the New Walter Canada Group with respect to the Unresolved Claim and will continue to do so; and

c) the releases in favour of the New Walter Canada Group Parties are also typically granted. In addition, the Amended Plan does not release or discharge any petitioner from any Excluded Claim, any Director from any Claim

that cannot be compromised pursuant to s. 5.1(2) of the *CCAA*, any releasee other than the petitioners and the Directors and Officers from liability for gross negligence or willful misconduct, or any releasee from any obligation created by or existing under the Amended Plan or any related document.

34 The final factor raised by the New Walter Canada Group is that no stakeholder registered any objection to the releases in the Amended Plan. In this case, that factor can not be taken too far, where sophisticated parties agreed to those releases in both the Original Plan and Amended Plan and perhaps less sophisticated creditors were not concerned given that they expect full payment.

35 It remains the case that, when exercising its jurisdiction, the Court must consider the appropriateness of any releases at two different junctures: firstly, whether it is appropriate to approve the filing of a plan, typically when a meeting order is sought (such as happened here); and secondly, when there is an application for a sanction order. In the latter circumstance, the court may determine that releases are not fair and reasonable despite a plan having been approved by the creditors in accordance with the *CCAA* procedures.

36 All of this is to say that it is incumbent upon the drafters of any *CCAA* plan to consider, *at the outset of that exercise*, the appropriateness of any releases sought and whether the necessary support is either before the court or can be put before the court at both junctures mentioned above. This will avoid any concerns or issues that may later develop either from a stakeholder or from the court while exercising its jurisdiction under the *CCAA* to provide oversight and safeguard all interests, whether formal objections are raised or not.

37 I find that the releases in the Amended Plan are appropriate in the circumstances and do not detract from the overall fairness and reasonableness of the Amended Plan.

CONCLUSION

38 The Sanction Order is granted on the terms sought, including that:

a) the Amended and Restated Plan of Compromise and Arrangement of the New Walter Canada Group dated June 22, 2018 is sanctioned and approved;

b) the New Walter Canada Group and the Monitor are authorized to take all steps necessary to implement the Amended Plan; and

c) the New Walter Canada Group and the Monitor are authorized to take such steps as may be necessary following the Plan Implementation Date to make distributions and complete such transactions as are contemplated by the Amended Plan, to seek an orderly wind-down or other process acceptable to the New Walter Canada Group for Energybuild, to complete the Claims Process, and to address any other matters that arise in connection with the *CCAA* Proceedings.

Application granted.

End of Document

TAB 24

2011 ONSC 1647
Ontario Superior Court of Justice [Commercial List]

Robertson v. ProQuest Information & Learning Co.

2011 CarswellOnt 1770, 2011 ONSC 1647, [2011] O.J. No. 1160, 199 A.C.W.S. (3d) 757

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 CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

HEATHER ROBERTSON (Plaintiff) and PROQUEST INFORMATION AND LEARNING COMPANY, CEDROM-SNI INC., TORONTO STAR NEWSPAPERS LTD., ROGERS PUBLISHING LIMITED and CANWEST PUBLISHING INC. (Defendants)

Pepall J.

Judgment: March 15, 2011
Docket: 03-CV-252945CP, CV-10-8533-00CL

Counsel: Kirk Baert, for Plaintiff
Peter J. Osborne, Kate McGrann, for Canwest Publishing Inc.
Alex Cobb, for CCAA Applicants
Ashley Taylor, Maria Konyukhova, for Monitor

Subject: Civil Practice and Procedure; Insolvency

Headnote

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Orders, awards and related procedures — Aggregate awards

Representative plaintiff was journalist who had written articles for defendant publishers — Journalist brought action claiming copyright violations by publishers — Actions against publishers C were stayed under Companies Creditors Arrangement Act (CCAA) — C brought motion for order approving proposed notice of settlement — C and journalist brought joint motion for approval of settlement of class action as against C and related CCAA claim — Motion granted — Notice procedure order required notice of settlement to be published on defendant counsel websites as well as monitor's website in major newspapers and in press release — Toll-free phone numbers were to be available to inform class members — Settlement terms allowed preservation of remaining claims against other defendants — C was insolvent and prospect of recovery against them was limited — Court had jurisdiction to approve agreement under CCAA — Court could approve settlement was supported by involved parties and not opposed by class members or non-settling defendants — Settlement agreement was negotiated by experienced lawyers and was fair to both parties — Both parties would have faced risks in litigation which were removed by settlement — Settlement was approved in both actions.

Table of Authorities

Cases considered by *Pepall J.*:

Air Canada, Re (2004), 2004 CarswellOnt 469, 47 C.B.R. (4th) 169 (Ont. S.C.J. [Commercial List]) — referred to

Calpine Canada Energy Ltd., Re (2007), 2007 CarswellAlta 1050, 2007 ABQB 504, 35 C.B.R. (5th) 1, 415 A.R. 196, 33 B.L.R. (4th) 68 (Alta. Q.B.) — referred to

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

Dabbs v. Sun Life Assurance Co. of Canada (1998), 1998 CarswellOnt 5823 (Ont. Gen. Div.) — followed

Dabbs v. Sun Life Assurance Co. of Canada (1998), 40 O.R. (3d) 429, 22 C.P.C. (4th) 381, 5 C.C.L.I. (3d) 18, [1998] I.L.R. I-3575, 1998 CarswellOnt 2758 (Ont. Gen. Div.) — 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

Ontario New Home Warranty Program v. Chevron Chemical Co. (1999), 37 C.P.C. (4th) 175, 46 O.R. (3d) 130, 1999 CarswellOnt 1851 (Ont. S.C.J.) — referred to

Playdium Entertainment Corp., Re (2001), 2001 CarswellOnt 3893, 18 B.L.R. (3d) 298, 31 C.B.R. (4th) 302 (Ont. S.C.J. [Commercial List]) — referred to

Robertson v. Thomson Canada Ltd. (2009), 2009 CarswellOnt 3660, 80 C.P.C. (6th) 77 (Ont. S.C.J.) — considered

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6

Generally — referred to

s. 29 — considered

s. 34 — referred to

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

Generally — referred to

MOTION by representative plaintiff jounalist and defendant publishing company for approval of settlement of two actions.

***Pepall J.*:**

Overview

1 On January 8, 2010, I granted an initial order pursuant to the provisions of the *Companies' Creditors Arrangement Act* ("*CCAA*") in favour of Canwest Publishing Inc. ("CPI") and related entities (the "LP Entities"). As a result of this order and subsequent orders, actions against the LP Entities were stayed. This included a class proceeding against CPI brought by Heather Robertson in her personal capacity and as a representative plaintiff (the "Representative Plaintiff"). Subsequently, CPI brought a motion for an order approving a proposed notice of settlement of the action which was granted. CPI and the Representative Plaintiff then jointly brought a motion for approval of the settlement of both the class proceeding as against CPI and the *CCAA* claim. The Monitor supported the request and no one was opposed. I granted the judgment requested and approved the settlement with endorsement to follow. Given the significance of the interplay of class proceedings with *CCAA* proceedings, I have written more detailed reasons for decision rather than simply an endorsement.

Facts

2 The Representative Plaintiff commenced this class proceeding by statement of claim dated July 25, 2003 and the action was case managed by Justice Cullity. He certified the action as a class proceeding on October 21, 2008 which order was subsequently amended on September 15, 2009.

3 The Representative Plaintiff claimed compensatory damages of $500 million plus punitive and exemplary damages of $250 million against the named defendants, ProQuest Information and Learning LLC, Cedrom-SNI Inc., Toronto Star Newspapers Ltd., Rogers Publishing Limited and CPI for the alleged infringement of copyright and moral rights in certain works owned by class members. She alleged that class members had granted the defendants the limited right to reproduce the class members' works in the print editions of certain newspapers and magazines but that the defendant publishers had proceeded to reproduce, distribute and communicate the works to the public in electronic media operated by them or by third parties.

4 As set out in the certification order, the class consists of:

A. All persons who were the authors or creators of original literary works ("Works") which were published in Canada in any newspaper, magazine, periodical, newsletter, or journal (collectively "Print Media") which Print Media have been reproduced, distributed or communicated to the public by telecommunication by, or pursuant to the purported authorization or permission of, one or more of the defendants, through any electronic database, excluding electronic databases in which only a precise electronic reproduction of the Work or substantial portion thereof is made available (such as PDF and analogous copies) (collectively "Electronic Media"), excluding:

(a) persons who by written document assigned or exclusively licensed all of the copyright in their Works to a defendant, a licensor to a defendant, or any third party; or

(b) persons who by written document granted to a defendant or a licensor to a defendant a license to publish or use their Works in Electronic Media; or

(c) persons who provided Works to a not for profit or non-commercial publisher of Print Media which was licensor to a defendant (including a third party defendant), and where such persons either did not expect or request, or did not receive, financial gain for providing such Works; or

(d) persons who were employees of a defendant or a licensor to a defendant, with respect to any Works created in the course of their employment.

Where the Print Media publication was a Canadian edition of a foreign publication, only Works comprising of the content exclusive to the Canada edition shall qualify for inclusion under this definition.

(Persons included in clause A are thereinafter referred to as "Creators". A "licensor to a defendant" is any party that has purportedly authorized or provided permission to one or more defendants to make Works available in Electronic Media. References to defendants or licensors to defendants include their predecessors and successors in interest)

B. All persons (except a defendant or a licensor to a defendant) to whom a Creator, or an Assignee, assigned, exclusively licensed, granted or transmitted a right to publish or use their Works in Electronic Media.

(Persons included in clause B are hereinafter referred to as "Assignees")

C. Where a Creator or Assignee is deceased, the personal representatives of the estate of such person unless the date of death of the Creator was on or before December 31, 1950.

5 As part of the *CCAA* proceedings, I granted a claims procedure order detailing the procedure to be adopted for claims to be made against the LP Entities in the *CCAA* proceedings. On April 12, 2010, the Representative Plaintiff filed a claim for $500 million in respect of the claims advanced against CPI in the action pursuant to the provisions of the claims procedure order. The Monitor was of the view that the claim in the *CCAA* proceedings should be valued at $0 on a preliminary basis.

6 The Representative Plaintiff's claim was scheduled to be heard by a claims officer appointed pursuant to the terms of the claims procedure order. The claims officer would determine liability and would value the claim for voting purposes in the *CCAA* proceedings.

7 Prior to the hearing before the claims officer, the Representative Plaintiff and CPI negotiated for approximately two weeks and ultimately agreed to settle the *CCAA* claim pursuant to the terms of a settlement agreement.

8 When dealing with the consensual resolution of a *CCAA* claim filed in a claims process that arises out of ongoing litigation, typically no court approval is required. In contrast, class proceeding settlements must be approved by the court. The notice and process for dissemination of the settlement agreement must also be approved by the court.

9 Pursuant to section 34 of the *Class Proceedings Act*, the same judge shall hear all motions before the trial of the common issues although another judge may be assigned by the Regional Senior Judge (the "RSJ") in certain circumstances. The action had been stayed as a result of the CCAA proceedings. While I was the supervising CCAA judge, I was also assigned by the RSJ to hear the class proceeding notice and settlement motions.

10 Class counsel said in his affidavit that given the time constraints in the *CCAA* proceedings, he was of the view that the parties had made reasonable attempts to provide adequate notice of the settlement to the class. It would have been preferable to have provided more notice, however, given the exigencies of insolvency proceedings and the proposed meeting to vote on the *CCAA* Plan, I was prepared to accept the notice period requested by class counsel and CPI.

11 In this case, given the hybrid nature of the proceedings, the motion for an order approving notice of the settlement in both the class action proceeding and the *CCAA* proceeding was brought before me as the supervising *CCAA* judge. The notice procedure order required:

> 1) the Monitor and class counsel to post a copy of the settlement agreement and the notice order on their websites;
>
> 2) the Monitor to publish an English version of the approved form of notice letter in the National Post and the Globe and Mail on three consecutive days and a French translation of the approved form of notice letter in La Presse for three consecutive days;
>
> 3) distribution of a press release in an approved form by Canadian Newswire Group for dissemination to various media outlets; and
>
> 4) the Monitor and class counsel were to maintain toll-free phone numbers and to respond to enquiries and information requests from class members.

12 The notice order allowed class members to file a notice of appearance on or before a date set forth in the order and if a notice of appearance was delivered, the party could appear in person at the settlement approval motion and any other proceeding in respect of the class proceeding settlement. Any notices of appearance were to be provided to the service list prior to the approval hearing. In fact, no notices of appearance were served.

13 In brief, the terms of the settlement were that:

> a) the *CCAA* claim in the amount of $7.5 million would be allowed for voting and distribution purposes;
>
> b) the Representative Plaintiff undertook to vote the claim in favour of the proposed *CCAA* Plan;
>
> c) the action would be dismissed as against CPI;
>
> d) CPI did not admit liability; and
>
> e) the Representative Plaintiff, in her personal capacity and on behalf of the class and/or class members, would provide a licence and release in respect of the freelance subject works as that term was defined in the settlement agreement.

14 The claims in the action in respect of CPI would be fully settled but the claims which also involved ProQuest would be preserved. The licence was a non-exclusive licence to reproduce one or more copies of the freelance subject works in electronic media and to authorize others to do the same. The licence excluded the right to licence freelance subject works to ProQuest until such time as the action was resolved against ProQuest, thereby protecting the class members' ability to pursue ProQuest in the action. The settlement did not terminate the lawsuit against the other remaining defendants. Under the *CCAA* Plan, all unsecured creditors, including the class, would be entitled to share on a pro rata basis in a

distribution of shares in a new company. The Representative Plaintiff would share pro rata to the extent of the settlement amount with other affected creditors of the LP Entities in the distributions to be made by the LP Entities, if any.

15 After the notice motion, CPI and the Representative Plaintiff brought a motion to approve the settlement. Evidence was filed showing, among other things, compliance with the claims procedure order. Arguments were made on the process and on the fairness and reasonableness of the settlement.

16 In her affidavit, Ms. Robertson described why the settlement was fair, reasonable and in the best interests of the class members:

> In light of Canwest's insolvency, I am advised by counsel, and verily believe, that, absent an agreement or successful award in the Canwest Claims Process, the prospect of recovery for the Class against Canwest is minimal, at best. However, under the Settlement Agreement, which preserves the claims of the Class as against the remaining defendants in the class proceeding in respect of each of their independent alleged breaches of the class members' rights, as well as its claims as against ProQuest for alleged violations attributable to Canwest content, there is a prospect that members of the Class will receive some form of compensation in respect of their direct claims against Canwest.
>
> Because the Settlement Agreement provides a possible avenue of recovery for the Class, and because it largely preserves the remaining claims of the Class as against the remaining defendants in the class proceeding, I am of the view that the Settlement Agreement represents a reasonable compromise of the Class claim as against Canwest, and is both fair and reasonable in the circumstances of Canwest's insolvency.

17 In the affidavit filed by class counsel, Anthony Guindon of the law firm Koskie Minsky LLP noted that he was not in a position to ascertain the approximate dollar value of the potential benefit flowing to the class from the potential share in a pro rata distribution of shares in the new corporation. This reflected the unfortunate reality of the *CCAA* process. While a share price of $11.45 was used, he noted that no assurance could be given as to the actual market price that would prevail. In addition, recovery was contingent on the total quantum of proven claims in the claims process. He also described the litigation risks associated with attempting to obtain a lifting of the *CCAA* stay of proceedings. The likelihood of success was stated to be minimal. He also observed the problems associated with collection of any judgment in favour of the Representative Plaintiff. He went on to state:

> ... The Representative Plaintiff, on behalf of the Class, could have elected to challenge Canwest's initial valuation of the Class claim of $0 before a Claims Officer, rather than entering into a negotiated settlement. However, a number of factors militated against the advisability of such a course of action. Most importantly, the claims of the Class in the class proceeding have not been proven, and the Class does not enjoy the benefit of a final judgment as against Canwest. Thus, a hearing before the Claims Officer would necessarily necessitate a finding of liability as against Canwest, in addition to a quantification of the claims of the Class against Canwest.
>
> ... a negative outcome in a hearing before a Claims Officer could have the effect of jeopardizing the Class claims as against the remaining defendants in the class proceeding. Such a finding would not be binding on a judge seized of a common issues trial in the class proceeding; however, it could have persuasive effect.
>
> Given the likely limited recovery available from Canwest in the Claims Process, it is the view of Class Counsel that a negotiated resolution of the quantification of Class claim as against Canwest is preferable to risking a negative finding of liability in the context of a contested Claims hearing before a Claims Officer.

18 The Monitor was also involved in the negotiation of the settlement and was also of the view that the settlement agreement was a fair and reasonable resolution for CPI and the LP Entities' stakeholders. The Monitor indicated in its report that the settlement agreement eliminated a large degree of uncertainty from the *CCAA* proceeding and facilitated the approval of the Plan by the requisite majorities of stakeholders. This of course was vital to the successful restructuring of the LP Entities. The Monitor recommended approval of the settlement agreement.

19 The settlement of the class proceeding action was made prior to the creditors' meeting to vote on the Plan for the LP Entities. The issues of the fees and disbursements of class counsel and the ultimate distribution to class members were left to be dealt with by the class proceedings judge if and when there was a resolution of the action with the remaining defendants.

Discussion

20 Both motions in respect of the settlement were heard by me but were styled in both the *CCAA* proceedings and the class proceeding.

21 As noted by Jay A. Swartz and Natasha J. MacParland in their article "*Canwest Publishing - A Tale of Two Plans*" [1] :

> "There have been a number of *CCAA* proceedings in which settlements in respect of class proceedings have been implemented including *McCarthy v. Canadian Red Cross Society*, *(Re:) Grace Canada Inc., Muscletech Research and Development Inc.*, and *(Re:) Hollinger Inc.* ... The structure and process for notice and approval of the settlement used in the LP Entities restructuring appears to be the most efficient and effective and likely a model for future approvals. Both motions in respect of the Settlement, discussed below, were heard by the *CCAA* judge but were styled in both proceedings." [citations omitted]

(a) Approval

(i) CCAA Settlements in General

22 Certainly the court has jurisdiction to approve a *CCAA* settlement agreement. As stated by Farley J. in *Lehndorff General Partner Ltd., Re*, [2] 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. Very broad powers are provided to the *CCAA* judge and these powers are exercised to achieve the objectives of the statute. It is well settled that courts may approve settlements by debtor companies during the *CCAA* stay period: *Calpine Canada Energy Ltd., Re* [3]; *Air Canada, Re* [4]; and *Playdium Entertainment Corp., Re*. [5] To obtain approval of a settlement under the *CCAA*, the moving party must establish that: the transaction is fair and reasonable; the transaction will be beneficial to the debtor and its stakeholders generally; and the settlement is consistent with the purpose and spirit of the *CCAA*. See in this regard *Air Canada, Re* [6] and *Calpine Canada Energy Ltd., Re*. [7]

(ii) Class Proceedings Settlement

23 The power to approve the settlement of a class proceeding is found in section 29 of the *Class Proceedings Act*, 1992 [8] . That section states:

> 29(1) A proceeding commenced under this *Act* and a proceeding certified as a class proceeding under this *Act* may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.
>
> (2) A settlement of a class proceeding is not binding unless approved by the court.
>
> (3) A settlement of a class proceeding that is approved by the court binds all class members.
>
> (4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,
>
> (a) an account of the conduct of the proceedings;

(b) a statement of the result of the proceeding; and

(c) a description of any plan for distributing settlement funds.

24 The test for approval of the settlement of a class proceeding was described in *Dabbs v. Sun Life Assurance Co. of Canada*[9] .The court must find that in all of the circumstances the settlement is fair, reasonable and in the best interests of those affected by it. In making this determination, the court should consider, amongst other things:

a) the likelihood of recovery or success at trial;

b) the recommendation and experience of class counsel; and

c) the terms of the settlement.

As such, it is clear that although the *CCAA* and class proceeding tests for approval are not identical, a certain symmetry exists between the two.

25 A perfect settlement is not required. As stated by Sharpe J. (as he then was) in *Dabbs v. Sun Life Assurance Co. of Canada*[10] :

> Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation.

26 Where there is more than one defendant in a class proceeding, the action may be settled against one of the defendants provided that the settlement is fair, reasonable and in the best interests of the class members: *Ontario New Home Warranty Program v. Chevron Chemical Co.*[11]

(iii) The Robertson Settlement

27 I concluded that the settlement agreement met the tests for approval under the *CCAA* and the *Class Proceedings Act*.

28 As a general proposition, settlement of litigation is to be promoted. Settlement saves time and expense for the parties and the court and enables individuals to extract themselves from a justice system that, while of a high caliber, is often alien and personally demanding. Even though settlements are to be encouraged, fairness and reasonableness are not to be sacrificed in the process.

29 The presence or absence of opposition to a settlement may sometimes serve as a proxy for reasonableness. This is not invariably so, particularly in a class proceeding settlement. In a class proceeding, the court approval process is designed to provide some protection to absent class members.

30 In this case, the proposed settlement is supported by the LP Entities, the Representative Plaintiff, and the Monitor. No one, including the non-settling defendants all of whom received notice, opposed the settlement. No class member appeared to oppose the settlement either.

31 The Representative Plaintiff is a very experienced and sophisticated litigant and has been so recognized by the court. She is a freelance writer having published more than 15 books and having been a regular contributor to Canadian magazines for over 40 years. She has already successfully resolved a similar class proceeding against Thomson Canada Limited, Thomson Affiliates, Information Access Company and Bell Global Media Publishing Inc. which was settled for $11 million after 13 years of litigation. That proceeding involved allegations quite similar to those advanced in the action before me. In approving the settlement in that case, Justice Cullity described the involvement of the Representative Plaintiff in the class proceeding:

> The Representative Plaintiff, Ms. Robertson, has been actively involved throughout the extended period of the litigation. She has an honours degree in English from the University of Manitoba, and an M.A. from Columbia University in New York. She is the author of works of fiction and non-fiction, she has been a regular contributor to Canadian magazines and newspapers for over 40 years, and she was a founder member of each of the Professional Writers' Association of Canada and the Writers' Union of Canada. Ms. Robertson has been in communication with class members about the litigation since its inception and has obtained funds from them to defray disbursements. She has clearly been a driving force behind the litigation: *Robertson v. Thomson Canada Ltd.* [12]

.

32 The settlement agreement was recommended by experienced counsel and entered into after serious and considered negotiations between sophisticated parties. The quantum of the class members' claim for voting and distribution purposes, though not identical, was comparable to the settlement in *Robertson v. Thomson Canada Ltd.*. In approving that settlement, Justice Cullity stated:

> Ms. Robertson's best estimate is that there may be 5,000 to 10,000 members in the class and, on that basis, the gross settlement amount of $11 million does not appear to be unreasonable. It compares very favourably to an amount negotiated among the parties for a much wider class in the U.S. litigation and, given the risks and likely expense attached to a continuation of the proceeding, does not appear to be out of line. On this question I would, in any event, be very reluctant to second guess the recommendations of experienced class counsel, and their well informed client, who have been involved in all stages of the lengthy litigation. [13]

33 In my view, Ms. Robertson's and Mr. Guindon's description of the litigation risks in this class proceeding were realistic and reasonable. As noted by class counsel in oral argument, issues relating to the existence of any implied license arising from conduct, assessment of damages, and recovery risks all had to be considered. Fundamentally, CPI was in an insolvency proceeding with all its attendant risks and uncertainties. The settlement provided a possible avenue for recovery for class members but at the same time preserved the claims of the class against the other defendants as well as the claims against ProQuest for alleged violations attributable to CPI content. The settlement brought finality to the claims in the action against CPI and removed any uncertainty and the possibility of an adverse determination. Furthermore, it was integral to the success of the consolidated plan of compromise that was being proposed in the *CCAA* proceedings and which afforded some possibility of recovery for the class. Given the nature of the CCAA Plan, it was not possible to assess the final value of any distribution to the class. As stated in the joint factum filed by counsel for CPI and the Representative Plaintiff, when measured against the litigation risks, the settlement agreement represented a reasonable, pragmatic and realistic compromise of the class claims.

34 The Representative Plaintiff, Class Counsel and the Monitor were all of the view that the settlement resulted in a fair and reasonable outcome. I agreed with that assessment. The settlement was in the best interests of the class and was also beneficial to the LP Entities and their stakeholders. I therefore granted my approval.

Motion granted.

Footnotes

1 Annual Review of Insolvency Law, 2010, J.P. Sarra Ed, Carswell, Toronto at page 79.

2 (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at 31 .

3 2007 ABQB 504 (Alta. Q.B.) at para. 71; leave to appeal dismissed 2007 ABCA 266 (Alta. C.A. [In Chambers]).

4 (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J. [Commercial List]).

5 (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J. [Commercial List]) at para. 23.

6 *Supra.* at para. 9.

7 *Supra.* at para. 59.

8 S.O. 1992, C.6.

9 [1998] O.J. No. 1598 (Ont. Gen. Div.) at para. 9.

10 (1998), 40 O.R. (3d) 429 (Ont. Gen. Div.) at para 30.

11 [1999] O.J. No. 2245 (Ont. S.C.J.) at para. 97.

12 [2009] O.J. No. 2650 at para. 15.

13 *Robertson v. Thomson Canada Ltd.*, [2009] O.J. No. 2650 (Ont. S.C.J.) para. 20.

End of Document

TAB 25

Most Negative Treatment: Distinguished
Most Recent Distinguished: Yankson v. R. | 2005 TCC 751, 2005 CCI 751, 2005 CarswellNat 3811, 2005 CarswellNat 6906, 2005 D.T.C. 1709 (Eng.), [2006] 1 C.T.C. 2391, 135 C.R.R. (2d) 371, [2005] T.C.J. No. 567 | (T.C.C. [Informal Procedure], Nov 22, 2005)

2003 SCC 3, 2003 CSC 3
Supreme Court of Canada

Siemens v. Manitoba (Attorney General)

2002 CarswellMan 574, 2002 CarswellMan 575, 2003 SCC 3, 2003 CSC 3, [2002] S.C.J. No. 69, [2003] 1 S.C.R. 6, [2003] 4 W.W.R. 1, [2003] A.C.S. No. 69, 102 C.R.R. (2d) 345, 119 A.C.W.S. (3d) 564, 173 Man. R. (2d) 1, 221 D.L.R. (4th) 90, 293 W.A.C. 1, 299 N.R. 267, 34 M.P.L.R. (3d) 163, 47 Admin. L.R. (3d) 205, 55 W.C.B. (2d) 609, J.E. 2003-270, REJB 2003-36968

David Albert Siemens, Eloisa Ester Siemens and Sie-Cor Properties Inc. o/ a The Winkler Inn, Appellants v. The Attorney General of Manitoba and the Government of Manitoba, Respondents and The Attorney General of Canada, the Attorney General for Ontario, the Attorney General for New Brunswick, the Attorney General for Alberta, 292129 Alberta Ltd., operating as The Empress Hotel, 484906 Alberta Ltd., operating as Lacombe Motor Inn, Leto Steak & Seafood House Ltd., Neubro Holdings Inc., operating as Lacombe Hotel, Wayne Neufeld, 324195 Alberta Ltd., operating as K.C.'s Steak & Pizza, and Katerina Kadoglou, Interveners

McLachlin C.J.C., Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps JJ.

Heard: October 31, 2002
Judgment: October 31, 2002
Written reasons: January 30, 2003
Docket: 28416

Proceedings: additional reasons to 2002 CarswellMan 461 (S.C.C.); affirming 2000 MBCA 152, [2001] 2 W.W.R. 515, 153 Man. R. (2d) 106, 238 W.A.C. 106, 85 C.R.R. (2d) 59 (Man. C.A.); affirming 2000 MBQB 140, [2001] 2 W.W.R. 491, 151 Man. R. (2d) 49, 78 C.R.R. (2d) 268 (Man. Q.B.)

Counsel: *David G. Hill* and *Curtis A. Knudson*, for appellants
Shawn Greenberg and *Jayne Kapac*, for respondents
Robert W. Hubbard, for intervener Attorney General of Canada
Hart Schwarts, for intervener Attorney General for Ontario
Gabriel Bourgeois, Q.C., for intervener Attorney General for New Brunswick
Roderich Wiltshire, for intervener Attorney General for Alberta
Ronald J. Dumonceaux and *Graham K. Neill*, for interveners 292129 Alberta Ltd. et al.

Subject: Public; Constitutional; Human Rights
Headnote
Gaming --- Legislative competence — Miscellaneous issues
Manitoba Gaming Control Local Option (VLT) Act in its entirety and s. 16 in particular are intra vires provincial legislature — Purposes of Act are to regulate gaming in province and to allow for local input into video lottery terminals — Provision that deemed municipal plebiscite supporting prohibition of VLTs to be binding and that resulted in

termination of siteholder agreement between plaintiffs and Manitoba Lotteries Corporation and removal of VLTs from plaintiffs' premises was constitutional.

Constitutional law --- Distribution of legislative powers — Relation between federal and provincial powers — Ancillary and necessarily incidental legislation (double aspect, pith and substance) — General principles

Manitoba Gaming Control Local Option (VLT) Act in its entirety and s. 16 in particular are intra vires provincial legislature — Purposes of Act are to regulate gaming in province and to allow for local input into issue of video lottery terminals — Provision that deemed municipal plebiscite supporting prohibition of video lottery terminals to be binding and that resulted in termination of siteholder agreement between plaintiffs and Manitoba Lotteries Corporation and removal of VLTs from plaintiffs' premises was constitutional.

Constitutional law --- Distribution of legislative powers — Relation between federal and provincial powers — Colourability — General principles

Manitoba Gaming Control Local Option (VLT) Act in its entirety and s. 16 in particular are intra vires provincial legislature — Purposes of Act are to regulate gaming in province and to allow for local input into issue of video lottery terminals — Act was not colourable attempt by provincial legislature to legislate criminal law, as Act has neither penal consequences nor criminal law purpose.

Constitutional law --- Charter of Rights and Freedoms — Nature of rights and freedoms — Freedom of expression — Nature and scope of expression

Effect of "deemed vote" in s. 16 of Manitoba Gaming Control Local Option (VLT) Act does not violate freedom of expression in s. 2(b) of Canadian Charter of Rights and Freedoms by denying plaintiffs' right to vote in plebiscite under Act — Although voting is protected form of expression, there is no constitutional right to vote in referendum, which is creation of legislation.

Constitutional law --- Charter of Rights and Freedoms — Nature of rights and freedoms — Life, liberty and security — Economic, commercial and proprietary rights

Section 16 of Manitoba Gaming Control Local Option (VLT) Act does not violate right of plaintiffs under s. 7 of Canadian Charter of Rights and Freedoms to pursue lawful occupation or restrict their freedom of movement — Right to life, liberty, and security of person encompasses fundamental life choices, not pure economic interests — Ability to generate business revenue by chosen means is not protected under s. 7.

Constitutional law --- Charter of Rights and Freedoms — Nature of rights and freedoms — Equality rights — General

Section 16 of Manitoba Gaming Control Local Option (VLT) Act does not violate right of plaintiffs under s. 15(1) of Canadian Charter of Rights and Freedoms by making discriminatory distinction between them and other residents of Manitoba — Residence in town was not analogous ground of discrimination, because nothing suggested that its residents have been historically disadvantaged or have suffered any prejudice — Town was singled out in s. 16 because it was only municipality that had held plebiscite on video lottery terminals, and purpose of section was to respect will of residents as expressed in plebiscite.

Jeu --- Compétence législative — Questions diverses

Loi sur les options locales en matière de jeu (appareils de loterie vidéo), en particulier l'art. 16, relève en entier de la compétence législative de la province — Loi a pour objet la réglementation du jeu à l'intérieur de la province ainsi que l'obtention de l'opinion locale sur la question des appareils de loterie vidéo (ALV) — Était constitutionnelle la disposition prévoyant que le référendum municipal en faveur de l'interdiction des ALV était décisionnel et donnait lieu à l'annulation de l'accord d'exploitation du site des demandeurs et au retrait des ALV de leur local — Loi sur les options locales en matière de jeu (appareils de loterie vidéo), L.M. 1999, c. 44, art. 16.

Droit constitutionnel --- Partage des compétences législatives — Rapport entre les compétences fédérales et compétences provinciales — Législation accessoire et nécessairement secondaire (double aspect, caractère véritable) — Principes généraux

Loi sur les options locales en matière de jeu (appareils de loterie vidéo), en particulier l'art. 16, relève en entier de la compétence législative de la province — Loi a pour objet la réglementation du jeu à l'intérieur de la province ainsi que l'obtention de l'opinion locale sur la question des appareils de loterie vidéo (ALV) — Était constitutionnelle la disposition prévoyant que le référendum municipal en faveur de l'interdiction des ALV était décisionnel et donnait lieu à l'annulation

de l'accord d'exploitation du site des demandeurs et au retrait des ALV de leur local — Loi sur les options locales en matière de jeu (appareils de loterie vidéo), L.M. 1999, c. 44, art. 16.

Droit constitutionnel --- Partage des compétences législatives — Rapport entre les compétences fédérales et compétences provinciales — Législation déguisée — Principes généraux

Loi sur les options locales en matière de jeu (appareils de loterie vidéo), en particulier l'art. 16, relève en entier de la compétence législative de la province — Loi a pour objet la réglementation du jeu à l'intérieur de la province ainsi que l'obtention de l'opinion locale sur la question des appareils de loterie vidéo (ALV) — Loi ne constitue pas une tentative déguisée de légiférer en matière de droit criminel puisqu'elle ne comporte aucune conséquence pénale et que son objet ne relève pas du droit criminel — Loi sur les options locales en matière de jeu (appareils de loterie vidéo), L.M. 1999, c. 44, art. 16.

Droit constitutionnel --- Charte canadienne des droits et libertés — Nature des droits et libertés — Liberté d'expression — Nature et étendue de l'expression

« Présomption de scrutin » contenue dans l'art. 16 de la Loi sur les options locales en matière de jeu (appareils de loterie vidéo) n'a pas pour effet de violer la liberté d'expression protégée par l'art. 2b) de la Charte en retirant aux demandeurs leur droit de voter au référendum prévu par la Loi — Même si le droit de vote représente une forme d'expression protégée, il demeure qu'il n'existe aucun droit constitutionnel de voter à un référendum, lequel est une création de la loi — Charte canadienne des droits et libertés, art. 2b) — Loi sur les options locales en matière de jeu (appareils de loterie vidéo), L.M. 1999, c. 44, art. 16.

Droit constitutionnel --- Charte canadienne des droits et libertés — Nature des droits et libertés — Vie, liberté et sécurité — Droits économiques, commerciaux et de propriété

Article 16 de la Loi sur les options locales en matière de jeu (appareils de loterie vidéo) ne porte pas atteinte au droit des demandeurs d'exercer un métier licite garanti par l'art. 7 de la Charte ni ne restreint leur liberté de mouvement — Droit à la vie, à la liberté et à la sécurité de sa personne comprend les choix de vie fondamentaux, mais non les intérêts économiques purs — Capacité de générer du revenu d'entreprise selon le moyen choisi n'est pas protégée par l'art. 7 — Charte canadienne des droits et libertés, art. 7 — Loi sur les options locales en matière de jeu (appareils de loterie vidéo), L.M. 1999, c. 44, art. 16.

Droit constitutionnel --- Charte canadienne des droits et libertés — Nature des droits et libertés — Droit à l'égalité — En général

Article 16 de la Loi sur les options locales en matière de jeu (appareils de loterie vidéo) ne porte pas atteinte au droit des demandeurs en vertu de l'art. 15 de la Charte en faisant une distinction discriminatoire entre les demandeurs et les autres résidents du Manitoba — Fait de résider dans la Ville ne constituait pas un motif analogue de discrimination puisque rien ne suggérait que les résidents de la Ville avaient été historiquement désavantagés ou qu'ils souffraient d'un quelconque préjudice — Ville a été mentionnée dans l'art. 16 parce qu'elle était la seule municipalité à avoir tenu un référendum sur la question des appareils de loterie vidéo et parce que l'article avait pour objet de respecter la volonté exprimée par les résidents lors du référendum — Charte canadienne des droits et libertés, art. 15(1) — Loi sur les options locales en matière de jeu (appareils de loterie vidéo), L.M. 1999, c. 44, art. 16.

The plaintiffs were the sole shareholders of a company that had entered into a "siteholder" agreement with the Manitoba Lotteries Corporation to operate several revenue-generating video lottery terminals in their hotel in the town of Winkler, Manitoba. The siteholders received a percentage of the revenue from the VLTs, which remained the property of the corporation. A non-binding plebiscite was held supporting the prohibition of VLTs in the town. The following year, the Manitoba government enacted the Gaming Control Local Option (VLT) Act, enabling municipalities to hold binding plebiscites on the prohibition of VLTs. Section 16 of the Act specifically deemed the Winkler plebiscite to be binding, resulting in the termination of the siteholder agreement between the plaintiffs and the lotteries corporation and the removal of the VLTs from their premises.

The plaintiffs challenged the legislation on the grounds that s. 16 violated ss. 2(b), 7 and 15(1) of the Canadian Charter of Rights and Freedoms and that the legislation was ultra vires the provincial government because it encroached upon Parliament's exclusive jurisdiction over criminal law. The motions judge rejected the application of the plaintiffs for an order of certiori and their appeal was dismissed. The plaintiffs appealed.

Held: The appeal was dismissed.

Per Major J.: The Winkler plebiscite was not held pursuant to a resolution prohibiting VLTs, as required by the Act. In accordance with the principles of purposive interpretation, however, s. 16 was intended to incorporate the wishes already expressed by Winkler voters into the broader provincial scheme. The province attempted to give effect to the Winkler plebiscite by incorporating the deeming provision into the Act to bring Winkler within the larger scheme of VLT plebiscites in the province. Unless legislation is otherwise unconstitutional, the particular means chosen by the legislature cannot be used as a reason to declare it invalid. Similarly, because the evaluation of Charter claims should be contextual, the plaintiffs' Charter claims could not be assessed without considering the plebiscite. The legislature did not arbitarily single out the town, but enacted s. 16 in response to the wishes of the Winkler voters.

To determine whether the Manitoba government had legislative authority to enact the Act, it was necessary to inquire into the purpose and effects of the legislation to identify its pith and substance. The purpose of the Act as a whole is to allow municipalities to express, by binding plebiscite, whether they wish VLTs to be permitted or prohibited within their communities. The purposes of s. 16 are to prohibit VLTs in Winkler and to cancel existing siteholder agreements. The provision was enacted to give effect to the plebiscite that had been held before the Act came into force. Section 16(1) cancelled the siteholder agreement between the plaintiffs' hotel and the lotteries corporation, and by deeming a resolution prohibiting VLTs to have been approved in Winkler in accordance with the Act, s. 16(2) put the town into the "starting position" of prohibiting VLTs. The pith and substance of the Act falls within a provincial head of legislative authority, because gaming falls within the "double aspect" doctrine and can be subject to legislation by both the federal and provincial governments. The Act was prima facie validly enacted under s. 92¶13 and 92¶16 of the Constitution Act, 1867. Section 16(1) specifically deals with siteholder agreements, which are contractual in nature and thus fall under property and civil rights. On a broader level, the municipal plebiscites empower each community to determine whether VLTs are to be permitted, thereby invoking matters of a local nature. The Act in its entirety and s. 16 in particular are intra vires the provincial legislature. The purposes of the Act are to regulate gaming in the province and to allow for local input into the issue of VLTs, both of which fall under the powers enumerated in s. 92 of the Constitution Act, 1867.

The Act was not a colourable attempt by the provincial government to legislate criminal law, as the Act has neither penal consequences nor a criminal law purpose. Although s. 3(1) prohibits the operation of VLTs in municipalities that have banned them pursuant to a binding plebiscite, that alone was not sufficient to establish that the Act is, in pith and substance, criminal law. The prohibition did not create a provincial offence, and neither did it impose a penalty for operating VLTs in those municipalities. Even if it had, the presence of a prohibition and a penalty would not invalidate an otherwise acceptable use of provincial legislative power. The termination of siteholder agreements could not be characterized as a forfeiture of VLTs within the meaning of criminal law, because the siteholder has no property interest in the machines. The siteholder has lost only the opportunity to earn a percentage of the revenue generated by the VLTs. The Act could not be said to have been an attempt by the Manitoba government to legislate criminal law because the trial judge found no evidence that it was enacted to regulate public morality, found no basis to assume that the dominant purpose for prohibiting VLTs in certain locations was to regulate public morality, and found that the presence of moral considerations does not, per se, render a law ultra vires the provincial legislature. The dominant purpose of the Act is to regulate gaming in the province, not to express moral disapproval of VLTs. When a law is, in pith and substance, related to the provincial legislative sphere, it will not be struck down merely because it has incidental effects on a federal head of power.

The effect of the "deemed vote" in s. 16 did not deny the plaintiffs the right to vote in a plebiscite under the Act and, therefore, violate their freedom of expression in s. 2(b) of the Charter. Although voting is a protected form of expression, s. 16 does not violate that freedom because there is no constitutional right to vote in a referendum. A municipal plebiscite, like a referendum, is a creation of legislation. In this case, any right to vote in a plebiscite must be found within the language of the Act, which alone defines the terms and qualifications for voting. Accordingly, the Act did not deny the plaintiffs the right to vote in a VLT plebiscite. Moreover, it did not prevent the residents of Winkler from voting in future plebiscites on the issue of VLTs. Like all other residents of Manitoba, the plaintiffs were free to initiate a plebiscite under the Act either to reinstate or remove VLTs from their municipality.

Section 16 does not violate the right of the plaintiffs under s. 7 of the Charter to pursue a lawful occupation or restrict their freedom of movement by preventing them from pursuing their chosen profession in a certain location. The right to life, liberty, and security of the person encompasses fundamental life choices, not pure economic interests. Consequently,

the rights asserted by the plaintiffs did not fall within the meaning of s. 7. The alleged right of the plaintiffs to operate VLTs at their place of business was purely an economic interest and could not be characterized as a fundamental life choice. The ability to generate business revenue by one's chosen means is not protected under s. 7 of the Charter.

Likewise, s. 16 did not violate the rights of the plaintiffs under s. 15(1) of the Charter by distinguishing between them and other residents of Manitoba based on the analogous ground of residence, which distinction would be discriminatory because it denied them the opportunity to vote in a binding plebiscite on the issue of VLTs. Atlhough s. 16 clearly distinguishes between Winkler and other municipalities, residence in Winkler did not constitute an analogous ground of discrimination, because nothing suggested that Winkler residents have been historically disadvantaged or have suffered any prejudice. Moreover, the legislation did not discriminate against them in any substantive sense. Winkler was singled out in s. 16 because it was the only municipality to have held a plebiscite on the issue of VLTs, and the very purpose of the section was to respect the will of the residents as expressed in their plebiscite. Within that context, it was unlikely that any reasonable resident of Winkler would feel that he or she has been marginalized, devalued, or ignored as a member of Canadian society. There was no harm to dignity and no violation of s. 15(1).

Les demandeurs étaient les seuls actionnaires d'une compagnie qui avait conclu un contrat d'exploitation du site avec la Corporation des loteries du Manitoba dans le but d'exploiter dans leur hôtel, situé dans la ville de Winkler, plusieurs appareils de loterie vidéo (ALV) générateurs de revenus. Les exploitants du site recevaient un pourcentage des revenus générés par les ALV, lesquels demeuraient la propriété de la Corporation. Un référendum consultatif a été tenu; ses résultats appuyaient l'interdiction d'avoir des ALV dans la Ville. L'année suivante, le gouvernement manitobain a adopté la Loi sur les options locales en matière de jeu (appareils de loterie vidéo), qui permettait aux municipalités de tenir des référendums portant sur l'interdiction des ALV. L'article 16 présumait spécifiquement que le référendum tenu par la ville de Winkler était décisionnel, ce qui donnait lieu à l'annulation de l'accord d'exploitation du site des demandeurs et au retrait des ALV de leur local.

Les demandeurs ont contesté la Loi, soutenant que l'art. 16 contrevenait aux art. 2b), 7 et 15 de la Charte canadienne des droits et libertés et excédait la compétence du gouvernement provincial parce qu'il empiétait sur la compétence du Parlement fédéral en matière de droit criminel. Le juge de première instance a rejeté la demande de certiorari présentée par les demandeurs; leur pourvoi a également été rejeté. Les demandeurs ont interjeté appel.

Arrêt: Le pourvoi a été rejeté.

Le référendum tenu par la ville de Winkler n'a pas été tenu en vertu d'une résolution visant à interdire les ALV comme l'exigeait la Loi. Cependant, conformément aux principes d'interprétation en fonction de l'objet, l'art. 16 avait pour but d'incorporer dans le régime général de la province la volonté exprimée par les électeurs de Winkler. Par le biais de la Loi, la province a tenté de donner effet au référendum tenu par Winkler à l'aide de plusieurs moyens, dont la disposition créatrice de présomption utilisée, afin d'inclure Winkler dans le régime général de la province portant sur les référendums relatifs aux ALV. Les moyens particuliers choisis par le législateur ne pouvaient servir de fondement pour déclarer la loi invalide, à moins que celle-ci ne soit par ailleurs inconstitutionnelle. De façon similaire, les arguments des demandeurs fondés sur la Charte ne pouvaient être examinés sans tenir compte du référendum, puisque l'évaluation d'arguments fondés sur la Charte doit être contextuelle. Le législateur n'a pas mentionné la Ville arbitrairement; il a plutôt adopté l'art. 16 afin de répondre aux désirs exprimés par les électeurs de Winkler.

Pour déterminer si le gouvernement manitobain avait la compétence législative pour adopter la Loi, il était nécessaire d'examiner l'objet et les effets de celle-ci dans le but d'identifier son caractère véritable. La Loi visait à permettre aux municipalités de dire, à l'aide d'un référendum décisionnel, si elles voulaient que les ALV soient permis ou interdits dans leur communauté. L'article 16 a pour but d'interdire les ALV dans la ville de Winkler et d'annuler les accords d'exploitation du site existants. La disposition a été adoptée afin de donner effet au référendum tenu avant l'entrée en vigueur de la Loi. L'article 16(1) avait pour effet d'annuler l'accord d'exploitation du site conclu avec l'hôtel des demandeurs; l'art. 16(2) avait pour effet de mettre la Ville dans la « situation de départ » permettant d'interdire les ALV, et ce, en présumant qu'une résolution interdisant les ALV avait été approuvée par Winkler conformément à la Loi. Le caractère véritable de la Loi relève du chef de compétence de la province puisque le jeu relève de la règle du « double aspect » et peut être assujetti aux lois des gouvernements fédéral et provincial. La Loi apparaissait, prima facie, avoir été validement adoptée en vertu des art. 92¶13 et 92¶16 de la Loi constitutionnelle de 1867. L'article 16(1) porte spécifiquement sur les accords d'exploitation du site, lesquels sont de nature contractuelle et relèvent donc de la propriété

et des droits civils. De façon plus générale, les référendums municipaux permettent à chaque communauté de décider si les ALV doivent être permis, faisant ainsi intervenir des questions de nature locale. La Loi dans son ensemble et l'art. 16 en particulier relèvent à l'intérieur de la compétence du législateur provincial. La Loi a pour but de réglementer le jeu dans la province et de permettre aux populations locales de donner leur opinion sur la question des ALV, questions qui relèvent toutes deux des compétences énumérées à l'art. 92 de la Loi constitutionnelle de 1867.

La Loi ne constituait pas une tentative déguisée de légiférer en matière de droit criminel puisqu'elle n'avait aucune conséquence pénale et que son objet ne relevait pas du droit criminel. Même si l'art. 3(1) interdit l'exploitation d'ALV dans les municipalités qui les ont interdits conformément à un référendum décisionnel, cela n'était pas suffisant pour établir que, de par son caractère véritable, la Loi relevait du droit criminel. L'interdiction ne créait aucune infraction provinciale ni n'imposait d'amende pour l'exploitation d'ALV dans ces municipalités. Même si elle l'avait fait, la simple présence d'une interdiction et d'une amende n'invalidait pas un usage par ailleurs acceptable de la compétence législative provinciale. On ne pouvait qualifier l'annulation des accords d'exploitation du site de perte au sens du droit criminel, puisque l'exploitant du site n'est pas propriétaire des machines. L'exploitant du site a tout simplement perdu la possibilité de gagner un pourcentage du revenu généré par les ALV.

On ne pouvait dire, de toute façon, que la Loi constituait une tentative de légiférer en matière de droit criminel puisque le juge de première instance n'a trouvé aucune preuve que la Loi avait été adoptée dans le but de réglementer la moralité publique. Rien ne permettait de présumer que l'objet premier de l'interdiction des ALV à certains endroits était de réglementer la moralité publique. De plus, la présence de considérations morales ne pouvait en soi faire qu'une loi excède la compétence du législateur provincial. La Loi avait comme objet premier la réglementation du jeu dans la province, et non l'expression de la désapprobation morale visant les ALV. Lorsque le caractère véritable d'une loi a un lien avec un domaine de compétence provinciale, la loi ne sera pas invalidée simplement parce qu'elle a des effets accessoires sur un chef de compétence fédérale.

La « présomption de scrutin » prévue par l'art. 16 n'avait pas pour effet de priver les demandeurs de leur droit de voter au référendum prévu par la Loi et donc de porter atteinte à leur liberté d'expression protégée par l'art. 2b) de la Charte. Même si le droit de vote est une forme d'expression protégée, l'art. 16 ne porte pas atteinte à cette liberté puisqu'il n'existe aucun droit constitutionnel de voter à un référendum. Le référendum municipal est une création de la loi. En l'espèce, le droit de voter au référendum devait se trouver dans les termes de la Loi, qui est la seule à définir les termes et qualifications du droit de vote. Par conséquent, la Loi ne pouvait priver les demandeurs du droit de voter au référendum portant sur les ALV. En outre, elle n'empêchait pas les résidents de Winkler de voter à d'autres référendums portant sur la question des ALV. Comme tout autre résident du Manitoba, les résidents de Winkler pouvaient faire un référendum en vertu de la Loi visant à rétablir les ALV dans leur municipalité ou à les retirer.

L'article 16 ne porte pas atteinte au droit des demandeurs d'exercer un métier licite garanti par l'art. 7 de la Charte ni ne restreint leur liberté de mouvement en les empêchant d'exercer dans un certain endroit la profession qu'ils ont choisie. Le droit à la vie, à la liberté et à la sécurité de la personne comprend le droit de faire des choix de vie fondamentaux, mais non les intérêts économiques purs. Par conséquent, les droits allégués par les demandeurs n'étaient pas visés par l'art. 7. Le droit allégué par les demandeurs d'exploiter des ALV dans leur établissement commercial était un intérêt économique pur et ne pouvait être qualifié de choix de vie fondamental. La capacité de générer des revenus d'entreprise grâce au moyen choisi n'est pas protégée par l'art. 7 de la Charte.

L'article 16 ne porte pas non plus atteinte au droit des demandeurs garanti par l'art. 15(1) de la Charte en faisant une distinction fondée sur le motif analogue de résidence entre les demandeurs et tous les autres résidents du Manitoba, distinction qui serait discriminatoire parce qu'elle priverait les demandeurs de la possibilité de voter dans un référendum décisionnel sur la question des ALV. Même si l'art. 16 fait clairement une distinction entre la ville de Winkler et les autres municipalités, le fait de résider à Winkler ne constituait pas un motif analogue de discrimination, puisque rien ne permettait de suggérer que les résidents de Winkler avaient été historiquement désavantagés ou avaient souffert d'un quelconque préjudice. De plus, la Loi ne faisait aucune discrimination réelle à leur endroit. La ville de Winkler était mentionnée dans l'art. 16 parce qu'elle était la seule municipalité à avoir tenu un référendum sur la question des ALV et parce que l'objet même de l'article était de respecter la volonté exprimée par les résidents lors du référendum. Pris dans ce contexte, il était peu probable qu'un résident raisonnable de Winkler ait l'impression d'avoir été marginalisé,

dévalué ou ignoré à titre de membre de la société canadienne. Aucune atteinte à la dignité ni aucune atteinte à l'art. 15(1) n'avaient été portées.

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Generally — referred to

ADDITIONAL REASONS to appeal by plaintiffs from judgment reported at 2000 MBCA 152, 2000 CarswellMan 655, [2001] 2 W.W.R. 515, 153 Man. R. (2d) 106, 238 W.A.C. 106, 85 C.R.R. (2d) 59 (Man. C.A.), dismissing appeal of judgment reported at 2000 CarswellMan 479, 2000 MBQB 140, [2001] 2 W.W.R. 491, 151 Man. R. (2d) 49, 78 C.R.R. (2d) 268 (Man. Q.B.), dismissing their appeal from ruling that *Gaming Control Local Option (VLT) Act* is constitutional.

MOTIFS SUPPLÉMENTAIRES au pourvoi interjeté par les demandeurs à l'encontre de l'arrêt publié à 2000 MBCA 152, 2000 CarswellMan 655, [2001] 2 W.W.R. 515, 153 Man. R. (2d) 106, 238 W.A.C. 106, 85 C.R.R. (2d) 59 (Man. C.A.), qui a rejeté le pourvoi à l'encontre du jugement publié à 2000 CarswellMan 479, 2000 MBQB 140, [2001] 2 W.W.R. 491, 151 Man. R. (2d) 49, 78 C.R.R. (2d) 268 (Man. Q.B.), qui a rejeté leur pourvoi à l'encontre de la décision ayant conclu que la *Loi sur les options locales en matière de jeu (appareils de loterie vidéo)* était constitutionnelle.

The judgment of the court was delivered by *Major J.*:

I. Introduction

1 In 1999, the Government of Manitoba enacted local option legislation enabling municipalities to hold binding plebiscites on the prohibition of video lottery terminals ("VLTs") in their communities. The legislation set out the procedure by which the plebiscites were to be initiated, held, and given effect. In addition, the legislation contained a specific section dealing with the Town of Winkler, which had held a non-binding plebiscite supporting a prohibition of VLTs the previous year. As a result of the legislation, VLTs were prohibited in Winkler until such time as a future binding plebiscite, held in accordance with the legislation, would permit their return to the municipality.

2 Both the Manitoba Court of Queen's Bench and the Court of Appeal concluded that the *Gaming Control Local Option (VLT) Act*, S.M. 1999, c. 44 ("VLT Act"), either as a whole or s. 16 in particular, was neither *ultra vires* the provincial legislature, nor did it violate the *Canadian Charter of Rights and Freedoms*. The appellants subsequently challenged the legislation before this Court on the grounds that s. 16, dealing specifically with Winkler, violates ss. 2(b), 7, and 15(1) of the *Charter*. They also argued that the legislation is *ultra vires* the provincial government because it is an affront to Parliament's exclusive jurisdiction over criminal law. On October 31, 2002, the Court unanimously dismissed their appeal. These are the reasons for that decision.

II. Facts

3 The Manitoba Lotteries Corporation ("MLC") is responsible for operating lottery schemes, including VLTs, in the province. The MLC enters into agreements with "siteholders" to place VLTs on the siteholders' property. The siteholders then receive a per centage of the VLTs' revenue. However, the VLTs remain the property of the MLC and, according to the terms of the siteholder agreement, can be removed at any time, with or without cause.

4 The appellants, David and Eloisa Siemens, are the sole shareholders of Sie-Cor Properties Inc., which purchased The Winkler Inn in 1993. They invested a considerable amount of money in the renovation and expansion of the Inn, and submitted that VLTs were an important consideration when making their investment. The appellants increased the number of VLTs from 8 to 10 when they first purchased The Winkler Inn, and then from 10 to 12 in the fall of 1994. Their mortgage payments roughly coincided with the monthly VLT revenue.

5 In August 1998, the Town of Winkler passed a resolution to hold a plebiscite regarding VLTs in the municipality. The plebiscite was held in conjunction with the October municipal elections. The question was:

> Should the Town of Winkler request that the Provincial Government ban video lottery terminals in Winkler, which would result in the Town of Winkler losing its annual municipal VLT grant?

Approximately 50 per cent of eligible voters participated in the plebiscite, including Mr. and Mrs. Siemens. A sizeable majority (77.8 per cent) of the votes cast were in favour of requesting a ban on VLTs. In response to the plebiscite, the Town of Winkler passed a resolution in December 1998 to forward the results to the Government of Manitoba. Sie-Cor Properties Inc., in turn, filed an application in the Court of Queen's Bench seeking a declaration that the resolution was invalid and an order of *certiorari* quashing it.

6 In July 1999, while Sie-Cor's application was proceeding to a hearing, the Manitoba Government passed the VLT Act. The Act permits municipalities to hold binding plebiscites regarding the prohibition of VLTs within their jurisdictions. In addition, the government used the new legislation as an opportunity to give effect to the plebiscite that had already been held in Winkler. Specifically, s. 16 of the Act seeks to terminate the siteholder agreements in Winkler and deems that a resolution prohibiting VLTs was passed in accordance with the Act. Pursuant to this legislation, the siteholder agreement with The Winkler Inn was terminated effective December 1, 1999.

III. Relevant Statutory Provisions

7 *The Gaming Control Local Option (VLT) Act*, S.M. 1999, c. 44

> 1 In this Act,
>
> . . . . .
>
> "plebiscite" means a vote by the electors of a municipality on a resolution approved by the council or stated on a petition
>
> (a) to prohibit video lottery gaming within the municipality, or

(b) where video lottery gaming within the municipality is prohibited because of a plebiscite, to permit video lottery gaming within the municipality;

. . . . .

"video lottery gaming" means the operation of a lottery scheme, as defined in the *Criminal Code* (Canada), that involves the use of a video lottery terminal.

. . . . .

3(1) Notwithstanding section 3 of *The Manitoba Lotteries Corporation Act*, no person shall carry on any video lottery gaming, under a siteholder agreement or otherwise, within a municipality while a resolution prohibiting video lottery gaming within the municipality is in effect.

3(2) A resolution prohibiting video lottery gaming within a municipality comes into effect on the first day of the fifth month following the month in which it is approved by a majority of the votes cast in a plebiscite and continues in effect until a resolution permitting video lottery gaming within the municipality is approved by a majority of the votes cast in a plebiscite.

. . . . .

16(1) Each siteholder agreement existing before the coming into force of this section respecting the operation of video lottery terminals at a site located in the Town of Winkler is terminated on the first day of the fifth month following the month in which this Act comes into force, and the corporation shall remove all video lottery terminals from sites located in the Town of Winkler as soon as practicable after that day.

16(2) A resolution to prohibit video lottery gaming within the Town of Winkler is deemed for the purposes of this Act to have been approved by a plebiscite and is deemed to come into effect on the first day of the fifth month following the month in which this Act comes into force.

Criminal Code, R.S.C. 1985, c. C-46

207.1(1) Notwithstanding any of the provisions of this Part relating to gaming and betting, it is lawful

(a) for the government of a province, either alone or in conjunction with the government of another province, to conduct and manage a lottery scheme in that province, or in that and the other province, in accordance with any law enacted by the legislature of that province; . . .

Constitution Act, 1867

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, -

. . . . .

13. Property and Civil Rights in the Province.

. . . . .

16. Generally all Matters of a merely local or private Nature in the Province.

Canadian Charter of Rights and Freedoms

2. Everyone has the following fundamental freedoms:

. . . . .

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

. . . . .

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

. . . . .

> 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

IV. Judgments Below

A. Manitoba Court of Queen's Bench (2000), [2001] 2 W.W.R. 491

8 In February 2000, Hamilton J. heard arguments on a motion to have certain questions of law determined before trial on Sie-Cor's *certiorari* application. At issue was whether the VLT Act, either as a whole or s. 16 in particular, was *ultra vires* the provincial legislature as an invasion into the federal government's criminal law power, and whether s. 16 violated ss. 2(b), 6, 7, and 15(1) of the *Charter*. It was also argued that the legislation constituted prohibited discrimination under the Manitoba *Human Rights Code*, S.M. 1987-88, c. 45. Hamilton J. rejected all the appellants' claims.

9 In dismissing the division of powers argument, Hamilton J. relied on *R. v. Furtney*, [1991] 3 S.C.R. 89 (S.C.C.). That case held that gaming was a matter within the "double aspect" doctrine, such that both Parliament and the provincial legislatures had jurisdiction to legislate in that area. She found that the VLT Act was, therefore, *prima facie* within the legislative authority of the Manitoba Government. She also found that the VLT Act was not an attempt to enact criminal law, as the legislation lacked both penal consequences and a criminal law purpose.

B. Manitoba Court of Appeal (2000), [2001] 2 W.W.R. 515

10 In a short oral judgment delivered by Twaddle J.A. (Kroft and Steel JJ.A. concurring), the Manitoba Court of Appeal dismissed the appeal on all grounds, expressing that it was in "substantial agreement" with Hamilton J., "both with respect to the declarations made and her reasons for them."

V. Issues

11 By order of the Chief Justice dated December 19, 2001, the following constitutional questions were stated for the Court's consideration:

> (1) Is *The Gaming Control Local Option (VLT) Act*, S.M. 1999, c. 44, in its entirety *ultra vires* the Legislature of the Province of Manitoba as it relates to a subject matter which is within the exclusive jurisdiction of the Parliament of Canada under s. 91(27) of the *Constitution Act, 1867*?
>
> (2) Is s. 16(1) of *The Gaming Control Local Option (VLT) Act*, S.M. 1999, c. 44, *ultra vires* the Legislature of the Province of Manitoba as it relates to a subject matter which is within the exclusive jurisdiction of the Parliament of Canada under s. 91(27) of the *Constitution Act, 1867*?
>
> (3) Is s. 16 of *The Gaming Control Local Option (VLT) Act* inconsistent with s. 2(b) of the *Canadian Charter of Rights and Freedoms*?
>
> (4) If the answer to question 3 is in the affirmative, is s. 16 of *The Gaming Control Local Option (VLT) Act* nevertheless justified by s. 1 of the *Canadian Charter of Rights and Freedoms*?
>
> (5) Is s. 16 of *The Gaming Control Local Option (VLT) Act* inconsistent with s. 7 of the *Canadian Charter of Rights and Freedoms*?
>
> (6) If the answer to question 5 is in the affirmative, is s. 16 of *The Gaming Control Local Option (VLT) Act* nevertheless justified by s. 1 of the *Canadian Charter of Rights and Freedoms*?
>
> (7) Is s. 16 of *The Gaming Control Local Option (VLT) Act* inconsistent with s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

(8) If the answer to question 7 is in the affirmative, is s. 16 of *The Gaming Control Local Option (VLT) Act* nevertheless justified by s. 1 of the *Canadian Charter of Rights and Freedoms*?

VI. Analysis

A. Interpreting the VLT Act

12 A significant portion of the appellants' submissions focused on the proper characterization and interpretation of the VLT Act, and particularly s. 16 of that Act. The main thrust of their argument was that s. 16 of the VLT Act did not "give effect" to the plebiscite that occurred in Winkler in 1998 and that, therefore, the constitutionality of the legislation must be assessed without reference to that plebiscite. They noted that s. 16 does not explicitly refer to the 1998 plebiscite, and that s. 16(2) refers to the indefinite "a plebiscite" rather than the definite "the plebiscite." As well, they submitted that the subsection deems a resolution prohibiting gaming to have been passed by a municipal plebiscite in Winkler, when no such resolution was ever approved by the town council. These characteristics allegedly demonstrate that s. 16 of the VLT Act did not give effect to the plebiscite that actually occurred in Winkler in the fall of 1998, and that it unfairly attributes a binding plebiscite to the residents of Winkler, who never voted in such a plebiscite.

13 The appellants expressed puzzlement at being affected by the 1998 plebiscite, as that plebiscite was not held pursuant to a resolution prohibiting VLTs, as required by the Act. The answer to that puzzlement is that the VLT Act has a more general application, and, in accordance with the principles of purposive interpretation, that s. 16 was intended to incorporate the wishes already expressed by Winkler voters into the broader provincial scheme.

14 No doubt the legislation could have been drafted in a way that more explicitly expressed the purpose of s. 16. Nevertheless, given the entire context of the legislation, the legislative purpose is clear. The Town of Winkler held a non-binding plebiscite in the fall of 1998, in which a majority of votes cast supported a request to remove VLTs from the community. The town council forwarded the results of the plebiscite to the provincial government. In response, the provincial government enacted legislation prohibiting the operation of VLTs in Winkler and terminating all siteholder agreements in that community.

15 The appellants acknowledged at the appeal that, if the government had wished to enact legislation dealing solely with the prohibition of VLTs in the Town of Winkler, it could legitimately have done so. However, instead of giving effect to the Winkler plebiscite in an Act designed solely for that purpose, the government incorporated a section prohibiting VLTs in Winkler into a larger statute that established a scheme for all municipalities to prohibit or reinstate VLTs through binding plebiscites. I cannot see how the legislative structure chosen by the government affects the Act's constitutionality. Through the VLT Act, the province attempted to bring Winkler within the larger scheme of VLT plebiscites in the province. In order to do so, it deemed that Winkler voters had approved a VLT prohibition in accordance with the Act. All the parties agree that the Winkler plebiscite did not, in fact, approve such a prohibition. Indeed, since the Winkler plebiscite preceded the introduction of the VLT Act, it was impossible for voters to do so. Regardless, the legislature had the latitude to give effect to the Winkler plebiscite by various means, including the deeming provision it used. Unless the legislation is otherwise unconstitutional, the particular means chosen by the legislature cannot be used as a basis to declare it invalid.

16 It should be noted that the less-than-ideal legislative drafting is not an independent ground upon which legislation can be found unconstitutional. The wording of the statute is only relevant to the analysis in so far as it informs the determination of the pith and substance of the legislation. As long as the pith and substance of s. 16 falls within the provincial sphere of legislative authority, it is immaterial whether it could have been drafted in clearer terms.

17 Similarly, it cannot be concluded that the wording of s. 16 dictates that the appellants' *Charter* claims must be assessed without considering the Winkler plebiscite of 1998. This Court has stated on numerous occasions that the evaluation of *Charter* claims should be contextual: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (S.C.C.), at p. 344 (*per* Dickson J. (as he then was)), *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.), at pp.

1355-1356 (*per* Wilson J.), *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154 (S.C.C.), at pp. 224-226 (*per* Cory J.), *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 (S.C.C.), at para. 87 (*per* Bastarache J.), *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R. 497 (S.C.C.), at para. 62 (*per* Iacobucci J.). The purpose and effects of the legislation cannot be examined in a vacuum, but must be considered in light of the facts as they are known to both the claimant and the legislator.

18 The rationale for contextual analysis is particularly strong in this case. But for the 1998 Winkler plebiscite, the provincial government would never have enacted s. 16 of the VLT Act. The legislature did not single out the Town of Winkler on an arbitrary basis; rather, it enacted s. 16 to respond to the wishes of Winkler voters. If the Court were to ignore the 1998 plebiscite in assessing the *Charter* claims, it would be ignoring the very circumstances that gave rise to the impugned section. This is both logically and legally flawed. Nevertheless, the analysis of the *Charter* claims is not dependent on the existence of the 1998 plebiscite, and the legislation would have been upheld in any event. The contextual analysis merely strengthens that conclusion.

B. The Division of Powers Claim

19 To determine whether the Manitoba Government had legislative authority to enact the VLT Act, it is necessary to identify the pith and substance of that legislation. In *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism & Culture)*, 2002 SCC 31 (S.C.C.), at para. 53, it was held that the pith and substance analysis involves an inquiry into both the purpose of the legislation and its effects. LeBel J. also wrote that, where a specific section of the legislation is being challenged, its pith and substance should be identified before that of the Act as a whole. If the impugned section is *ultra vires*, it may still be upheld if it is sufficiently integrated into a valid provincial legislative scheme (para. 58). However, since the appellants in the present case have challenged both s. 16 and the VLT Act as a whole, it is necessary to identify the pith and substance of both in any event.

20 The purpose of s. 16 of the VLT Act is to prohibit VLTs in Winkler and to cancel all existing siteholder agreements with respect to VLTs. The legislative debates on the VLT Act indicate that s. 16 was enacted to give effect to the plebiscite that had already been held in Winkler, albeit before the Act came into force. The responsible Minister said:

> As you may be aware, Madam Speaker, last fall the citizens of Winkler conducted a plebiscite requesting the removal of VLTs from that community. This legislation supports that community's will. This legislation will recognize the legitimacy of the 1998 VLT plebiscite in Winkler.

(Manitoba, Legislative Assembly, *Debates and Proceedings* (Hansard), 5th Sess., 36th Leg., vol. XLIX, No. 57A, July 8, 1999, at p. 4092 (Ms Render))

The effect of s. 16(1) of the VLT Act was to cancel the siteholder agreement with The Winkler Inn. Further, as indicated, s. 16(2) attempted to bring the non-binding Winkler plebiscite within the local option scheme outlined in the other sections of the Act. The Act allows plebiscites to be held on whether to prohibit VLTs within the municipality or, where a VLT prohibition is already in effect, on whether to reinstate VLTs within the municipality. Thus, by deeming a resolution prohibiting VLTs to have been approved in Winkler in accordance with the Act, the effect of s. 16(2) is to put the Town of Winkler into the "starting position" of prohibiting VLTs. If a subsequent VLT plebiscite is to be held in Winkler, the question will ask whether to reinstate VLTs in that community.

21 More broadly, the purpose of the VLT Act as a whole seems to be, quite simply, to allow municipalities to express, by binding plebiscite, whether they wish VLTs to be permitted or prohibited within their communities. This purpose is evident from the title of the Act, *The Gaming Control Local Option (VLT) Act*, which clearly expresses the government's desire to obtain local input on the issue of VLTs. The VLT Act was the government's response to two reports: the Manitoba Lottery Policy Review's *Working Group Report* (1995) (the "Desjardins Report"), and the Manitoba Gaming Control Commission's *Municipal VLT Plebiscite Review* (Winnipeg: The Commission, 1998). Both reports recommended that municipal plebiscites be held to determine local opinion on the issue of VLTs.

22 The pith and substance of the VLT Act falls within a provincial head of legislative authority. As Stevenson J. wrote for this Court in *Furtney*, *supra*, at p. 103, gaming is a matter that falls within the "double aspect" doctrine. Accordingly, gaming can be subject to legislation by both the federal and provincial governments:

> In my view, the regulation of gaming activities has a clear provincial aspect under s. 92 of the *Constitution Act, 1867* subject to Parliamentary paramountcy in the case of a clash between federal and provincial legislation. . . . Altogether apart from features of gaming which attract criminal prohibition, lottery activities are subject to the legislative authority of the province under various heads of s. 92, including, I suggest, property and civil rights (13), licensing (9), and maintenance of charitable institutions (7) (specifically recognized by the *Code* provisions). Provincial licensing and regulation of gaming activities is not *per se* legislation in relation to criminal law.

Without foreclosing discussion on other potential heads of jurisdiction, it is sufficient for this appeal to find that the VLT Act was, *prima facie*, validly enacted under ss. 92(13) and 92(16). Section 16(1) deals specifically with the siteholder agreements, which are contractual in nature and thereby fall under property and civil rights. On a broader level, the municipal plebiscites empower each community to determine whether VLTs will be permitted, thereby invoking matters of a local nature.

23 The VLT Act is not, as the appellants have submitted, a colourable attempt to legislate criminal law. The Act does not possess the relevant characteristics outlined by Rand J. in *Reference re Validity of s. 5(a) of Dairy Industry Act (Canada), (Margarine Case)* (1948), [1949] S.C.R. 1 (S.C.C.), at p. 50, and affirmed by the Privy Council in (1950), [1951] A.C. 179 (Canada P.C.), at p. 196, and, more recently, in *Reference re Firearms Act (Canada)*, [2000] 1 S.C.R. 783, 2000 SCC 31 (S.C.C.), at para. 27. These are (1) a prohibition, (2) coupled with a penalty, and (3) a criminal law purpose. The respondents conceded that the VLT Act contains a prohibition, namely, s. 3(1) prohibits the operation of VLTs in municipalities that have banned them as the result of a binding plebiscite. Nevertheless, this alone is insufficient to establish that the VLT Act is, in pith and substance, criminal law. The Act does not create penal consequences, and was not enacted for a criminal law purpose.

24 Although s. 3(1) prohibits the operation of VLTs in relevant municipalities, it does not create a provincial offence. Nor does it impose a penalty for operating VLTs in those municipalities. If VLT operators were to be charged with any offence, it would be under the gaming provisions in the *Criminal Code*, which prohibit gambling *except* in accordance with lottery schemes conducted and managed by the provinces. The effect of s. 3(1) of the VLT Act is simply to remove the exception and give full effect to the existing federal offences.

25 However, even if the VLT Act did create a provincial offence or impose a fine, that would not necessarily make it an attempt to legislate criminal law. Section 92(15) of the *Constitution Act, 1867* allows the provincial legislatures to impose fines or other punishments as a means of enforcing valid provincial law, and the provinces have enacted countless punishable offences within their legislative spheres. Motor vehicle offences are the classic example, and they have been declared constitutionally valid in, *inter alia*, *O'Grady v. Sparling*, [1960] S.C.R. 804 (S.C.C.) (careless driving), and *Ross v. Ontario (Registrar of Motor Vehicles)* (1973), [1975] 1 S.C.R. 5 (S.C.C.) (provincial licence suspension upon conviction for *Criminal Code* impaired driving offence). The mere presence of a prohibition and a penalty does not invalidate an otherwise acceptable use of provincial legislative power.

26 The appellants submitted that the VLT Act contains penal consequences because it terminates all siteholder agreements in municipalities that have voted to prohibit VLTs in accordance with the Act. Relying on this Court's decision in *Johnson v. Alberta (Attorney General)*, [1954] S.C.R. 127 (S.C.C.), they argued that the provisions of the VLT Act result in the forfeiture of VLTs, which can be characterized as a penalty. However, the termination of siteholder agreements cannot be characterized as a forfeiture within the meaning of the criminal law. At all times during a siteholder agreement, the MLC maintains ownership of the VLTs. The siteholder (in this case, the appellants) has no property interest in the machines. Therefore, when the agreement is terminated and the VLTs are removed from the siteholder's

establishment, the siteholder is not required to forfeit any property. The siteholder has merely lost the opportunity to earn a percentage of the revenue that the VLTs generate.

27 That is sufficient to distinguish the present appeal from *Johnson*, *supra*, which properly identified the alleged penalty as a forfeiture. In that case, the impugned legislation specifically denied property rights in slot machines. Where the machines were being operated contrary to the legislation, the Act allowed police to confiscate those machines even if, except for the legislation, they would have been considered the property of the offender. In short, a violation of the legislation struck down in *Johnson* resulted in a loss of property. In the present case, however, the VLT Act merely allows the MLC to reclaim its own VLTs. This cannot be considered a forfeiture.

28 The conclusion that the VLT Act does not impose penal consequences makes it unnecessary to determine whether it was enacted for a criminal law purpose. Nevertheless, certain submissions made during the course of proceedings warrant a brief response. The appellants argued that the VLT Act was enacted for purposes of public morality, and that it was, therefore, an attempt to legislate criminal law. This submission is flawed on several bases. First, the trial judge found no evidence indicating that this law was enacted to regulate public morality. The province has authority to regulate gaming, and this includes provisions regulating where gaming may be conducted. Just as the province can regulate when and where alcohol may be legally consumed, so can it regulate when and where individuals can legally operate VLTs. It does not follow that, in doing so, the province is somehow regulating public morality.

29 Second, the province and individual municipalities may have any number of reasons for restricting gaming to certain locations. Some may concern the local economy, and others may be purely aesthetic or cultural. There is no basis on which to assume that the dominant purpose for prohibiting VLTs in certain locations is to regulate public morality. Indeed, the fact that the VLT Act does not affect VLTs located at racetracks or other "premises dedicated to gaming activity" suggests that the government was not attempting to condemn VLTs on any moral basis. See *Gaming Control Act*, S.M. 1996, c. 74, s. 1. Rather, it supports the interpretation that the VLT Act was designed merely to limit more "incidental" contact with VLTs - in taverns, for example - in municipalities that wish to do so.

30 Third, the presence of moral considerations does not *per se* render a law *ultra vires* the provincial legislature. In giving Parliament exclusive jurisdiction over criminal law, the *Constitution Act, 1867* did not intend to remove all morality from provincial legislation. In many instances, it will be impossible for the provincial legislature to disentangle moral considerations from other issues. For example, in the present case, it is difficult to ignore the various social costs associated with gambling and VLTs. As the Desjardins Report, *supra*, examined in detail, government-run gambling can have adverse social consequences, including addiction, crime, bankruptcy, and reductions in charitable gaming. The provincial government can legitimately consider these social costs when deciding how to regulate gaming in the province. The fact that some of these considerations have a moral aspect does not invalidate an otherwise legitimate provincial law.

31 The dominant purpose of the VLT Act is to regulate gaming in the province. Any moral aspects of the VLT Act fall within the doctrine of "incidental effects," recently affirmed by this Court in *Kitkatla Band*, *supra*, at para. 54, and *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21 (S.C.C.), at para. 23. Where a law is in pith and substance related to the provincial legislative sphere, it will not be struck down merely because it has incidental effects on a federal head of power. For instance, in *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, [1987] 2 S.C.R. 59 (S.C.C.), it was held that a provincial law restricting nude entertainment at licensed taverns was valid. It is reasonable to assume that such a law would have had some incidental effects on public morality. Yet the Court found that the law was validly enacted because in pith and substance it dealt with licensing, local matters, and property and civil rights.

32 In the present appeal, the provincial government passed a law that was within a provincial head of legislative authority. Although there is a possibility that local morality may affect which municipalities choose to ban VLTs through binding plebiscites, the dominant purpose of the VLT Act is not to express moral disapproval of VLTs. In as much as there is a moral aspect to the VLT Act, this effect is incidental to the overall regulatory scheme and does not infringe on Parliament's exclusive authority to legislate criminal law.

33 In making this determination, I am mindful of the presumption of constitutionality recognized in *Reference re Farm Products Marketing Act (Ontario)*, [1957] S.C.R. 198 (S.C.C.), at p. 255, *McNeil v. Nova Scotia (Board of Censors)*, [1978] 2 S.C.R. 662 (S.C.C.), at pp. 687-688, *Re Firearms Act*, *supra*, at para. 25. When faced with two plausible characterizations of a law, we should normally choose that which supports the law's constitutional validity.

34 The Attorney General of Canada's intervention in support of the provincial government creates a situation of attempted federal-provincial cooperation. The governments, in the absence of jurisdiction, cannot by simple agreement lend legitimacy to a claim that the VLT Act is *intra vires*. However, given that both federal and provincial governments guard their legislative powers carefully, when they do agree to shared jurisdiction, that fact should be given careful consideration by the courts: *O.P.S.E.U. v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2 (S.C.C.), at pp. 19-20, *Kitkatla Band*, *supra*, at paras. 72-73.

35 This principle is further bolstered in the present case by the explicit interaction of the *Criminal Code* and provincial gaming legislation. Section 207(1)(a) of the *Criminal Code* specifically creates an exception to the gaming and betting offences where a lottery scheme has been established by a province. It was first enacted in 1969 for the purpose of decriminalizing lotteries and allowing each province to determine whether it wished to establish a lottery scheme. Where no such scheme exists, the *Criminal Code* offences still apply. Parliament has intentionally designed a structure for gaming offences that affirms the double aspect of gaming and promotes federal-provincial cooperation in this area. Section 207(1)(a) removes the possibility of operational conflict and, with it, any question of paramountcy.

36 I conclude that the VLT Act in its entirety, and s. 16 in particular, are *intra vires* the provincial legislature. The Act's purposes are to regulate gaming in the province and to allow for local input on the issue of VLTs, both of which fall under the powers enumerated in s. 92 of the *Constitution Act, 1867*. It is not an attempt to legislate criminal law, as it has neither penal consequences nor a criminal law purpose. Finally, the issues of interjurisdictional immunity and paramountcy do not arise in this case, and they need not be discussed beyond what has already been stated.

C. The Claim of Improper Delegation

37 Before turning to the various *Charter* claims, a brief comment is warranted on the argument raised by the intervening group of Alberta merchants. They challenged the entire VLT Act on the ground that it constitutes an improper abdication of the legislature's law-making powers and usurps the authority of the Lieutenant Governor. These interveners submit that, by allowing municipalities to hold binding plebiscites, the provincial government has given them the power to make and repeal law. This, they argue, violates the provincial legislature's exclusive authority to make laws for the province.

38 This submission fails, as the interveners' argument rests on an incorrect characterization of the impugned legislation. The VLT Act does not, in any way, empower municipal voters to enact legislation. The Act has been wholly drafted, debated and enacted by the provincial legislature, and has been given Royal Assent by the Lieutenant Governor. It sets out how the municipal plebiscites will take place and what their effects will be in the relevant municipalities. The only role played by municipal electors is in initiating and voting in a plebiscite. The results of the plebiscite determine whether the prohibition in s. 3 of the VLT Act will apply in the municipality. In other words, the application of the statutory VLT prohibition is conditional upon there being a certain plebiscite result. Consequently, the VLT Act falls within the category of "conditional legislation" which was upheld by the Privy Council in *Russell v. R.* (1882), (1881-82) L.R. 7 App. Cas. 829 (Canada P.C.), at p. 835:

> . . . the Act does not delegate any legislative powers whatever. It contains within itself the whole legislation on the matters with which it deals. The provision that certain parts of the Act shall come into operation only on the petition of a majority of electors does not confer on these persons power to legislate. Parliament itself enacts the condition and everything which is to follow upon the condition being fulfilled. Conditional legislation of this kind is in many cases convenient, and is certainly not unusual, and the power so to legislate cannot be denied to the Parliament of Canada, when the subject of legislation is within its competency.

39 Through the VLT Act, the Manitoba Government has employed a statutory instrument to bind itself to respect local opinion. Nowhere does the Act, in purpose or effect, give municipal voters the power to legislate. This case is distinguishable from the *Reference re Initiative and Referendum Act (Manitoba)* (1916), 27 Man. R. 1 (Man. C.A.), upon which the interveners based their argument. There, the impugned legislation allowed voters to submit laws for approval by ballot and, if approved, the proposed law would be deemed an Act of the provincial legislature. Here, there has been no attempt to bypass the Legislative Assembly or to usurp its law-making function. The Act merely allows municipalities to decide on the applicability of the Act to their communities.

40 Finally, I would add that the interveners' argument would severely restrict Parliament and the provincial legislatures from enacting "local option" legislation, which was upheld over a century ago by the Privy Council in *Russell*, *supra*, with respect to the *Canada Temperance Act*. That decision was affirmed by the Privy Council in *Reference re Canada Temperance Act*, [1946] A.C. 193 (Ontario P.C.), and there is no need to question its continued validity as authority on this issue.

D. The Claim under s. 2(b) of the Charter

41 According to the appellants, the effect of the "deemed vote" in s. 16 of the VLT Act was to deny them the right to vote in a plebiscite under the Act and, therefore, to violate their freedom of expression in s. 2(b) of the *Charter*. There is no question since this Court's decision in *Haig v. R.*, [1993] 2 S.C.R. 995 (S.C.C.), that casting a vote is a form of expression that is protected under s. 2(b). The question in this case is whether s. 16 of the VLT Act actually violates this freedom. I conclude that it does not.

42 While *Haig* held that voting is a protected form of expression, it also concluded that there is no constitutional right to vote in a referendum. See L'Heureux-Dubé J., at pp. 1040-1041:

> A referendum is a creation of legislation. Independent of the legislation giving genesis to a referendum, there is no right of participation. The right to vote in a referendum is a right accorded by statute, and the statute governs the terms and conditions of participation. . . . In my view, though a referendum is undoubtedly a platform for expression, s. 2(b) of the *Charter* does not impose upon a government, whether provincial or federal, any positive obligation to consult its citizens through the particular mechanism of a referendum. Nor does it confer upon all citizens the right to express their opinions in a referendum. A government is under no constitutional obligation to extend this platform of expression to *anyone*, let alone to *everyone*. A referendum as a platform of expression is, in my view, a matter of legislative policy and not of constitutional law. [emphasis in original]

A municipal plebiscite, like a referendum, is a creation of legislation. In the present case, any right to vote in a plebiscite must be found within the language of the VLT Act. It alone defines the terms and qualifications for voting. Accordingly, the appellants cannot complain that the VLT Act, itself, denied them the right to vote in a VLT plebiscite.

43 A *caveat* was added in *Haig* that, once the government decides to extend referendum voting rights, it must do so in a fashion that is consistent with other sections of the *Charter*. However, as the appellants submitted that they had been denied referendum voting rights on a discriminatory basis, their claim should be assessed under s. 15(1), of which more will be said below.

44 Finally, it is worth noting that the VLT Act does not prevent the residents of Winkler from voting in future plebiscites on the issue of VLTs. They have not been disenfranchised from VLT plebiscites. Like all other residents of Manitoba, they are free to initiate a plebiscite under the Act to either reinstate or remove VLTs from their municipality.

E. The Claim under s. 7 of the Charter

45 The appellants also submitted that s. 16 of the VLT Act violates their right under s. 7 of the *Charter* to pursue a lawful occupation. Additionally, they submitted that it restricts their freedom of movement by preventing them from

pursuing their chosen profession in a certain location, namely, the Town of Winkler. However, as a brief review of this Court's *Charter* jurisprudence makes clear, the rights asserted by the appellants do not fall within the meaning of s. 7. The right to life, liberty and security of the person encompasses fundamental life choices, not pure economic interests. As La Forest J. explained in *Godbout c. Longueuil (Ville)*, [1997] 3 S.C.R. 844 (S.C.C.), at para. 66:

> . . . the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence.

More recently, *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44 (S.C.C.), concluded that the stigma suffered by Mr. Blencoe while awaiting trial of a human rights complaint against him, which hindered him from pursuing his chosen profession as a politician, did not implicate the rights under s. 7. See Bastarache J., at para. 86:

> The prejudice to the respondent in this case . . . is essentially confined to his personal hardship. He is not "employable" as a politician, he and his family have moved residences twice, his financial resources are depleted, and he has suffered physically and psychologically. However, the state has not interfered with the respondent and his family's ability to make essential life choices. To accept that the prejudice suffered by the respondent in this case amounts to state interference with his security of the person would be to stretch the meaning of this right.

46 In the present case, the appellants' alleged right to operate VLTs at their place of business cannot be characterized as a fundamental life choice. It is purely an economic interest. The ability to generate business revenue by one's chosen means is not a right that is protected under s. 7 of the *Charter*.

F. The Claim under s. 15(1) of the Charter

47 The appellants argued that their rights under s. 15(1) of the *Charter* were violated by s. 16 of the VLT Act. This claim should be analyzed in accordance with the three-pronged test summarized by Iacobucci J. in *Law*, *supra*, at para. 88:

> (A) whether a law imposes differential treatment between the claimant and others, in purpose or effect;
>
> (B) whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment; and
>
> (C) whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee.

The appellants submitted that part (A) of the test was met because s. 16 of the VLT Act distinguished between residents of Winkler and all other residents of Manitoba. They further argued that this distinction was based on the analogous ground of residence, and was discriminatory because it denied them the opportunity to vote in a binding plebiscite on the issue of VLTs.

48 There is no merit in this ground of appeal. First, although s. 16 of the VLT Act clearly makes a distinction between Winkler and other municipalities, it is implausible that residence in Winkler constitutes an analogous ground of discrimination. Residence was rejected as an analogous ground in both *Haig*, *supra*, and *R. v. Turpin*, [1989] 1 S.C.R. 1296 (S.C.C.). Further, the majority in *Corbiere v. Canada (Minister of Indian & Northern Affairs)*, [1999] 2 S.C.R. 203 (S.C.C.), clearly stated that the analogous ground recognized in that case was "Aboriginality-residence," and that "no new water is charted, in the sense of finding residence, in the generalized abstract, to be an analogous ground" (para. 15). In rejecting the claimant's s. 15 argument in *Haig*, the majority explained, at p. 1044, why residence is an unlikely analogous ground:

> It would require a serious stretch of the imagination to find that *persons moving to Quebec less than six months before a referendum date* are analogous to persons suffering discrimination on the basis of race, religion or gender.

> People moving to Quebec less than six months before a referendum date do not suffer from stereotyping, or social prejudice. Though its members were unable to cast a ballot in the Quebec referendum, the group is not one which has suffered historical disadvantage, or political prejudice. Nor does the group appear to be "discrete and insular". Membership in the group is highly fluid, with people constantly flowing in or out once they meet Quebec's residency requirements. [emphasis in original]

Although the Court in *Haig* left it open for residence to be established as an analogous ground in the appropriate case, I share the trial judge's view here that this is not such a case. Nothing suggests that Winkler residents are historically disadvantaged or that they suffer from any sort of prejudice.

49 However, putting the appellants' case at its best and assuming that they could establish a distinction based on an analogous ground, the legislation does not discriminate against them in any substantive sense. It is not necessary to proceed through all the contextual factors listed by Iacobucci J. in *Law*, *supra*, because it is clear that the VLT Act directly corresponds to the circumstances of Winkler residents. The Town of Winkler was singled out in s. 16 of the VLT Act because it was the *only municipality* to have held a plebiscite on the issue of VLTs. The very purpose of that section was to respect the will of Winkler residents, as expressed in their 1998 plebiscite. Viewed in the context of that plebiscite, I am not convinced that any reasonable resident of Winkler would feel that he or she has been marginalized, devalued or ignored as a member of Canadian society (see *Law*, *supra*, at para. 53). There is no harm to dignity and no violation of s. 15(1).

50 It was noted above in the s. 2(b) claim that s. 15(1) might be implicated where the opportunity to vote in a plebiscite is extended to some and withheld from others based on a prohibited ground of discrimination. This would be the case if a law prohibited members of a certain race or religion from voting in a plebiscite. However, that is not the case in this appeal. First, as previously noted, the distinction in s. 16 of the VLT Act is not based on an analogous ground. Second, the distinction does not affect the qualification and ability of Winkler residents to vote in a VLT plebiscite under the Act. They are free to initiate a plebiscite should they wish to reinstate VLTs in their community. Consequently, although s. 16 makes a distinction for Winkler residents, that distinction has nothing to do with the alleged right to vote.

VII. Conclusion and Disposition

51 These reasons support the October 31, 2002, dismissal of this appeal. The respondents are entitled to costs, and the stated constitutional questions are answered as follows:

> (1) Is *The Gaming Control Local Option (VLT) Act*, S.M. 1999, c. 44, in its entirety *ultra vires* the Legislature of the Province of Manitoba as it relates to a subject matter which is within the exclusive jurisdiction of the Parliament of Canada under s. 91(27) of the *Constitution Act, 1867*?
>
> *Answer*: No.
>
> (2) Is s. 16(1) of *The Gaming Control Local Option (VLT) Act*, S.M. 1999, c. 44, *ultra vires* the Legislature of the Province of Manitoba as it relates to a subject matter which is within the exclusive jurisdiction of the Parliament of Canada under s. 91(27) of the *Constitution Act, 1867*?
>
> *Answer*: No.
>
> (3) Is s. 16 of *The Gaming Control Local Option (VLT) Act* inconsistent with s. 2(b) of the *Canadian Charter of Rights and Freedoms*?
>
> *Answer*: No.
>
> (4) If the answer to question 3 is in the affirmative, is s. 16 of *The Gaming Control Local Option (VLT) Act* nevertheless justified by s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: It is unnecessary to answer this question.

(5) Is s. 16 of *The Gaming Control Local Option (VLT) Act* inconsistent with s. 7 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

(6) If the answer to question 5 is in the affirmative, is s. 16 of *The Gaming Control Local Option (VLT) Act* nevertheless justified by s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: It is unnecessary to answer this question.

(7) Is s. 16 of *The Gaming Control Local Option (VLT) Act* inconsistent with s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

(8) If the answer to question 7 is in the affirmative, is s. 16 of *The Gaming Control Local Option (VLT) Act* nevertheless justified by s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: It is unnecessary to answer this question.

Appeal dismissed.

Pourvoi rejeté.

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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 IMPERIAL TOBACCO CANADA LIMITED AND IMPERIAL TOBACCO COMPANY LIMITED

Court File No: CV-19-616077-00CL

APPLICANTS

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

BOOK OF AUTHORITIES OF THE APPLICANTS
(Genstar Settlement Approval Motion returnable June 26, 2019)

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